TC02532

Appeal numbers: TC/2011/01729 & TC/2011/04384

VAT – exemption for provision of services of an insurance intermediary – whether exemption applies to services provided to facilitate insurance brokers obtaining better terms and related benefits from insurance companies and other insurance related services – Article 135 (1)(a) Directive 2006/112 EC- Schedule 4 Group 2 Value Added Tax Act 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

WESTINSURE GROUP LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
MICHAEL BELL, ACA, CTA

Sitting in public at 45 Bedford Square, London WC1 on 17 and 18 September 2012

David Southern, Counsel, instructed by Dickson Minto W.S. for the Appellant

Luke Connell, Tribunal Caseworker, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant, Westinsure Group Limited ("Westinsure") appeals against two decisions of the Respondents ("HMRC").

2. In the first of these decisions, confirmed in a letter dated 17 February 2011, HMRC stated that it considered that the supply of membership fees to subscribers to services provided by Westinsure to insurance brokers was taxable at the standard rate of VAT, in response to Westinsure's contention that the services concerned qualified for exemption from VAT as the provision of the services of an insurance intermediary.

3. The second decision was that of HMRC to register Westinsure compulsorily for VAT purposes with effect from 1 September 2005 consequent upon its decision that Westinsure was making taxable supplies from that date. A Certificate of Registration for VAT purposes was issued by HMRC on 31 May 2011.

The Facts

4. The facts as to the essential elements of Westinsure's business and the manner in which it was carried on were largely undisputed. The area of dispute concerns how that business is to be characterised for VAT purposes. We had before us various documents, including specimens of the contractual agreements entered into between Westinsure and the insurers and brokers with whom it deals, explanatory material given to potential subscribers to Westinsure's services and Westinsure's annual report and accounts for the year ended 31 December 2009.

5. Witness statements were admitted from Mr Mark Addis ("Mr Addis") a director of Westinsure, and Mr Graham Brown ("Mr Brown) the Managing Director of Pavey Group Limited, an insurance broker which subscribed for Westinsure's services. Both Mr Addis and Mr Brown gave oral evidence on which they were cross examined. We found both Mr Addis and Mr Brown to be knowledgeable and reliable witnesses and we have no hesitation in accepting their evidence.

6. From the documents submitted and the oral evidence we make the following findings of fact.

7. Westinsure was formed on 8 February 2000 to provide introductions and improved terms to member insurance brokers. It receives commission from insurers in respect of policies written with those insurers following introduction from member insurance brokers and subscription fees from those brokers. Westinsure operates entirely in the field of general insurance rather than life insurance.

8. As explained by Mr Addis, the role of an insurance broker in the general insurance market is to intermediate on behalf of personal and commercial customers,

through the assessment of their circumstances and to assist them in purchasing the cover they need. The cover required is placed with risk carrying insurance companies and syndicates at Lloyd's. Often the insurance broker who has a client who requires insurance will access the insurer underwriting the risk through an intermediate or wholesale broker as it will not have the expertise necessary to make the assessment of the most appropriate insurer to carry the risk; in particular the end broker needs to access the Lloyd's market through a specialist Lloyd's broker. Thus often in a typical insurance transaction there will be a chain of brokers between the insurer and the insured, each broker typically being remunerated by a share of the commission paid by the insurer concerned.

9. It is usual practice in the general insurance market for an insurance broker to derive its income through a commission paid by the insurer on business placed with that insurer, or alternatively through a fee paid by the insurance broker's client. Typically, smaller regionally based insurance brokers will join a network or alliance of similar businesses to gain commercial buying power, regulatory compliance assistance and marketing and other business support for their business. Westinsure is an example of such an alliance.

10. The essence of Westinsure's business model is that it interfaces with both insurance brokers and insurers in providing insurance brokers who join its alliance (known as "Westinsure Brokers") with access to a range of insurers (known as "Partner Insurers") and specialist insurance products and facilities, in conjunction with access to broking support such as compliance and regulatory training. Westinsure harnesses the buying power of the Westinsure Brokers to persuade the Partner Insurers to pass on better commissions to those brokers and better insurance terms for those brokers' clients than would be the case if they dealt individually with the Partner Insurers. The other advantage for a Westinsure Broker being part of the alliance is that the minimum business requirement that is often imposed by insurers on brokers before they will deal with them is waived. Westinsure markets its alliance of brokers to Partner Insurers by saying that if those insurers provide favourable leads to those brokers the flow of business that those insurers will see from those brokers will increase and it markets the alliance to brokers by saying that if they join the alliance that they will benefit from special terms from Partner Insurers as well as other support for their business.

11. Westinsure derives its income by charging brokers who wish to join the alliance what is described as a "membership fee", and thus it refers to the brokers who join as "members" or "subscribers". It also receives commission from Partner Insurers (as explained in more detail below) on specific insurance contracts that are conducted between Partner Insurers and the clients introduced by Westinsure Brokers. Mr Addis explained that the commission paid is at a much lower rate than would normally be the case because of the income that Westinsure derives from membership fees, which in turn encourages insurers to deal with Westinsure.

12. Westinsure's objective is to help smaller brokers who do not otherwise have much bargaining power with insurers. It employs a business development team which identifies potential broker members and markets Westinsure's services to them.

Brokers become Westinsure Brokers by filling in an application form which is designed to enable Westinsure to assess that the broker is suitable for membership. This assessment will be based on the broker concerned being duly authorised by the Financial Services Authority ("FSA") to provide insurance intermediation services, being creditworthy and meeting Westinsure's criteria as to the level of premium they place with insurers (as the object is to help smaller brokers who have limited bargaining power with insurers) and the type of insurance risk they deal with. If the broker is accepted, it will sign a membership agreement the contents of which are described in more detail in paragraph 14 below.

13. Under the membership agreement the broker agrees to pay an annual fee, the amount of the fee being initially calculated based on the gross premium income derived from business placed with the insurers with whom it deals in the year prior to the signing of the membership agreement. There is an annual adjustment to the fee to ensure that the fee received is based on the actual gross premium income for the relevant year and a joining fee of £250, paid up front. There are currently some 180 Westinsure Brokers and the vast majority pay a membership fee which is between £1,500 and £3,500 per annum.

14. We were provided with three specimen membership agreements that have been in use since Westinsure commenced business. All of them describe the services that Westinsure will provide in very general terms, and there is no material difference in the substance of each form of agreement in this regard. The latest form of membership agreement in use summarises the services to be provided as follows;

> "4.1. During the term of this Agreement, the Member shall be entitled to participate in, and benefit from:
>
> 4.1.1 to the extent that the Member wishes and to the extent that the Partner Insurers agree to make available, products, services and facilities provided by the Partner Insurers, as negotiated and introduced by Westinsure from time to time. Without any guarantee, undertaking or warranty of the same, this may entitle the Member to access from the Partner Insurers where available (i) enhanced remuneration packages and (ii) new or enhanced insurance related products, terms or service standards; and
>
> 4.1.2 insurance related training and marketing services, insurance related central purchasing arrangements and centralised insurance related support services made available by Westinsure, including through the 'Westinsure Extranet' and 'Westinsure on-line'.
>
> 4.2 During the term of this Agreement, the Member is granted a non-exclusive licence to use the name and logo of Westinsure strictly in connection with the Member's ordinary course of business. The grant of this licence is subject always to the Member's compliance with user policies and regulations as notified by Westinsure from time to time."

15. Mr Addis explained in some detail the nature of the services that are actually provided in practice as follows:

(1) Negotiating with Partner Insurers to achieve beneficial rates of commission for Westinsure Brokers as well as superior products and service standards and lower premiums (which will benefit Westinsure Broker's clients and therefore encourage clients of Westinsure Brokers to choose a policy provided by a Partner Insurer);

(2) Negotiating with businesses which provide premium instalment finance to achieve better rates for Westinsure Brokers' clients (as this also gives rise to income to Westinsure from the premium instalment finance company);

(3) Visits and communications by Westinsure employees to Westinsure Brokers to provide them with updates and information on insurance matters and products, and generally provide ideas for generating further business based on Westinsure's knowledge of current ideas or developments in the insurance industry;

(4) a free annual insurance exhibition organised by Westinsure which allows Westinsure Brokers to meet Partner Insurers;

(5) regional meetings (held twice a year) organised by Westinsure for Westinsure Brokers to meet and network and a newer development of 'online smartgroups' where Westinsure Brokers can communicate within the members section of the Westinsure website.

(6) Negotiating with the Chartered Insurance Institute for discounts on its on its qualifications and competence products for Westinsure Brokers; and

(7) Organising assistance with Westinsure Brokers' FSA compliance obligations through a third party provider.

16. Mr Addis also explained that Westinsure also allows Westinsure Brokers to enter into wholesale broker arrangements with other Westinsure Brokers. A separate agreement is entered into between the Westinsure Broker concerned and Westinsure pursuant to which Westinsure receives a commission in respect of the business the Westinsure broker receives as a result of receiving introductions from other Westinsure Brokers.

17. As far as Westinsure's relationship with Partner Insurers is concerned, Westinsure identifies insurers who it believes will be suitable as Partner Insurers. In making those selections, Westinsure would seek to engage only insurers who were sound with a good credit rating and proven satisfactory levels of client service. Insurers became Partner Insurers by agreeing to provide exclusive products and beneficial commissions to Westinsure Brokers. The exclusive products are designed to stand apart from the products made available generally to the market by the Partner Insurer. Westinsure receives income from the Partner Insurers in the form of a commission which is paid annually and is calculated as a sum between 1% and 2% of the premium of each insurance policy taken out with a Partner Insurer by a client of a Westinsure Broker, this payment reflecting the work Westinsure has done in encouraging Westinsure Brokers to insure their clients with the Partner Insurer concerned. The level of payment Westinsure receives from Partner Insurers is thus entirely dependent on whether business is actually placed by the Westinsure Broker with the Partner Insurer concerned.

18. We were provided with a specimen of the agreement that Westinsure typically enters into with Partner Insurers. It is described on its factsheet as a "Marketing Agreement" and indeed the core obligation imposed on Westinsure, as set out in Clause 3.1 of the specimen we were shown reflects this terminology. This clause provides as follows:

> "Westinsure shall ensure that it shall use its best endeavours to promote and market Partner Provider and the Partner Provider products to the Westinsure Brokers"

The recitals to the specimen agreement make it clear that each Westinsure Broker who wishes to trade with a Partner Insurer would enter into a separate terms of business agreement with the Partner Insurer concerned.

19. Mr Addis explained what in practice Westinsure did pursuant to the terms of its agreement with a Partner Insurer as follows:-

(1) Westinsure employees visit Westinsure Brokers to explain the Partner Insurers' products so as to encourage the Westinsure Brokers to select the products of Partner Insurers for their clients;

(2) Westinsure provides information relating to the Partner Insurers' products on the members section of the Westinsure website.

(3) Westinsure distributes sales literature and presentations from Partner Insurers, this is by way of newsletters (approximately monthly) to Westinsure Brokers and by way of news updates on the members section of the Westinsure website; and

(4) Westinsure develops the amount of business which can be placed with Partner Insurers; for example, by sharing current ideas or developments in the insurance industry with Westinsure Brokers if these are relevant to the areas of insurance covered by Partner Insurers.

20. Mr Addis confirmed that in substantially all cases Westinsure did not get involved in the negotiation or arrangement of any particular insurance contract, which would be entered into by a client of the Westinsure Broker and the Partner Insurer concerned, pursuant to terms of business entered into separately between the Partner Insurer concerned and the Westinsure Broker. Thus if there was a chain of brokers involved in a transaction, Westinsure would not be part of that chain and it received no part of the commission paid by the Partner Insurer to the Westinsure Broker which passed directly down the chain of brokers from the Partner Insurer. Westinsure was remunerated separately by the Partner Insurer through a commission. Mr Addis described the essence of Westinsure's business as standing between the Westinsure Brokers and the Partner Insurers and having no interest in any particular insurance transaction, using its business development expertise to attract brokers to the alliance. He explained that there would be occasions where Westinsure might assist a Westinsure Broker with placement advice that would be transaction specific, but that would be rare. Mr Addis agreed, when it was put to him by Mr Connell, that the essence of the business is to provide two different services, that is marketing or

promotional services to the Partner Insurer and aggregation services to the Westinsure Brokers.

21. Mr Addis also confirmed that the Westinsure Brokers and Partner Insurers would meet, either at trade exhibitions or individual development meetings, and that the Westinsure Brokers would not bring clients to those meetings. He added that the focus of Westinsure's efforts was to promote particular products of the Partner Insurers to the Westinsure Brokers rather than focusing on the underlying client base of the brokers concerned.

22. Mr Brown confirmed that as a broker he would jealously guard his client relationship and would only seek general guidance on his business from Westinsure rather than asking for assistance in relation to a particular client transaction. He confirmed that there was a significant advantage in dealing with Partner Insurers as part of the Westinsure alliance as minimum business requirements imposed by insurers were applied to the Westinsure relationship as a whole rather than to individual brokers, and that there was a clear benefit in enhanced commission rates which ceased to apply when a Partner Insurer terminated its agreement with Westinsure.

23. Mr Brown noted a number of other key benefits as a Westinsure Broker as follows:

(1) facility to market our own niche schemes to other members (that is to act as a wholesaler selling insurance products to them);

(2) access to insurance products promoted by other Westinsure Brokers at enhanced commission rates;

(3) access to dedicated teams within insurers for both underwriting and claims. He explained that some insurers provided limited resource to smaller brokers via a 'call centre' and his experience of these is very poor;

(4) Lloyd's market access at discounted commission rates. He explained that to gain access to the Lloyd's market a broker would need to have approved access (by exam and funding). He stated that Westinsure had agreed terms with Lloyd's brokers who allow members access at reduced costs;

(5) discounted rates off professional services for compliance;

(6) access to training, provided by Partner Insurers on various products; and

(7) access to broker forums by email to discuss difficult risks and service issues with insurers.

24. Mr Brown explained that membership of the alliance allows his firm as an independent broker to access far more markets to obtain the most competitive terms and at enhanced commission rates. His firm's clients benefit from the ability to ensure a much broader market analysis and this has been a key strategy in the development and growth of his firm's business.

25. Mr Brown did not believe standing on its own, his firm would gain the wider insurer access or the enhanced commission terms with the number of insurers it dealt with. The dedicated service team and number of the insurers established for WG Brokers means it had access to senior people and quality decision makers within the insurance companies and insurance agents and wholesalers.

26. Mr Southern, summarised the nature of Westinsure's business as the organisation of co-operation between insurance providers and insurance brokers to facilitate the insurance business of both and enhance the effective working of the insurance market by enabling buyers of insurance to obtain good value. In our view, this description is wholly consistent with the findings of fact set out above. It is against those findings we now turn to how the business is to be characterised for VAT purposes.

Issues to be determined

27. We have to determine whether the services provided by Westinsure to the Westinsure Brokers in consideration for which it receives the membership fees are provided by Westinsure as an insurance broker or insurance agent in relation to insurance transactions and where it can be said that the services concerned are provided by Westinsure in the course of it acting in an intermediary capacity. If that is the case Westinsure's services will exempt from VAT pursuant to Schedule 9 Group 2 of the Value Added Tax 1994 and Westinsure will not be required to be registered for VAT purposes.

28. It should be noted that we are not required to determine whether the services that Westinsure provides to Partner Insurers are exempt from VAT. For reasons that are not apparent to us, HMRC decided, as described in a letter dated 29 July 2009 addressed to Westinsure's then advisers responding negatively to a request for clearance in respect of the services provided to Westinsure Brokers, that the services which Westinsure provided to Partner Insurers did amount to the provision of an intermediary service relating to an insurance transaction and were exempt from VAT.

29. Mr Connell contended before us that in retrospect that decision may have been incorrect. Mr Southern contended that there is a presumption that the decision was correct and until it is rebutted the Tribunal must assume that it is correct.

30. We accept that it is not open to the Tribunal to determine whether the decision of HMRC in relation to the services provided to the Partner Insurers was correct or not, for the simple reason that the decision is not the subject of the appeal before us. In our view the fact that HMRC took the view that the services to the Partner Insurers were exempt does not preclude us from making a different finding in relation to the services provided to the Westinsure Brokers, which we must do purely on the basis of the evidence before us and after consideration of the relevant legal arguments. We cannot be bound by HMRC's separate decision relating to the Partner Insurers based as it is on evidence and reasoning which has not been made available to us.

31. We therefore confine ourselves to considering the question as to whether the services provided to the Westinsure Brokers are exempt from VAT, although inevitably our analysis of the issues will require us to look at the business of Westinsure overall.

32. Westinsure originally applied for clearance in respect of the VAT treatment of the provision of membership services to Westinsure Brokers in July 2009. In response to that application in its letter of 29 July 2009, HMRC, in refusing the clearance, appeared to treat Westinsure as being a club subject to the rules relating to clubs and associations and their subscriptions, which provide for such subscriptions to be standard rated for VAT purposes.

33. It is not clear whether this remained the basis of HMRC's decision as set out in its letter of 17 February 2011, which was one of the issues following a renewal of Westinsure's application for clearance and which is one of the decisions which is the subject of these proceedings. However, the case was argued by HMRC before us on the basis that Westinsure carried out a business of providing promotional services to Partner Insurers and aggregation services to the Westinsure brokers, that is services that provide benefits to the Westinsure Brokers in the form of enhanced commissions and wider access to Partner Insurers products than would otherwise be the case because of the greater buying power created by the Westinsure alliance. HMRC contend that these services to not amount to an intermediary service and do not fall within the exemption described in paragraph 27 above.

34. In our view it is not necessary to characterise the services in any particular way if we decide that they do not fall within the exemption for insurance intermediary services. It appears that the services are, on the basis of Mr Southern's description as set out in paragraph 26 above, in any event related to the supply of insurance without necessarily being the services of an insurance intermediary able to benefit from the exemption.

35. It appears to us that if we determine that the exemption does not apply then the services will inevitably be subject to VAT at the standard rate, it not having been argued that any other exemption is available or that Westinsure is for other reasons not liable to be registered for VAT purposes. There appears to be no issue as to whether the services concerned fall outside the scope of VAT altogether; it appears to us that there is a service of some description being provided by Westinsure for consideration and no issue as to whether the services are being provided in the course or furtherance of a business carried on by them.

36. We therefore proceed on the basis that the sole issue to be determined is whether the exemption in Schedule 9 Group 2 of the Value Added Tax 1994 is applicable to the services that Westinsure provides to the Westinsure Brokers. If we find that they do not, then inevitably the result would be that the services amount to standard rated supplies of services related to insurance transactions and thus Westinsure will required to be registered for VAT purposes.

Legislation

37. The basis for the exemption from VAT for insurance and insurance-related activities derives from Article 135(1) (a) of Council Directive 2006/112/EC ("the Principal Directive") which provides:

> "1. Member States shall exempt the following:
>
> (a) insurance and reinsurance transactions including related services performed by insurance brokers and insurance agents"

38. The United Kingdom has implemented Article 135(1)(a) of the Principal Directive through Group 2 of Schedule 9 to Item 4 to VATA ("Item 4") which so far as relevant as now in force provides:-

> "Item No.
>
> 1. Insurance transactions and reinsurance transactions.
>
> 2. ….
>
> 3. ….
>
> 4. The provision by an insurance broker or insurance agent of any of the services of an insurance intermediary in a case in which those services-
>
> (a) are related (whether or not a contract of insurance or reinsurance is finally concluded) to an insurance transaction or a reinsurance transaction; and
>
> (b) are provided by that broker or agent in the course of his acting in an intermediary capacity."

39. Item 4 is supplemented by notes (1)-(2):

> "(1) for the purposes of Item 4 services are services of an insurance intermediary if they fall within any of the following paragraphs-
>
> (a) the bringing together, with a view to the insurance of reinsurance of risks of –
>
> (i) persons who are or may be seeking insurance or reinsurance, and
>
> (ii) persons who provide insurance or reinsurance;
>
> (b) the carrying out of work preparatory to the conclusion of contracts of insurance or reinsurance;
>
> (c) the provision of assistance in the administration and performance of such contracts, including the handling of claims;
>
> (d) the collection of premiums.

(2) For the purpose of item 4 an insurance broker or insurance agent is acting in an intermediary capacity whenever he is acting as an intermediary, or one of the intermediaries, between-

(a) a person who provides insurance or reinsurance and

(b) a person is or who may be seeking insurance or reinsurance or is an insured person."

40. "Insurance broker" and "insurance agent" are not defined. Some guidance as to what is meant by an "insurance agent" can be obtained from Recital 8 to Council Directive 77/92 EEC, a transitional directive relating to the freedom of establishment and freedom to provide services in relation to insurance brokers and insurance agents, which provided that the activity of an agent includes;

"the exercise of a permanent authority from one or more insurance undertakings, empowering the beneficiary, in respect of certain or all transactions falling within the normal scope of the business of the undertaking(s) concerned, to enter in the name of such undertaking(s) into commitments binding upon it or them."

This tends to suggest that an insurance agent is a person acting as agent of an insurance company whereas an insurance broker would be acting as agent of the insured or potential insured.

41. Directive 77/92 EC has now been replaced by the EC Insurance Mediation Directive (Council Directive 2002/92) which contains no definition of "insurance broker" or "insurance agent" but in Article 2(3) defines "insurance mediation" as follows:

" 'insurance mediation' means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.

These activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation.

The provision of information on an incidental basis in the context of another professional activity provided that the purpose of that activity is not to assist the customer in concluding or performing an insurance contract, the management of claims of an insurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims shall also not be considered as insurance mediation"

42. Article 2(5) of the EC Insurance Mediation Directive defines "insurance intermediary" as meaning;

"any natural or legal person, who, for remuneration, takes up or pursues insurance mediation".

43. HMRC have given guidance on their interpretation and application of the exemption contained in Schedule 9 Group 2 to VATA in Public Notice 701/36/02, the relevant provisions of which are as follows;

"(1) Paragraph 8.2.3 which states that to be 'insurance related services' must be 'closely related to insurance and not just incidental to it' and states that Note (7) in Schedule 9, Group 2 to VATA specifically excludes from Item No 4 market research, advertising services and valuations.

(2) Paragraph 8.2.5 which states:

'Provided you are an insurance broker or agent acting in an intermediary capacity … you can exempt the supply of –

- Introductory services ….

- The provision of assistance in the administration and performance of contracts".

(3) Paragraph 9.1.1 deals with 'traditional brokers and agents'. It states;

'If you are an insurance broker or agent by profession most of the services you supply are likely to be the kind of services covered in section 8 and qualify for exemption….'

(4) Paragraph 9.1.2 deals with 'other insurance intermediaries' and states;

'If you are not an insurance broker or agent by profession you are not automatically excluded from the exemption. As well as traditional brokers and agents, other intermediaries sell insurance and/or supply services connected to insurance in other ways.

We do not, therefore, restrict the exemption to those who are insurance brokers and agents by profession, but allow exemption for other intermediaries supplying services akin to those of traditional brokers and agents.'

(5) Paragraph 9.2 deals with 'acting in an intermediary capacity' and states;

"Whilst we accept that the insurance exemption is not restricted to traditional brokers and agents, to qualify as an "insurance agent", UK law requires a person to be acting as an intermediary between an insurer and an insured party…. To be acting in an intermediary capacity a business will be acting somewhere in the chain of supply of a contract of insurance. This does not necessarily mean they will have direct contact with the insurer or the insured party because there can be more than one intermediary in a chain ….'

Authorities

44. We now turn to the relevant authorities cited to us to see how the jurisprudence concerning the exemption has developed.

45. Our starting point is the judgment of the European Court of Justice ("ECJ") in Case-2/95 *Sparkekassernes Datacenter (SDC) v Skatteministeriet* [1997] STC 932. This was a case relating to the services that SDC, an association of Danish savings banks, provided to its members. SDC provided partly by electronic means, to its members, and other customers connected to its data-handling network, services

comprising the execution of transfers, the provision of advice on and trade in services, and the management of deposits, purchase contracts and loans. A typical service consisted of a number of components which, added together, made up the service which a bank or its customer wished to have performed. The ECJ was asked whether the services provided were covered by the exemptions from VAT in Articles 13(B)(d)(3) and (5) of EC Council Directive 77/388 (the Sixth Directive and predecessor to the Principal Directive). Article 13B(d)(3) of the Sixth Directive provided that Member States should exempt:

> "transactions, including negotiation, concerning deposit and current accounts, payments transfers debts, cheques and other negotiateable instruments"

and Article 13 B(d)(5) of that Directive provided that member states should exempt

> "transactions, including negotiation, in shares interests in companies or associations, debentures and other securities"

46. The Danish government had confined the exemptions concerned to banks in its domestic legislation. However the ECJ held in paragraph 32 of its judgment;

> "The transactions exempted under points (3) and (5) of Article 13B(d) are defined according to the nature of the services provided and not according to the person supplying or receiving the services. Those provisions make no reference to that person".

47. In paragraph 66 of the judgement the ECJ set out the principles to be applied so as to assess whether the services that *SDC* provided were merely those of a data handler to those providing the services or whether it could be said to be providing the services themselves as follows:-

> "66. In order to be characterised as exempt transactions for the purposes of points (3) and (5) of art 13B, the services provided by a data-handling centre must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in those two points. For 'a transaction concerning transfers', the services provided must therefore have the effect of transferring funds and entail changes in the legal and financial situation. A service exempt under the directive must be distinguished from a mere physical or technical supply, such as making a data-handling system available to the bank. In this regard, the national court must examine in particular the extent of the data-handling centre's responsibility vis-a vis the banks, in particular the question whether its responsibility is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions."

48. Mr Southern relies on this case to support the principle that what matters in considering whether an exemption is available is the nature of the service provided rather than the type of person who provides them. Thus in *SDC* because what was provided amounted to the services described in the exemption, it was of no concern that they were not provided by a bank.

49. The analogy to this case would be that Westinsure can be regarded as providing insurance intermediation services notwithstanding the fact that it does not describe itself as an insurance broker or an insurance agent. We accept that analogy as far as it

goes, but we note that Item 4 does require the services concerned, that is the insurance intermediation services, to be provided by an insurance broker or insurance agent, and this reflects the wording of Article 135 (1)(a) of the Principal Directive. There is therefore a need to assess whether the services are being provided by a person who meets that description, but we accept that he does not need to describe himself as such. It is also clear from paragraph 66 of the judgment in *SDC*, that the services concerned must have the effect of bringing about the transaction concerned which benefits from the exemption.

50. In Case C-349/96 *Card Protection Plan Ltd v Customs and Excise Commissioners* [1999] STC 270 the ECJ considered the question of whether the service of a card protection plan provided by Card Protection Plan Limited ("CPP") to holders of credit cards designed to protect them against financial loss and inconvenience resulting from the loss or theft of their cards or of certain other items such as car keys, passports and insurance documents should be exempt from VAT on the basis that it constituted the making of arrangements for the provision of insurance. CPP obtained insurance cover in respect of cardholders who purchased the plan by instructing an insurance broker to arrange a block policy from an insurance company, Continental. The cardholders, as CPP's customers, were mentioned in the block policy as the assured. The indemnity given by CPP in respect of financial loss in the event of the theft or loss of credit cards corresponded to the insurance cover described in the schedule to the block policy. The UK Government contended that there was no direct contractual relationship between the insurance company and CPP's customers capable of creating specific legal relations in connection with the insurance policy and hence no supply of insurance to the customer.

51. The ECJ held that CPP in procuring the block policy from Continental performs an "insurance transaction" as that term is used in what is now Article 135(1)(a) of the Principal Directive. The reasoning of the Court is set out in paragraphs 21 to 25 of this judgment as follows:

> "21. ……. It must be noted that CPP is the holder of a block insurance policy under which its customers are the insured. It procures for those customers, for payment, in its own name and on its own account, to the extent of the services mentioned in the Continental policy, insurance cover by having recourse to an insurer. Consequently, for the purposes of VAT, there is a supply of services between Continental and CPP on the one hand, and between CPP and its customers on the other, and the fact that Continental under the terms of its contract with CPP provides insurance cover directly to CPP's customers is not material in this respect.
>
> 22. Such a supply of services by CPP constitutes an insurance transaction within the meaning of art 13B(a). it is true that the exemptions provided for by art 13 of the Sixth Directive are to be construed strictly (see *Stichting Uitvoering Financiele Acties* [1989] ECR 1737 at 1753, para 13). However, the expression 'insurance transactions' is broad enough in principle to include the provision of insurance cover by a taxable person who is not himself an insurer but, in the context of a block policy, procures such cover for his customers by making use of the supplies of an insurer who assumes the risk insured.

> 23, That interpretation is supported by the purpose of the Sixth Directive, which exempts insurance transactions but gives member states, in art 33, the possibility of maintaining or introducing a tax on insurance contracts. Consequently, if 'insurance transactions' refers solely to transactions performed by insurers themselves, the final consumer might have to pay not only that tax but also VAT, in the case of block policies. Such a result would be contrary to the purpose of the exemption provided by art 13B(a).
>
> 24. Having regard to the foregoing, there is no further need to consider whether CPP carried on the activity of an insurance agent referred to in art 13B(a) of the Sixth Directive.
>
> 25. The answer to Question 3 must therefore be that art 13B(a) of the Sixth Directive is to be interpreted as meaning that a taxable person, not being an insurer, who, in the context of a block policy of which he is the holder, procures for his customers, who are the insured, insurance cover from an insurer who assumes the risk covered performs an insurance transaction within the meaning of that provision……"

52. We observe from paragraph 22 of the judgment that the exemption must be interpreted strictly, but full meaning must be given to it. We also observe that the case was decided on the basis that the act of procuring the block policy was in itself an insurance transaction, and the Court did not consider whether CPP was an insurance agent performing an intermediation service. We do however accept Mr Southern's submission that the case is authority for the principle that the exemption for insurance transactions is broad and unspecific and what determines the application of the exemption in that nature of what is supplied rather than what the service is called. We also observe that in the case the service performed by CPP was closely linked to a specific insurance transaction, and consistent with the test laid down in *SDC*, the activity performed by CPP resulted in the issue of a specific insurance policy.

53. In *Century Life plc v Customs and Excise Commissioners* [2001] STC 38 the Court of Appeal considered whether the services provided by Century Life to another insurer, L Ltd, in relation to L Ltd's obligation to carry out a review of the policies L Ltd had sold so as to identify any potential misselling of those policies benefited from the exemption in Item 4. L Ltd was obliged by its regulator to carry out a review of the pensions policies it had sold in order to ascertain whether there was evidence of misselling. It outsourced the review to Century Life. If Century Life concluded there had been no misselling of a particular policy, the case was referred back to L Ltd who informed the relevant investor if it agreed with Century Life's conclusion. If Century Life considered there had been misselling it arranged for the loss to be calculated and checked and prepared the compensation offer. HMRC contended that the services provided by Century Life were subject to VAT whereas Century Life contended they could rely on the exemption in Item 4, relying on Note 1(c), which included the provision of assistance in the administration and performance of contracts of insurance within the services of an insurance intermediary, and Note 2, which included the provision that a broker or agent acted in an intermediary capacity whenever he acted as an intermediary between a person who provided insurance and an insured person.

54. It was accepted that Century Life was in relation to its main business an insurance agent, but HMRC contended that in relation to the work it did for L Ltd it was not acting in that capacity.

55. The Court focussed its reasoning on the wording of what is now Article 135 (a) of the Principal Directive, it being common ground that Item 4 was no more than an explanation of what it described as "the pithy primary source"; see paragraph 8 of the judgment. It therefore considered whether the services fell within the scope of "insurance and reinsurance transactions including related services performed by insurance brokers and insurance agents"

56. The Court of Appeal rejected the argument that the services had to be provided in the capacity of an insurance broker or insurance agent; it was only in the context of whether a provider was an insurance broker or agent for the purposes of the exemption that there might have to be an enquiry as to whether what he did was the sort of thing normally performed by insurance brokers or agents, but that inquiry did not arise because it was accepted that Century Life were such agents: see paragraph 13 of the judgment.

57. The Court did however accept that the principle that the exemption be construed strictly (see Paragraph 22 of *Card Protection Plan* set out in Paragraph 47 above) in relation to the construction of the words "related services" Applying that principle the Court held (per Jacob J) in paragraph 15 of its judgment;

> "15. I would, however, accept the application of this principle to the words 'related services.' These formed the basis of the last point made by Miss Foster on the Sixth Directive. She submitted that unless her main submission was correct, one is left merely with the words 'related services.' These, she suggested, were so vague that a businessman would not know where he stood. I do not agree. Of course, the words involve a question of degree. But that is true of many legal tests. And one does have the 'exemptions are narrow' principle to help here. Applying that, one can say that if a service is only remotely or incidentally connected with an insurance transaction it is not 'related to' it; there must also be a close nexus between the service and the insurance transaction concerned. So, for example, if an insurance agent supplies secretarial or general computer services to an insurance company, the exemption would not apply. Those services would only be incidental to insurance transactions."

58. In relation to the services provided by Century Life, the Court held that assessing whether a policy had complied with regulations was intimately related to it and the fact that the policy had already been sold did not mean there were not continuing obligations: see Paragraph 16 of the judgment.

59. Mr Southern observes that the case establishes that the mere fact that the services provided were in the nature of outsourcing services was irrelevant: the fact that the services were insurance related services was sufficient to bring the services within the exemption. We observe that the Court, in paragraph 15 of the judgment, as the ECJ did in *Card Protection Plan*, placed emphasis on the need for a close nexus between the service and the insurance transaction concerned.

60. A number of subsequent cases have considered the question as to whether particular services were "related services performed by insurance brokers and insurance agents" as provided for in Article 135 (1)(a) of the Principal Directive.

61. In Case C-240/99 *Re Forsakringsaktiebolaget Skandia* [2001] STC 754, in paragraph 23 of its judgment the Court stated that the exemptions provided by what is now Article 135(1)(a) of the Principal Directive are independent concepts of Community law whose purpose is to avoid discrepancies in the application of the VAT system as between one Member State and another and must be placed in the general context of the common system of VAT. This has been followed by the ECJ, in Case C–472/03 *Staatssecretain van Financien v Arthur Andersen & Co* [2005] STC 508: see Paragraph 15 of the judgment. The Court held in *Skandia* (see paragraph 42 of the judgment) that "related services performed by insurance brokers and insurance agents" cannot be broadly construed so as to encompass all services provided by insurance companies, in concluding that a commitment assumed by an insurance company to carry out, in return for remuneration at market rates, the business of its subsidiary and which continued to conclude insurance contracts in its own name does not constitute an "insurance transaction"

62. The question of what constituted an insurance broker or insurance agent was considered by the ECJ in Case C-8/01 *Assurandor-Societet, acting on behalf of Taksatorringen v Skatteminmsteriet* [2006] STC 1842. In that case a provider of vehicle damage assessments to insurance companies was held not to be an insurance broker or agent and not to be providing insurance related services. The Court's reasoning was set out in paragraphs 44 to 46 of its judgment as follows:

> "44. As to whether such services are 'related services performed by insurance brokers and insurance agents', it must be stated, as the Advocate General has pointed out in para 86 of his opinion, that this expression refers only to services provided by professionals who have a relationship with both the insurer and the insured party, it being stressed that the broker is no more than an intermediary.
>
> 45. With regard to Directive 77/92, without its being necessary to rule on whether the terms 'broker' and 'insurance agent' must necessarily be construed in the same manner in Directive 77/92 as they are in the Sixth Directive, suffice it to note that, for the reasons stated by the Advocate General in paras 90 and 91 of his opinion, the activity of an association such as Taksatorringen fails to satisfy the conditions of art 2(1)(a) or 2(1) (b) of Directive 77/92. The assistance in the administration and performance of contracts of insurance referred to in art 2(1)(a) of that directive is in addition to the activities involved in introducing persons seeking insurance and the insurance companies and in preparing and concluding insurance contracts and that referred to in art 2(1)(b) of that directive involves the power to render the insurer liable in respect of an insured person who has incurred a loss.
>
> 46. The answer to the first question submitted must therefore be that art 13B(a) of the Sixth Directive must be construed as meaning that motor vehicle damage assessments carried out, on behalf of its members, by an association whose members are insurance companies are neither insurance transactions nor services related to insurance transactions that are performed by insurance brokers or insurance agents within the meaning of that provision."

63. We observe that the Court, in paragraph 45 of the judgment specifically declined to follow the course of construing the terms "insurance broker" and "insurance agent" by reference to the definitions contained in the EC Insurance Mediation Directive, the Court repeating, in paragraph 37 of its judgment, the findings in *Skandia* and *Arthur Andersen* that the exemptions constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system form one Member State to another.

64. We also observe that the Court identifies in Paragraph 44 of its judgment that the essence of the concept is that the person concerned acts as an intermediary who has a relationship with both the insurer and the insured.

65. The question as to how close a connection there needs to be between what an intermediary does and particular transactions that are effected by the persons with whom he interfaces as an intermediary has been considered in a number of cases.

66. In Case C–235/00 *CSC Financial Services Ltd v Customs and Excise Commissioners* [2002 STC 57] the ECJ considered the extent of the exemption in Article 13B(d)(5) of the Sixth Directive for "transactions, including negotiation…… in shares and other securities"

67. The essential facts of that case were that CSC provided a "call centre" for financial institutions. One of those institutions, Sun Alliance, delegated to CSC all communication and contacts with the public concerning a unit trust product which Sun Alliance sold. CSC operators provided potential investors with information and the relevant application forms. CSC processed the forms, checking they had been properly completed, checked that the applicant satisfied eligibility conditions, that the correct payment was enclosed and dealt with cancellation requests. It did not deal with the formalities of issuing and transferring the units in the unit trust. The ECJ held that the activities concerned did not amount to "negotiation" its reasoning being set out in paragraph 39 to 41 of its judgment as follows:

> "39. It is not necessary to consider the precise meaning of the word 'negotiation' which also appears in other provisions of the Sixth Directive, in particular, art 13B(d)(1)-(4), in order to hold that, in the context of art 13B(d)(5), it refers to the activity of an intermediary who does not occupy the position of any party to a contract relating to a financial product, and whose activity amounts to something other than the provision of contractual services typically undertaken by the parties to such contracts. Negotiation is a service rendered to, and remunerated by a contractual party as a distinct act of mediation. It may consist, amongst other things, in pointing out suitable opportunities for the conclusion of such a contract, making contact with another party or negotiating, in the same of and on behalf of a client, the detail of the payments to be made by either side. The purpose of negotiation is therefore to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract.
>
> 40. On the other hand, it is not negotiation where one of the parties entrusts to a sub-contractor some of the clerical formalities related to the contract, such as providing information to the other party and receiving and processing applications for subscription to the securities which form the subject-matter of the contract. In such a

case, the sub-contractor occupies the same position as the party selling the financial product and is not therefore an intermediary who does not occupy the position of one of the parties to the contract, within the meaning of the provision in question.

41. In view of all the foregoing considerations, the answer to the national court's question must be that, on a proper construction of art 13B(d)(5) of the Sixth Directive,

- 'transactions in securities' means transactions liable to create, alter or extinguish parties' rights and obligations in respect of securities;

- 'negotiation in securities' does not cover services limited to providing information about a financial product and, as the case may be, receiving and processing applications for subscription, without issuing them."

68. We observe that the ECJ regarded as the essence of negotiation, which it regarded as a constituent of mediation, of doing all that is necessary in order for tow parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract. This implies a degree of independence form both the contracting parties, which is consistent with the ECJ's approach in *Arthur Andersen* where the Court held that the provision of outsourced back office services did not come within the insurance exemption, because Arthur Andersen was not acting as an insurance broker or agent, but was providing clerical and administrative support. The Advocate General said at paragraph 33 of his opinion in that case:

> 'The activity of an insurance agent should therefore be viewed as a supply of services on a professional basis, which begins and ends in itself and which thus has an independent substance distinct from the business of the insurer. The activity of an insurance agent cannot be confused with that of the insurer on behalf of and possibly in the name of which the agent acts'.

69. In *Customs and Excise Commissioners v BAA plc* [2002] EWHC 196 (Chancery Division) and [2002] EWHC 1814 (Court of Appeal) the extent of the exemption in Article 13 B(d)(1) of the Sixth Directive for the "negotiation of credit" was considered.

70. The essential facts were that a wholly owned subsidiary of BAA plc, the airport operating company, provided an affinity credit card scheme whereby a credit card issued by a bank was endorsed by and recommended to BAA customers, BAA's subsidiary receiving a commission related to the usage and provision of the card. The subsidiary identified from its customer base who satisfied the bank's preconditions for the issue for the card and wrote to them inviting them to apply for the card. Applications were received by the subsidiary's agent who checked them and sought any further information necessary to correct any errors before forwarding them to the bank for consideration. The bank made the decision whether to grant credit and it alone was the credit provider. BAA argued that the services provided by the subsidiary to the bank were exempt from VAT as they fell within the expression "the negotiation of credit". The Commissioners contended that the expression "negotiation" meant the brokering of an actual exempt transaction (the grant of credit) by an intermediary who had the power to affect the substance of the transaction itself

with the subsidiary did not have. Etherton J held at first instance in favour of BAA. His reasoning was set out in Paragraph 47 of his judgment as follows:

> "[47] In my judgment, the activities carried out by BAAE, pursuant to the credit card agreement, satisfy the requirements for 'negotiation of credit' in art 13B(d)(1). They constitute 'a distinct act of mediation' within para 39 of the judgment of the Court of Justice in *CSC Financial Services Ltd v Customs and Excise Commrs* (Case C-235/00) [2002] STC 57. Without BAAE's services, the individual contracts for the issue of WorldCards to individual customers of BAAE would not take place. BAAE's activities cannot be fairly characterised as mere clerical formalities, which it effectively carries out as a sub-contractor of BOS (cf para 40 of the Court of Justice's judgment in the *CSC* case). BAAE does not play a purely passive role in relation to the individual contracts for the issue of a WorldCard to the applicant. Nor can its activities properly be described as merely carrying out promotional or marketing activities for BOS".

71. We observe that the basis of the decision that the subsidiary's activities amounted to negotiation was that without the intermediation provided by BAA's subsidiary the issue of the credit cards would not have taken place. Etherton J's reasoning was expressly approved by the Court of Appeal: see paragraph 35 of the judgment of Sir Andrew Morritt VC and paragraph 39 where he stated;

> "Equally the introductory services of BAAE without which the card cannot be issued and the benefits cannot be obtained seem to me to be properly characterised as "negotiation of credit" within the European concept denoted by that phrase as decided by the Court of Justice in CSC".

72. Etherton J in paragraph 50 of his judgment noted that the Commissioners' submission that the activities do not fall within the exemptions for "intermediary services" provided for in the domestic legislation that implemented Article 13B(d)(1) of the Sixth Directive (that is item 5 of Group 5 of Schedule 9 to VATA) unless the intermediary has power to affect the substance of the transaction itself is not reflected in any express language in Group 5, although, we observe Item 5 of Group 5 does refer to the "provision of intermediary services in relation to any transaction comprised in item 2……[the making of any advance or the granting of credit] (whether or not any such transaction is concluded) by a person acting in an intermediary capacity."

73. The ECJ has also accepted in two cases that in order to benefit from an exemption based on the provision of intermediary services it is not necessary that the intermediary had any contractual link with any of the parties to the underlying transaction that results where the intermediary has contributed to the conclusion of the transaction concerned.

74. In the first of these cases, Case C-453/05 *Ludwig v Finanzamt Luckenwalde* [2008] STC 1640 which involved the participation of a sub-agent in the negotiation of credit the Court held in paragraph 38 to 40 of its judgment as follows:

> "38. As stated in para 39 of *CSC Financial Services*, negotiation is an act of mediation which may consist, amongst other things, in pointing out to one party to the contract suitable opportunities for the conclusion of such a contract, the purpose of such an

activity being to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract. The concept of negotiation does not, therefore necessarily presuppose that the negotiator, as sub-agent of the main agent, enters into direct contact with both parties to the contract, in order to negotiate its terms, provided, however that his activity is not limited to dealing with some of the clerical formalities related to the contract.

39. In addition, the very fact that the terms of the credit agreement have been fixed in advance by one of the parties to the contract cannot, as such, preclude the supply of a negotiation service for the purposes of art 13B(d)(1) of the Sixth Directive, given that, as stated in the previous paragraph, the activity of negotiation may be limited to point out to one party to the contact suitable opportunities for the conclusion of such a contract.

40. The answer to the second question must therefore be that the fact that the taxable person has no contractual link with any of the parties to a credit agreement to the conclusion of which he has contributed and that he does not establish direct contact with one of those parties does not preclude that taxable person from providing a service of negotiation of credit which is exempt under art 13B(d)(1) of the Sixth Directive."

75. In Case C-124/07 JCM *Beheer BV v Staatssecretaris Van Financien* [2008] STC 3360 the ECJ reached the same conclusion in relation to a sub agent of an insurance company, namely that an indirect link with the insurers sufficed. Its reasoning was set out in paragraph 29 of its judgment as follows:

> "29. In the light of the foregoing considerations, the answer to the question referred to the court should be that art 13B(a) of the Sixth Directive must be interpreted as meaning that the fact that an insurance broker or agent does not have a direct relationship with the parties to the insurance or reinsurance contract in the conclusion of which he has been instrumental, but merely an indirect relationship with them through the intermediary of another taxable person who is, himself, in a direct relationship with one of those parties, and to whom that insurance broker or agent is contractually bound does not prevent the service provided by the latter from being exempt from VAT under that provision."

76. All these authorities were extensively reviewed by the Court of Appeal in *InsuranceWide.com Services Ltd v Revenue and Customs Commissioners* [2010] STC 1572. The essential facts in that case were that a publishing company (TM) specialised in classified display advertising allowing individuals and businesses to sell and purchase a wide variety of motor vehicles. In addition to its magazines, TM maintained a website comprising a number of products including the ability to advertise a car for sale, car valuation, details of new cars, financing, insurance and other products. For insurance products, there was an 'insurance centre' which customers using the website could use to obtain quotes for car insurance from a panel of selected insurers. If an insurance contract between the customer and one of the panel of insurers resulted, TM was paid a commission by the insurer, InsuranceWide (IW) supplied similar services pursuant to an agreement with F (an internet service supplier) whereby F appointed IW to be its sole designated provider of insurance products. That was done by IW passing particulars of would-be insured though F, to the operator of a panel of insurers who would put each customer in contact with an appropriate insurer chosen by it. If an insurance contract resulted, IW would be paid

a commission. The arrangements provided by IW evolved over the years to include a panel of insurers and more sophisticated software that provided quotes tailored to the potential insured's requirements. In neither case did TM or IW have a direct relationship with the parties and in neither case could TM or IW bind the insurer or the insured.

77. HMRC contended that TM and IW were not entitled to the exemption in Item 4 for the commission that they received in respect of the services they provided through their websites on the basis that they had not acted as an insurance broker or insurance agent; they had merely provided a "click-though" facility to a broker, agent or insurer and that, in the absence of any legal relationship with either the insurer or the insured or the prospective insured, and in the absence of any involvement in the negotiation of the terms of the insurance contract or its preparation or the collection of premiums or the handling of any claims, their activities were not such to constitute them as an insurance broker or insurance agent for the purposes of what is now Article 135(1)(b) of the Principal Directive or the insurance intermediary exemption in Item 4.

78. Etherton LJ, in giving the leading judgment set out at paragraph 85 the principles to be applied as to the interpretation and application of what is now Article 135 (1)(b) of the Principal Directive and Item 4, in the light of the case law reviewed and the domestic and EU legislation, as follows:

> "(1) The insurance intermediary exemption should be interpreted so far as possible, consistently with its terms, in a way that reflects the jurisprudence of the ECJ and the United Kingdom's obligations under the Sixth Directive and the 2006 VAT Directive. To do otherwise would, as Ms Foster pointed out, risk infraction of EU legislation by the United Kingdom.
>
> (2) The exemption in art 13B(a) must be interpreted strictly since it constitutes an exception to the general principle that VAT is to be levied on all services supplied by a taxable person. This does not mean, however, that the words and expression in art 13B(a) and the insurance intermediary exemption are to be given a particularly narrow or restricted interpretation. It is for the supplier to establish that it and its activities come within a fair interpretation of the words of the exemption.
>
> (3) the exemption for 'related services' under art 13B(a) only applies to services performed by persons acting as an insurance broker or an insurance agent. Although those expressions are not defined by EU legislation, they are independent concepts of the common system of VAT.
>
> (4) Whether or not a person is an insurance broker or an insurance agent, within art 13B depends on what they do. How they choose to describe themselves or their activities is not determinative.
>
> (5) The definitions of 'insurance broker' and 'insurance agent' in the Insurance Directive are relevant to the meaning of the same expressions in art 13B(a), to the extent, but only to the extent, that they should be taken into consideration as reflecting legal reality and practice in the area of insurance law. It is not necessary, in order to invoke the exemption in art 13B(a), for the taxpayer to perform precisely the description of activities in art 2(1)(a) or (b) of the Insurance Directive.

(6) On the other hand, the mere fact that a person is performing one of the activities described in art 2(1)(a) or (b) of the Insurance Directive or the definition of 'insurance mediation' in the Insurance mediation Directive does not automatically characterise that person as an insurance agent or insurance broker for the purposes of art 13B(a).

(7) It is an essential characteristic of an insurance broker or an insurance agent, within art 13B(a), that they are engaged in the business of putting insurance companies in touch with potential clients or, more generally, acting as intermediaries between insurance companies and clients.

(8) It is not necessary, in order to claim the benefit of the exemption in the art 13B(a), for a person to be carrying out all the functions of an insurance agent or broker. It is sufficient if a person is one of a chain of persons bringing together an insurance company and a potential insured and carrying out intermediary functions, provided that the services which that person is rendering are in themselves characteristic of the services of an insurance agent or broker.

(9) All the above principles are capable of being applied, and must be applied, to the insurance intermediary exemption in Sch 9 to VATA 1994."

79. Applying these principles to the facts, Etherton LJ held that TM and IW were much more than a "click through" facility to a broker, agent or insurer and were entitled to the exemption in Item 4. In particular he observed at paragraph 86 of his judgment:

"They identified, and provided those looking for insurance with access to insurers who provided a range of competitive insurance products. In both cases the evidence indicated that the insurers were appraised and selected bearing in mind the competitiveness of their pricing and products and their level of consumer service. In the post-Wizard phases, InsuranceWide provided those seeking insurance with a means of directing them most effectively and efficiently to the most appropriate insurers, whether directly or through another intermediary, to match their requirements. In the case of Trader Media the evidence was that it not only had an input into the questions to be answered by those seeking insurance, but, importantly, it made suggestions for the composition of the insurance panel based on its understanding of the experience and demographics of the consumer and with a view to providing customers with insurers who would quote competitive prices. Neither of them were, as Ms Sloane emphasised, a mere 'conduit'. Their relevant activities can fairly be described as the business of bringing together insurers and those seeking insurance, by contrast with the tax payers in *Skandia*, *Taksatorringen* and *Arthur Andersen*, who were sub-contractors."

80. He went on to reject HMRC's submissions of the nature of an insurance broker or insurance agent in paragraph 87 of his judgment as follows:

"For the reasons I have given, I reject the proposition of law advanced by HMRC that neither InsuranceWide nor Trader Media can claim the benefit of the insurance intermediary exemption because they did not have a legal relationship with either the insurer or the insured or the prospective insured. It is sufficient that they were providing services characteristic of an insurance broker or agent, and which were vital to the process of introducing those seeking insurance with insurers, even if they were only part of a chain of such persons. In any event, they did have direct relations with the customers who used their website, just as much as Beheer, and they did have

collaborative arrangements with intermediaries who did have legal relations with insurers. It would therefore also be immaterial that neither Insurance Wide nor Trader Media had anything to do with the negotiation of the terms of the insurance contract or its preparation or the collection of premiums or the handling of claims."

81. In our view the principles laid down in *InsuranceWide* are the correct starting point for our consideration as to whether Westinsure is entitled to the benefit of the exemption in Item 4 in relation to the services it provides to the Westinsure Brokers. The key finding that we need to make, based on those principles and the case law that underlies them, is whether the services that Westinsure provides can be properly described as the business of bringing together insurers and those seeking insurance, (the essential characteristic of an insurance broker or an insurance agent) as opposed to providing insurance related services which fall short of the essential characteristics that denote services provided by an insurance agent or insurance broker because they are incidental to the insurance transactions that result.

Discussion

82. Mr Southern helpfully summarised the key elements of Westinsure's business which he submitted were sufficient, taken together, to show that Westinsure was providing the services of an insurance intermediary, within the scope of Item 4 as follows:

(1) Establishing structures so that insurers and brokers can do business with each other;

(2) Providing access to Lloyd's brokers either via Partner Insurers or though Westinsure itself;

(3) Assisting in the administration of the insurance business carried on by Westinsure Brokers, for example through visits by Westinsure business development managers;

(4) Bringing together Partner Insurers and Westinsure Brokers;

(5) Preselecting brokers for eligibility to participate in the arrangements made with Partner Insurers;

(6) Maintaining a continuing dialogue between Partner Insurers and Westinsure Brokers at events such as roadshows and the annual exhibition organised for both sides to participate in;

(7) Allowing Westinsure Brokers to provide wholesale brokering services to other Westinsure Brokers;

(8) Facilitating access to and acceptance by a wider range of insurers, which would not otherwise be possible for a Westinsure Broker to achieve on its own; and

(9) Creating synergies by putting insurer contacts in touch with broker contacts.

83. We accept that all these features are borne out by the findings of fact that we have made regarding Westinsure's business as set out in paragraphs 7 to 26 above.

84. Mr Southern accepts that in order for Westinsure to qualify for the exemption the following conditions must be satisfied;

(1) There must be a relationship with both the insurer and the insured, but the relationship may be direct or indirect, does not require a contractual relationship with either and is not limited to specific forms. Mr Southern relies on *Beheer*, paragraphs 26 to 29, and *InsuranceWide* paragraph 85(7), for this proposition. Mr Southern submits that this requirement is satisfied; there is a direct relationship with the insured and potential insured through the arrangements with the Westinsure Brokers. It is sufficient to meet the requirement of a relationship with the insured that Westinsure's services result in the Westinsure Brokers being introduced to the Partner Insurers even thought the Westinsure Broker's client is not introduced into the chain of transactions that ultimately leads to a particular insurance transaction.

(2) "related services" as that term is used in Article 135(1)(a) of the Principal Directive means services which have a close nexus to insurance transactions rather than merely being ancillary to insurance transactions; see *Century Life*, paragraph 15. Mr Southern submits that this condition is satisfied even where the intermediation does not itself relate to the effecting of a particular transaction, as opposed to a whole class of transactions as is the case here, and he relies on *BAA plc* in that regard.

(3) The intermediary must not himself be an insurer or purchaser of insurance. His business must have a distinct independent substance and he must be paid for his intermediary services; see *CSC*, paragraphs 39 to 39 and *Arthur Andersen*, paragraphs 33 of the Advocate General's opinion. Mr Southern submits that on the facts these conditions are clearly satisfied in the case of Westinsure.

(4) Insurance intermediation requires the putting together of people who want to sell insurance with people who want to buy insurance with a view to entering into insurance transactions; See Schedule 9, Group 2, Note (1) to VATA. Mr Southern submits that Westinsure's role is akin to a gatekeeper, guarding the entrance of a facility where brokers and insurers can do business with each other in order to conclude insurance transactions, and the entrance is opened to those who agree to contract with Westinsure either as a Partner Insurer or Westinsure Broker, and this role is sufficient for it to be regarded as an insurance broker or insurance agent: see *BAA plc* paragraph 47.

85. We accept that the conditions that Mr Southern has identified as a useful basis for assessing whether Westinsure can properly be regarded as an insurance broker or

insurance agent and one consistent with the principles identified by Etherton LJ and InsuranceWide as set out in paragraph 78 above.

86. We start from the position that we should focus our reasoning on Article 135(1)(a) of the Principal Directive on the basis that Item 4 is no more than an implementation of the "pithy primary source" – see paragraph 8 of the judgment in *Century Life*.

87. We also bear in mind that the exemption should be construed strictly and this should be particularly borne in mind when considering the extent of the term "related services" as used in Article 135(1)(a) of the Principal Directive: see paragraph 15 of *Century Life* where the principle was called in aid to confine the extent of the exemption to situations where there was a "close nexus" between the services and the insurance transaction concerned.

88. In our view whilst the third of the four conditions is clearly satisfied in this case the others are not.

89. Our characterisation of the services provided by Westinsure is that they prepare the ground in order to enable other market participants to intermediate and are too remote from the effecting of particular insurance transactions to amount to the services of an insurance broker or insurance agent. The services provided by Westinsure undoubtedly assist both the Partner Insurers and the Westinsure brokers to develop their respective businesses and add clear value to those businesses. In respect of the Partner Insurers the essence of the services, as expressed in the specimen agreement we referred to in paragraph 18 above is marketing the Partner Insurers' services to the Westinsure Brokers. In respect of the Westinsure Brokers, the core obligation under the specimen agreements we were provided with as referred to in paragraph 14 above was to grant access to the Partner Insurers and the specialist products that had been negotiated for the benefit of their clients on favourable terms.

90. We are therefore of the view that Mr Southern's analogy of Westinsure being a gatekeeper is apt. Westinsure is the gatekeeper of a facility that it has built and to which it controls access. Where we part company with Mr Southern is that in our view for the services that Westinsure provides to constitute the services of an insurance broker or insurance agent they would need to go further and actually enter the facility themselves, participating in the intermediary services that are conducted through the facility. In our view the services that Westinsure provides are more akin to the support services provided in *Arthur Andersen* or the services of the lawyer who assists an intermediary or insurer to carry out its business by drafting the policy terms that the insurer will use, or the terms of business which the broker will provide to his client than being acts of intermediation in themselves. Whilst it is true that the insurer or broker could not effect transactions without policy wordings or terms of business, so in that sense transactions would not take place without them, there is not a sufficiently close connection to the transactions themselves that result.

91. We are able to make this distinction on the basis of applying the seventh and eighth principles laid down by Etherton LJ in InsuranceWide as set out in paragraph

85 of his judgment. In Principle (7) he states that it is an essential characteristic of an insurance broker or insurance agent that he is engaged "in the business of putting insurance companies in touch with potential clients." Whilst *Beheer* is authority for the proposition that an indirect relationship with the client was sufficient, it is clear that Etherton LJ was interpreting that development of the jurisprudence (which he expressly acknowledges at paragraph 80 of his judgment) in the context of the requirement as laid down in *Century Life* that there must be a close nexus between the intermediary's service and the transactions that result. Hence the reference in Principle (8) to the requirement that the intermediary is "one of a chain of persons bringing together an insurance company a potential insured." In *Beheer* as in *InsuranceWide* itself, the intermediary concerned was part of a chain linking the ultimate client and the insurer in respect of the conclusion of a particular transaction. That essential feature is missing in the case of the situation with which we are concerned; Westinsure does not participate in the chain but makes arrangements which facilitate the creation of such a chain between the insured and the Partner Insurer.

92. Whilst *BAA Plc* establishes that it is not necessary, in the context of acting as an intermediary negotiating the granting of credit, that the intermediary had the power to effect the substance of the resulting credit transaction it was clear that nevertheless there needed to be a close nexus between the services the intermediary provided and the transactions that resulted, reflected in that case by the fact that without BAA's activities the transactions concerned would not take place, as we observed in paragraph 71 above. In that case, applications were passed on to BAA containing all necessary information on which the bank could base its decision to grant credit or not; that is not the case with the services that Westinsure provides where it has no role in relation to the gathering or processing of information which relates to any particular insurance transaction.

93. It is also apparent from *InsuranceWide* that merely acting as an introducer in a chain of intermediaries is insufficient. Etherton LJ made it clear that InsuranceWide was providing other valuable services characteristic of an insurance broker such as approving insurers for the competitiveness of their pricing and products and level of consumer service: see paragraph 86 of the judgment. It was the combination of this with the fact that they were part of the chain which led to the introduction of the insured to the insurer which led Etherton LJ to conclude that InsuranceWide and TM were providing the services of an insurance broker or insurance agent: see paragraph 87 of the judgment.

94. In the current case Westinsure undoubtedly does provide the services referred to in paragraph 93 above, namely the appraisal of insurers, which are characteristic of the services provided by an insurance broker or insurance agent but it does not do so as part of the transaction chain. It is this difference that distinguishes its services from that of an insurance broker or insurance agent and means that it services must be regarded as too remote from particular insurance transactions to enable it to benefit from the exemption.

95. Mr Southern, when the question of the significance of this distinction was put to him by the Tribunal, replied that in his view there was a chain of intermediaries in the current situation but it went through two stages. In the first stage, Westinsure set up the chain through putting the Westinsure Brokers and Partner Insurers together and then moved aside, but in stage two, a second chain was created after particular clients had been introduced into the chain by the Westinsure Brokers to effect insurance, in which Westinsure participated by virtue of it receiving commissions from Partner Insurers in respect of the transactions that resulted from the arrangements set up in stage one.

96. In our view this does not alter our analysis; it remains the case that Westinsure is not part of the chain that leads to particular transactions being effected. Mr Southern sought to argue that the situation was similar to that in *BAA plc* where it was held to be sufficient that the intermediary intermediated a potential class of transaction rather than any particular transaction, but as we have observed, the essence of the case there was that BAA gathered information that was specific enough to enable particular transactions to be effected and without its intervention such transactions could not have been completed. Consequently BAA could clearly be said to be in the transaction chain .

97. Whilst Westinsure is remunerated by Partner Insurers by reference to the completion of particular transactions, and this may have influenced HMRC in deciding that such remuneration was exempt from VAT, that is not the case with respect to the remuneration that Westinsure receives from Westinsure Brokers. As we find in paragraph 13 above, Westinsure is remunerated by Westinsure Brokers through an annual fee, which is related to the gross premium income generated by the broker concerned, whether that is through particular transactions with Partner Insurers or not, and is therefore not transaction specific.

Conclusion

98. We therefore conclude that the services which Westinsure provides to the Westinsure Brokers are not services related to insurance transactions which are performed by an insurance broker or insurance agent within the ambit of Article 135(1)(a) of the Principal Directive and accordingly the exemption in Schedule 9 Group 2 of the Value Added Tax 1994 is not available to Westinsure in respect of those services. The appeals are therefore dismissed.

99. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JUDGE TIMOTHY HERRRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 11 February 2013