[2015] UKFTT 469 (TC)

TC04636

Appeal number: TC/2013/9575

VAT – Exemptions – Insurance – Article 135 (1)(a) VAT Directive - Item 4 group 2 sch 9 VAT Act 1994 – insurance intermediaries – whether appellant was an "insurance agent"

FIRST-TIER TRIBUNAL
TAX CHAMBER

RISKSTOP CONSULTING LIMITED **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster
Mr Mohammed Farooq

Sitting in public at Priory Court, Birmingham on 26 August 2014 and 10-11 June 2015

Mr Nicholas Lawrence (NLCS Limited) for the Appellant

Mr Luke Connell (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant ("Riskstop") appeals against a decision by the Respondents ("HMRC") dated 2 August 2013 which was upheld by formal internal review on 28 November 2013 ("the Disputed Decision") concerning the VAT status of certain services supplied by Riskstop ("the Assist Service" and "the Support Service"). The Disputed Decision concluded that both the Assist Service and the Support Service are standard rated supplies for VAT purposes. Riskstop maintains that both the Assist Service and the Support Service are exempt supplies, pursuant to item 4 group 2 sch 9 VAT Act 1994 (insurance intermediaries).

Statutory Provisions

2. Article 135(1) of Council Directive 2006/112/EC provides (so far as relevant):

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

Article 135(1)(a) replaced the earlier art 13B(a) EC Council Directive 77/38 (the Sixth Directive), which was in the same terms and, therefore, for the purposes of this appeal references (eg in caselaw) to the two provisions (art 135 and art 13B) are interchangeable.

3. Section 31 VAT Act 1994 provides (so far as relevant):

> "(1) A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 …"

4. Item 4 group 2 sch 9 VAT Act 1994 ("Item 4") provides (so far as relevant):

> "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."

5. The Notes to group 2 sch 9 VAT Act 1994 provide (so far as relevant):

> "(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 or 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 purposes of item 4 an insurance broker or insurance agent is acting 'in an intermediary capacity' wherever he is acting as an intermediary, or one of the intermediaries, between—

(a) a person who provides insurance or reinsurance, and

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

…

(7) Item 4 does not include—

(*a*) the supply of any market research, product design, advertising, promotional or similar services; or

(*b*) the collection, collation and provision of information for use in connection with market research, product design, advertising, promotional or similar activities.

(8) Item 4 does not include the supply of any valuation or inspection services.

(9) Item 4 does not include the supply of any services by loss adjusters, average adjusters, motor assessors, surveyors or other experts except where—

(*a*) the services consist in the handling of a claim under a contract of insurance or reinsurance;

(*b*) the person handling the claim is authorised when doing so to act on behalf of the insurer or reinsurer; and

(*c*) that person's authority so to act includes written authority to determine whether to accept or reject the claim and, where accepting it in whole or in part, to settle the amount to be paid on the claim.

…"

Evidence

6. As well as a bundle of documents we took oral evidence from the following witnesses for Riskstop, all of whom also adopted and confirmed formal witness statements:

(1) Mr Colin Westwood, group financial controller of Riskstop Group Limited (the parent company of Riskstop).

(2) Mr Trevor Smith, director of Riskstop Group Limited.

(3) Mr Danny Lillington, managing director of Riskstop Group Limited.

7. At the first hearing in August 2014 we took Mr Westwood's evidence. Mr Westwood's witness statement described Riskstop's relevant activities. It became clear that Mr Westwood had not been closely involved in the relevant business

activities, and had prepared his witness statement relying on explanations provided by a colleague (Ms Beaton). While that was doubtless intended to be helpful to the Tribunal, it meant that Mr Westwood was unable to answer pertinent questions by Mr Connell in cross-examination and from the Tribunal. We noted that the description of activities provided in the witness statement varied from the description stated by HMRC in background correspondence prior to the Disputed Decision. We felt that it was important for the Tribunal to have a clear explanation of Riskstop's relevant activities from an individual with personal knowledge thereof, and for HMRC to have the opportunity to test aspects of that explanation if they so chose. We decided that out of an abundance of fairness to Riskstop (which as appellant bears the burden of proof) the best course would be to adjourn the hearing to permit Riskstop to adduce alternative evidence in that regard. At the resumed hearing in June 2015 we took the evidence of Mr Smith and Mr Lillington, both of whom did have the requisite personal knowledge. On that basis, we have decided to put aside Mr Westwood's evidence and make our findings by reference to the evidence of the other two witnesses and the relevant documents.

Mr Smith's evidence

8. General business insurance cover in the UK is provided by a number of Insurers, such as insurance companies or Lloyds syndicates. Each Insurer will have its own philosophy concerning what sorts and levels of risk it is willing to underwrite. The risk proposal may be presented to the Insurer by the potential Insured or by a Broker acting as an intermediary on behalf of the Insured. There would be a proposal form or a Broker's presentation which would describe the nature of the risk, the values at risk etc. Some risk management information would be gathered at this time (eg building construction, type of burglar alarm system etc) but the Insurer may require more information before providing a quotation or, more often (because of the competitive nature of the market), a quotation will be provided but with acceptance subject to a Risk Management Survey being carried out within a specified period, and the Insured's compliance with any Risk Improvement Requirements arising from the Risk Management Survey within a further specified period. Risk Management Surveys may also be commissioned by Insurers after inception of the policy - for example if there was a significant increase in stock value notified, or a claims history. In almost all cases any Risk Improvement Requirements identified in a Risk Management Survey would be adopted by an Insurer as a condition of the quotation. The Risk Management Survey may also make certain recommendations but these were not mandatory for the Insured, and were typically ignored as they involved optional costs. Approximately 70-80% of Risk Management Surveys generated Risk Improvement Requirements – typically around three requirements per survey.

9. There are two types of Risk Management Survey. The choice is specified by the Insurer. The cost is borne by the Insurer as part of its business overheads (but will of course eventually be reflected in the premiums charged to the Insureds). The survey is addressed to and for the purposes of the Insurer (a copy is usually supplied to any Broker), although the Risk Improvement Requirements will be communicated to the Insured.

(1) *Site Survey* - An expert risk surveyor will visit the Insured's business site, gather information and prepare a detailed report. This route is usually followed only for potentially hazardous businesses (eg waste disposal companies) or specialised premises (eg a pier) – probably around 5% of quotations.

(2) *Questionnaire Survey* – No site visit is performed. Riskstop prepares a questionnaire using its expertise to identify the information necessary to form a view on the insurance risk being presented. The Insured completes the questionnaire; the completed form is analysed by Riskstop; and a report to the Insurer is prepared by Riskstop. The cost of a Questionnaire Survey can be as little as 20% of the cost of a Site Survey.

10. Historically, having stipulated Risk Improvement Requirements an Insurer would then expect the Insured to ensure compliance; the Broker, if any, would chase its client. This was neither customer-friendly nor particularly effective, and could give rise to significant and costly disputes over whether cover was in place if a claim arose. In 2001 Riskstop developed and introduced a product which involved Riskstop liaising directly with the Insured to assist the Insured in satisfying the Risk Improvement Requirements by the deadlines. This could be something as simple as providing information on what type of security locks were adequate under the policy and recommending approved suppliers, or be more technical. The fees for this product were borne by the Insurer, who would presumably indirectly build them into the premium quotation. Many Insurers had since adopted and now used this model. It was speedy and there was no direct cost to the Insured. Also, as Riskstop was involved it could warn the Insurer if the Insured was not acting to satisfy the Risk Improvement Requirements, in which case the Insurer could extend the deadline, amend the terms of cover (eg the insured amount or the claims excess), or come off cover altogether. In the event of a loss, Riskstop's files might be requested by an Insurer to judge whether to accept or refuse the claim, or by the police if required for an investigation.

11. The VAT status of fees from Site Surveys is in dispute between Riskstop and HMRC but is *not* the subject of the current appeal. The subject of the current appeal is the VAT status of fees paid by Insurers for two Riskstop products:

(1) *Support Service* – This is the provision of Questionnaire Surveys to the Insurers.

(2) *Assist Service* – This is the assistance provided to the Insured towards satisfying the Risk Improvement Requirements by the deadlines.

12. In reply to cross-examination by Mr Connell:

(1) Riskstop was not involved in any claims process – its work was at the front end when the cover was being taken on.

(2) The preparation of the questionnaire by Riskstop would be done in conjunction with the Insurer, to ensure it captured the information necessary for the Insurer to evaluate the risk, but relied mainly on Riskstop's expertise in identifying the areas to be addressed and designing the questionnaire. For example, there was a constantly changing raft of environmental and safety legislative requirements which affected different businesses to different degrees. Of course, some sets of questions could be used for a number of types of businesses.

(3) Riskstop's services were a fundamental part of the insurance process; they were part of the appraisal and management of the risk which determined whether to accept the business, and on what terms. He disagreed that Riskstop was merely providing raw data to the Insurers.

(4) The decision whether to accept or reject the risk was that of the Insurer. In 99% of cases the Insurer would go along with the Risk Improvement Requirements in quoting for the cover. The Insurer would calculate and determine the premium for cover. There was no contractual relationship between Riskstop and the Insured – although they were in direct contact.

(5) If Riskstop did not exist then Insurers would still write cover but would revert to the old model (using in-house surveyors if necessary) which was inefficient, slow, costly, and had low compliance.

(6) Insurers would reinsure part of their risks, and it was logical that they could get lower reinsurance premia if they could demonstrate a process for ensuring the risks had met the Risk Improvement Requirements.

Mr Lillington's evidence

13. Mr Lillington generally supported the evidence of Mr Smith.

14. The Support Service and Assist Service were previously provided by another company in the same group as Riskstop (Riskstop Limited - "RSL"), and HMRC had confirmed to that company (in 2003 and 2005) that fees from both products were VAT exempt. In 2009 Riskstop took over provision of those products to Insurers (effectively subcontracting them from RSL) and was surprised when HMRC contended that fees from both products were standard rated for VAT purposes, as confirmed in the Disputed Decision.

Appellant's case

15. Mr Lawrence for Riskstop submitted as follows.

16. It was unfortunate and unsatisfactory that HMRC had changed their view on the VAT status of the relevant products. HMRC had previously confirmed (in 2003 and 2005) that both the Support Service and the Assist Service were exempt; the only business change since then had been that rather than the services being supplied to the Insurers by RSL, the work was still done by that company but then supplied to Riskstop who in turn supplied the products to the Insurers; this was effectively merely subcontracting and had no bearing on the VAT status of the relevant products. Riskstop's customers, the Insurers, could not recover VAT charged on the relevant services, and thus the VAT status was an important commercial issue for both Riskstop and its customers. It was accepted that HMRC could change their interpretation of the legislation; also, that the previous ruling had been provided to a legal entity other than Riskstop (ie RSL); further, that the Tribunal had no remit to consider the fairness of what Riskstop considered to be misleading information and behaviour by HMRC.

17. HMRC had issued assessments based on the Disputed Decision but those assessments were not currently before the Tribunal. Rather, the Tribunal was asked to give a ruling in principle on the VAT status of the Support Service and the Assist Service. Riskstop contended that both the Support Service and the Assist Service were exempt supplies for VAT purposes, pursuant to Item 4:

(1) Riskstop was an insurance agent for the purposes of Item 4.

(2) The services were provided in the course of Riskstop acting in an intermediary capacity (as clarified by Note 2).

(3) The Support Service fell within Note 1(b) as work preparatory to the conclusion of contracts of insurance. The Assist Service fell within Note 1(c) as assistance in the performance of contracts of insurance.

(4) None of the exclusions in Notes 7 to 9 applied:

(a) The services did not relate to "market research, product design, advertising, promotional or similar services" (Note 7).

(b) Nor were they "valuation or inspection services." (Note 8).

(c) Nor were they "services by loss adjusters, average adjusters, motor assessors, surveyors or other experts" (Note 9).

18. The Support Service and the Assist Service comprised insurance related services supplied by Riskstop as an insurance agent acting in an intermediary capacity. The services were supplied to the Insurer but required the significant involvement of the potential Insured. The services were closely related preparatory work leading to an insurance contract or a decision not to insure. The services were essential and fundamental to the assessment and mitigation of risks. The Support Service was "preparatory to a contract" because the insurance cover might die without Riskstop's involvement. Riskstop was not merely a subcontractor of the Insurer; Riskstop had a close and strong relationship with the potential Insureds. The Assist Service was beneficial to both the Insurer and the policyholder.

19. Further guidance was provided by art 2.3 Council Directive 2002/92 (insurance mediation):

> "For the purpose of this Directive: …
>
> '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; …"

20. Riskstop's view was supported by HMRC's own statements in Public Notice 701/36 and HMRC's VAT Insurance Manual ("the Manual"). It was accepted that those were only interpretations, and thus not binding on the Tribunal, but they were indicative of the correct approach, which indeed HMRC had previously applied to these very services.

21. The Manual (at VATINS5205) stated:

> "There is no definition of either [an insurance broker] or insurance agent within UK or EC VAT law. Whereas the profession of an insurance broker is well recognised, however, this is not so true of an insurance agent and this can sometimes cause problems.
>
> For the purposes of the VAT exemption HMRC recognise, that an insurance agent might be anyone who provides insurance related services in an intermediary capacity. An agent could be a tied agent who sells insurance as his main business or, for example, a typical high street retailer or a car dealer arranging insurance to cover the goods they sell.
>
> Whereas an insurance broker usually acts for the insured, an agent may act for the insurer, the insured or both. The definition of an insurance agent, therefore, is fairly wide."

22. Also (at VATINS5210):

> "In the light of this judgment [ie *Staatssecretaris van Financiën v Arthur Andersen & Co Accountants cs* (Case C-472/03) [2005] STC 508] we accept that the UK exemption for insurance related services in Group 2 of Schedule 9 is drawn too widely. However, UK law has not yet been amended to take account of the judgment. As part of the wider EU Review of VAT and Financial Services, the European Commission is considering the VAT treatment of insurance related services and it has been decided to defer any changes to UK legislation pending progress in this review. Any necessary amendments to the law will be made in due course and this guidance will be updated accordingly. Until then, businesses are able to rely on UK law as it is currently drafted and on published policy.
>
> This means that until such time as the law is amended, some services which currently fall within the UK exemption at Item 4, for example claims handling or the administration of contracts of insurance provided separately from introductory services, can continue to be treated as exempt even though they fall outside the exemption in the Principal VAT Directive following the Andersen Judgment. However, if a business wishes it may apply 'direct effect' of EU law and treat such services as taxable."

23. Further (at VATINS5220):

> "An insurance intermediary for the purposes of Group 2 is someone who acts in the direct chain between an insurer providing insurance (see VATINS1210) and anyone who wants to buy, or has already bought, insurance or reinsurance."

24. Further (at VATINS5240):

> "The second of the two tests for exemption under Item 4 is that the services being supplied must be insurance related. … [Note 1 to Group 2 is then quoted]
>
> This list includes all the services you would normally expect an insurance broker or agent to provide. The list is comprehensive but it is important that only those services which involve the effecting of insurance contracts, and closely related preparatory and follow up services are included as insurance related services. So, a person provides an insurance related service for the purposes of the VAT

exemption, only if they perform one or more of the services listed above.

Some of the above services now fall outside the exemption for insurance related services following Andersen, but may continue to be treated as exempt under UK law pending implementation of the Judgment. See VATINS5220."

25. Further (at VATINS5305):

"Introductory services bring together people who want to purchase insurance with an insurer or reinsurer. The exemption also covers work preparatory to the conclusion of a contract of insurance or reinsurance.

It is not necessary for a contract of insurance to be concluded for an introductory service to be performed. If the customer decides not to purchase the insurance, or the insurer decides not to underwrite the risk, any work carried out by the intermediary prior to this point is still exempt.

You will see from the extract from the law in VATINS5240 that these services fall within legal note (1) (a)."

26. Similarly, Public Notice 701/36 (Insurance) stated:

"8.2.4 *Services which are 'insurance related'*

Provided you are an insurance broker or agent acting in an intermediary capacity (see section 9), you can exempt the supply of: introductory services, including work preparatory to the conclusion of a contract - see paragraph 8.3 …"

"9.1 *What are insurance brokers and agents?*

… For the purposes of the VAT exemption, however, brokers and agents are defined in terms of what they do rather than what they are and, as well as insurance brokers and agents by profession, it can apply to other intermediaries making supplies of 'related services'."

"9.2 *Acting in an intermediary capacity*

The term 'agent' or 'intermediary' by definition means someone acting on behalf of someone else in effecting something with a third party. 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 (or a potential insured party). This means that, for the purposes of the VAT exemption, insurance brokers, professional insurance agents and other intermediaries must all be acting 'in an intermediary capacity' when supplying a 'related service'.

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 that one intermediary in a chain. It does mean, however, that at one end of the chain there will be a business which has direct contact with the insured party (or potential insured party) and at the other end there will be a business which has direct contact with the insurer. …"

27. The Disputed Decision was erroneous in a number of regards:

(1) The statement in the Disputed Decision that an agent's "supply will be to the person requiring the insurance" was incorrect, as recognised in the Manual at VATINS5205 (quoted above).

(2) Although HMRC had stated in the Disputed Decision that "the services must be closely related to insurance and not just incidental to it", no justification of that had been provided and it was disputed by Riskstop on the facts. Similarly, the statement in the Disputed Decision that "the supply of risk management lies outside of the insurance transaction chain" was simply incorrect; the services were right at the core of the transaction chain, being a crucial element leading to the decision whether to supply insurance.

(3) The statement in the Disputed Decision that the services "have more in common with an actuary than with a broker or agent" was incorrect and unjustified.

28. Note 7 to Group 2 did not prevent the services from being within Item 4. Even if (which was disputed) the services were no more than the "collection of information", the exclusion in Note 7(b) only applied to "the collection … of information for use in connection with market research, product design, advertising, promotional or similar activities", which was not the case here.

29. Note 8 to Group 2 did not prevent the services from being within Item 4. The Support Service was, by its very nature as a Questionnaire Survey (contrast a Site Survey), *not* an inspection. Although in some cases the trigger for the provision of the Assist Service may have been an "inspection" (ie Risk Improvement Requirements identified following a Site Survey), the Assist Service itself did not involve inspection services.

30. HMRC's reliance on *InsuranceWide.com Services Ltd v Revenue and Customs Commissioners* and *Revenue and Customs Commissioners v Trader Media Group Ltd* [2010] STC 1572 was unjustified as that case concerned introductory services under Note 1(a) whereas in the present appeal it is Note 1(b) & (c) that are in point. However, that case did helpfully state that:

(1) The VAT liability is determined by what a business does, rather than what it is or calls itself (at [85]), as recognised by HMRC in para 9.1 of Public Notice 701/36 (quoted above).

(2) The existence of a power to render the Insurer liable was not the determining criterion for recognition of an insurance agent within (what is now) art 135 (at [74]).

(3) "It is an essential characteristic of an insurance broker or an insurance agent, within art [135], 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 or potential clients*" (at [85] (emphasis added)). The final words were important in that they demonstrated that actually putting Insurers in contact with potential Insureds was not essential; instead, more generally acting as an intermediary between Insurers and potential Insureds was sufficient.

(4) "It is not necessary, in order to claim the benefit of the exemption in art [135], 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" (at [85]).

31. As recognised by HMRC in the Manual at VATINS5210 (quoted above), Item 4 was drafted wider than the Directive had been interpreted in *Arthur Andersen* but a taxpayer was entitled to rely on the wording of Item 4. In the VAT Tribunal case of *Morganash Ltd* (2006) V19777 the services comprised "the completion of health questionnaires by persons submitting proposals for life assurance policies" (at [1]). The Tribunal explained (at [2]):

> "Morganash receives instructions from a number of life assurance companies to carry out telephone interviews of persons who have submitted proposals to them for life assurance cover as to their medical history and condition. The interviews, which take between 20 and 40 minutes each, are carried out by qualified nurses. At the end of each interview, Morganash prepares a report containing the information obtained, and submits it to the assurance company. Morganash makes no recommendation as to whether the proposal should be accepted or declined: that is for the life assurance company to decide."

The VAT Tribunal concluded that Morganash was not an insurance agent within what is now art 135(1)(a) (at [6]) but that the UK domestic provisions in Item 4 were wider and Morganash was entitled to rely on those wider provisions. Morganash was an insurance agent within Item 4 because "While Morganash plays no part in actually providing the insured benefits, it does "carry out work preparatory to the conclusion of … contracts of insurance."" (at [12]). The words quoted by the VAT Tribunal were from art 2(1)(b) EC Council Directive 77/92 (insurance intermediaries) and were similar to those in art 2.3 Council Directive 2002/92 (quoted at [19] above). Further, Morganash was an intermediary for the purposes of Note 2 (at [17]). Riskstop was in an analogous position to Morganash and thus there was "sufficient nexus between [the] services and the contract of insurance provided by the insurer" (at [19]), and as the "services form an essential part of the risk assessment process there is the required nexus between its services and the contract of insurance provided by the insurer" (at [20]).

32. In *Westinsure Group Ltd v Revenue and Customs Commissioners* [2013] SFTD 873 (upheld on appeal by the Upper Tribunal at [2015] STC 238) the First-tier Tribunal had (at [84-85]) adopted the following conditions for identifying an insurance broker or insurance agent:

> (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." Here Riskstop had a direct contractual relationship with the Insurer, and also an indirect relationship with the potential Insured through the Risk Improvement Requirements and the Assist Service
>
> (2) "'Related services' as that term is used in art 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". That was exactly the case with Riskstop, whose services were at the core of the transaction chain, being a crucial element leading to the decision whether to supply insurance.

(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". Riskstop satisfied that test.

(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". Riskstop's services formed an integral and fundamental part of the transaction chain resulting in the provision of an insurance contract by the Insurer.

33. The facts in *Assurandør-Societetet, acting on behalf of Taksatorringen v Skatteministeriet* [2006] STC 1842 were very different from the position of Riskstop. In *Taksatorringen* the services were back-end claims handling whereas Riskstop's services were front-end and preparatory to the conclusion of insurance contracts.

34. HMRC's contention that a "mediator" must work both upstream and downstream was irrelevant for the UK legislative provisions in Group 2, but in any event Riskstop did indeed work with both its Insurer customers and the potential Insureds.

35. The insurance mediation Directive (quoted at [19] above) envisaged not just (a) introductions, but also (b) preparatory work, and (c) assistance in administration and performance. It was not necessary for a taxpayer to satisfy all three heads; any one would suffice – see also *Taksatorringen* at [45]. The Support Service was work preparatory to the conclusion of contracts of insurance, and the Assist Service was assistance in the performance of contracts of insurance.

36. HMRC appeared to be trying to deprive Note 1(b) of any meaning or potential application. HMRC were candid that they intended to rewrite the legislation (see the Manual at VATINS5210, quoted above) but pending that exercise taxpayers were entitled to be taxed according to the existing rules in Group 2.

37. On the Questionnaire Surveys Riskstop did not just mechanically hand over raw data to the Insurers; that would have little value to the Insurers. Instead Riskstop applied its expertise in formulating the nature and scope of the questions in the Questionnaire Survey and in analysing the responses, leading to generation of the Risk Improvement Requirements.

38. As the Tribunal had noted in its questions to Mr Connell, the inclusion of certain loss adjuster services in Item 4 envisaged that Item 4 must include some services unrelated to the introduction of business. If loss adjusters could (in defined circumstances) be insurance agents within Item 4 then Riskstop certainly could be included.

39. If the services in dispute had been provided by an Insurer from its in-house resources then they would clearly be exempt; the same treatment should apply where the services were "outsourced" and purchased from an external provider such as Riskstop.

40. The fact that HMRC had given a ruling one way to RSL but a different ruling the other way to Riskstop, thereby giving different treatments to two taxpayers in identical situations, was a breach of the EU law principle of neutrality. HMRC was not following its own policy as stated in the Manual and Public Notice 701/36, and its current stance was not even in the public domain.

Respondents' case

41. Mr Connell for HMRC submitted as follows.

42. HMRC accepted that the change in the manner of providing the services to the Insurers (previously by RSL directly but later from RSL to Riskstop and then on to the Insurers) did not affect the VAT status of those supplies. The change in the arrangements had prompted HMRC to re-examine the nature of the services and there had been fresh eyes, new views and deeper research. There had not been any change of policy. It was accepted that the conclusion in the Disputed Decision in 2013 was different from that communicated to RSL some years earlier. However, it was proper for HMRC to keep under consideration the correct VAT treatment of businesses, particularly in a complicated area such as insurance. While the Disputed Decision may be disappointing to Riskstop, the only question before the Tribunal was whether the Support Service and the Assist Service were exempt supplies for VAT purposes.

43. For exemption it is necessary that Riskstop is characterisable as an "insurance agent" within art 135(1)(a) and Item 4. That term was not defined in either art 135 or Item 4 but some guidance was obtained from the now repealed Council Directive 77/92 EC (insurance brokers and agents) (at Recital 8):

> "Whereas, where the activity of 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 or undertakings concerned, to enter in the name of such undertaking or undertakings into commitments binding upon it or them, the person concerned must be able to take up the activity of broker in the host Member State"

44. Council Directive 77/92 EC was replaced by Council Directive 2002/92 (insurance mediation) (quoted at [19] above).

45. HMRC's views were set out in Notice 701/36. The Disputed Decision was in accordance with those published views. As well as the passages quoted by Mr Lawrence (at [26] above), the Notice stated:

> "**8.2 Definition of insurance related services**
>
> …
>
> 8.2.2 *Services which are not 'insurance related'*
>
> To be 'insurance related', services must be closely related to insurance and not just incidental to it. This means that services such as secretarial services and general computer services supplied in connection with insurance are not covered by the exemption.
>
> UK law specifically exclude the following services from the VAT exemption:
>
> - market research, product design, advertising, promotional or similar services and the collection, collation and provision of information for use with those services
> - valuation or inspection services
> - supplies by loss adjustors, average adjustors, motor assessors, surveyors and other experts except under specific circumstances (see paragraph 9.3 for more information on this)

Whilst there are obviously many other services that are not 'insurance related', the law seeks to clarify the tax treatment of these particular services where borderline difficulties are most likely to occur.

Where taxable services are provided as a minor and ancillary part of a single composite supply of exempt insurance related services, the entire supply will be exempt. More information on this can be found in section 11.

…

8.2.4 *Services which are 'insurance related'*

Provided you are an insurance broker or agent acting in an intermediary capacity (see section 9), you can exempt the supply of:

- introductory services, including work preparatory to the conclusion of a contract - see paragraph 8.3
- the provision of assistance in the administration and performance of contracts - see paragraph 8.4
- the handling of claims - see paragraph 8.5
- the collection of premiums - see paragraph 8.6

…

9.1.2 *Other insurance intermediaries*

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.

Such businesses will probably not be supplying only insurance related services and it is likely that the supply of insurance services will not be their main business activity. Insurance related services are often supplied by businesses such as estate agents and solicitors in connection with their principal business activities. Many retailers arrange insurance in connection with the goods they are selling (for example, extended warranties on electrical items or breakdown cover on cars).

Regardless of who is supplying them, however, insurance related services will only be exempt when the supplier is acting 'in an intermediary capacity' (see paragraph 9.2 below for information on what is meant by this)."

46. The categories of supply treated as exempt should be interpreted in a restrictive manner, as they were in effect distortionary in economic terms. The current case was an example of "exemption creep" and of "pushing the envelope" of the insurance exemption.

47. Riskstop supplied a subcontracted service to the Insurers that, while doubtless commercially valuable, was standard-rated for VAT purposes. HMRC accepted that some subcontracted services could fall within the Item 4 exemption, if they were

insurance related (see for example *Century Life plc v CEC* [2001] STC 38), but that did not include the Support Service or the Assist Service.

48. In *Century Life* an insurer (Lincoln) subcontracted to Century Life the review of policies to determine whether they had been missold, such a review being a regulatory requirement. In that case it had been accepted by the parties (see [13]) that Century Life was an "insurance agent" for the purposes of Item 4. Century could settle or compromise claims on behalf of Lincoln. The Court of Appeal first considered the words "related services" in art 135 (formerly art 13B EC Council Directive 77/388):

> "15. … 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."
>
> 16. That cannot be said of the services in the present case. Two points were taken to suggest otherwise. Firstly, it was suggested that the nature of the services was essentially that of compliance rather than commercial. Secondly, it was suggested that the service could not be in relation to the pension transactions because they were past transactions. Like Moses J I think there is no substance in either point. Seeing that a policy complies with regulations is intimately related to it—the very nature of the individual policy is under scrutiny. And the fact that the policy was already sold does not mean that there are not continuing obligations. There clearly are, an important one of which is compliance.
>
> 17. Accordingly, I think the services provided by Century Life were within the exemption provided by art 13B(a) of the Sixth Directive."

49. The Court of Appeal then went on to consider Item 4:

> "17. … For the reasons I have already given, it is strictly unnecessary to consider the case from the point of view of the domestic legislation. But, since the matter was argued both here and below I do so briefly.
>
> 18. The commissioners' main point was that Century Life did not provide the services in 'the course of acting in an intermediary capacity'. It was said that the activity was merely ancillary to the provision of insurance, rather like functions performed by solicitors or auditors. But I think their activity was more than that. It fell within note 1(c)—'the provision of assistance in the administration and performance of such contracts ...'. It was indeed a vital part of the administration of the contracts. And the actual work done by Century Life involved acting as an intermediary between the insured and Lincoln so is within note 2(b).
>
> 19. As to whether the work was 'related to' the pensions contracts, the legislation gives no express definition as to the meaning of 'related.' Each side sought to draw comfort from the notes, seeking to deduce the scope of the term from what was excluded from or included within the exemption provided by item 4. ...
>
> 20. I do not find these arguments helpful. They stem partly from the fact that the legislation has introduced the term 'acting in an intermediary capacity' which is not found in the Sixth Directive. Since

> that phrase may cover activities beyond that of a broker or agent, the explanatory notes are an attempt to clarify the concept. Moreover, the notes are, in part, a commentary and may be merely explanatory rather than truly inclusive or exclusive of any particular service.
>
> 21. Thus, in the result, I am of the view that the more complicated domestic legislation leads to the same conclusion."

50. In *Staatssecretaris van Financiën v Arthur Andersen & Co Accountants cs* (Case C-472/03) [2005] STC 508 the facts were that an Arthur Andersen entity, ACMC, contracted with a Dutch life assurance company, UL, to perform various "back office" activities for UL. These included the acceptance of applications for insurance, the issue and administration of, and amendments to, policies, the management of claims, the fixing and payment of commission to insurance agents, and the provision of information and reports to UL, insurance agents, insured parties and others. Save where a medical examination was necessary (in which case UL itself decided whether to accept the risk), ACMC could take the decision to accept an application and thereby bind UL; and it was responsible for almost all of the daily contacts with intermediaries(see[10]). The Court rejected ACMC's claim that it was acting as insurance agent. Although ACMC's staff were skilled in life assurance and its activities were related to insurance transactions, these two factors were insufficient by themselves to make ACMC an insurance agent. It was necessary to assess whether the activities in question corresponded with those of such an agent (see [26-27]). The existence of a power to render the insurer liable was not the determining criterion for recognition as an insurance agent ([32]); that presupposed an examination of what the activities in question comprise, and having examined those activities, the CJEU concluded that they did not constitute services that typify an insurance agent (at [34]). The Court stated (at [36]):

> "36. Furthermore, as the Commission of the European Communities stated in its written observations and as the Advocate General pointed out in para 32 of his opinion, essential aspects of the work of an insurance agent, such as the finding of prospects and their introduction to the insurer, are clearly lacking in the present case. It is apparent from the order for reference—and the defendant has not disputed—that the activity of ACMC starts only when it handles the applications for insurance sent to it by the insurance agents through whom UL seeks prospects in the Netherlands life assurance market.
>
> 37. As the Commission submitted in its written observations and at the hearing, the agreement between ACMC and UL must be regarded as a contract for sub-contracted services under which ACMC provides UL with the human and administrative resources which it lacks, and supplies it with a series of services to assist it in the tasks inherent in its insurance activities. …
>
> 38. Consequently, the services rendered by ACMC to UL must be regarded as a form of co-operation consisting in assisting UL, for payment, in the performance of activities which would normally be carried out by it, but without having a contractual relationship with the insured parties. Such activities constitute a division of UL's activities and not the performance of services carried out by an insurance agent (see, by analogy, *CSC Financial Services Ltd v Customs and Excise Comrs* (Case C-235/00) [2002] STC 57, [2002] 1 WLR 2200, para 40).
>
> 39. In the light of the foregoing, the answer to the question referred to the Court of Justice must be that art 13B(a) of the Sixth Directive must

> be interpreted as meaning that 'back office' activities, consisting in rendering services, for payment, to an insurance company do not constitute the performance of services relating to insurance transactions carried out by an insurance broker or an insurance agent within the meaning of that provision."

51. Similarly, Riskstop was providing subcontracted risk assessment services to the Insurers. That was insufficient to qualify Riskstop as an "insurance agent" for these purposes. In the commercial chain between Insurers and potential Insureds Riskstop (an outsourced service provider) was not independent of the two principals involved. Riskstop's activities could not be distinguished from those of their Insurer principals, and were effectively functionally part of the Insurer's own insurance economic activity. As regards the supply of its outsourced services Riskstop was part of a commercial chain between itself and the Insurer as principal. Riskstop could not at the same time in respect of the same transaction be part of the chain which was mediating between the Insurer and the potential Insured.

52. In *Taksatorringen* (cited above) the situation was:

> "7. … Taksatorringen is an association whose members are small or medium-sized insurance companies authorised to underwrite motor-vehicle insurance policies in Denmark. ...
>
> 8. The purpose of Taksatorringen is to assess damage to motor vehicles in Denmark on behalf of its members. The latter are required to use the services provided by Taksatorringen in respect of damage to motor vehicles incurred within Denmark.
>
> 9. The expenses involved in Taksatorringen's activity are apportioned among the members ...
>
> 11. In the case where a policy holder's vehicle has been damaged and is to be repaired at the expense of a company affiliated to Taksatorringen, the policy holder draws up a declaration of damage, which he hands over, together with the damaged vehicle, to the car-repair workshop of his choice. The workshop examines the damaged vehicle and, on conclusion of its examination, requests that the vehicle be inspected by an assessor ('the expert') from one of Taksatorringen's local assessment centres.
>
> 12. The expert estimates the damage to the vehicle after consultation with the workshop. He compiles a detailed report containing a description of the work to be carried out and information on the total expenses involved in repairing the damage. The repair work must be carried out under the conditions laid down in the expert's report. Should the workshop become aware, while carrying out the repair work, of discrepancies between the information contained in the expert's report and the actual damage, it must contact the expert in order to establish exact agreement on any amendments to be made to the assessment.
>
> 13. If the costs involved in repairing the damage to the vehicle are below D Kr 20,000 (approximately €2,700), the insurance company pays the amount calculated in the expert report directly to the workshop immediately after the date of completion of the work. The expert report functions as an invoice for the work in question. Should the repair costs exceed D Kr 20,000, the workshop draws up an invoice, which must be approved by the expert before the insurance company makes payment to the workshop.

14. In the case of a 'total write-off', that is to say, damage involving repair costs in excess of 75% of the commercial value of the vehicle, the expert agrees with the policy holder on an amount in compensation corresponding to the value of a new purchase. The expert then draws up a compensation report, on the basis of which the insurance company pays compensation to the policy holder. Once the expert has invited tenders for the vehicle wreck, arranged for its disposal and forwarded the proceeds of the sale to the insurance company, the matter is then concluded so far as Taksatorringen is concerned.

15. The experts employed by Taksatorringen use a computerised system, known as 'Autotaks', for the purpose of damage assessment. This system has been used in Denmark since 1990 by all insurance companies that underwrite car insurance policies. Although Danish motor vehicle workshops have no right of consultation in respect of the Autotaks system, all of them have, through agreements concluded with the insurance companies, accepted the use of that system.

16. The Autotaks system is based on an international computerised system owned by a Swiss company which issues licences to users. In the case of Denmark, the rights of user in respect of the system belong to Forsikring & Pension ...

17. … there is nothing to prevent an insurance company which is a member of Forsikring & Pension from engaging an independent subcontractor to carry out assessments and from authorising that subcontractor to use the Autotaks system for that purpose, in return, where appropriate, for payment of a fee to Forsikring & Pension."

53. The CJEU stated:

"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 set 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."

54. The paragraph of the Advocate General's opinion to which the Court referred states:

> "86. … Even if art 13B(a) of the Sixth Directive is not particularly well drafted, in that it distinguishes between insurance brokers and insurance agents, whereas a broker is truly an insurance agent in that his task is to act on behalf of a person seeking insurance in finding an insurance company that will offer cover exactly suited to his needs, it remains clear that this provision applies only to services provided by those professionals who have a relationship with both the insurance company and persons seeking insurance.
>
> 87. Taksatorringen itself does not contend that it has any kind of relationship with insured persons, in other words it does not claim to act as an intermediary."

55. Taksatorringen had some incidental contact with the Insured during the damage assessment procedure but it was not acting as an intermediary. Riskstop had no role in introducing business to the Insurers; that role was performed by the brokers. Riskstop did not participate in the chain; the chain was already established by the time Riskstop's services were relevant. It was accepted that a sequence of chains was acceptable (see *JCM Beheer BV v Staatssecretaris van Financiën* (Case C-124/07) [2008] STC 3360) but the trader claiming exemption must be an intermediary and thus must work in both directions, both upstream and downstream; one could not have a unilateral intermediary. Riskstop's services were clearly relevant to the chain but they were not part of the chain; the services might "dangle off" the chain but were not part of it. Indeed, it appeared to be important to Riskstop's risk advisory role that it should *not* be part of the chain, otherwise Riskstop might be perceived as competing with its customers or the brokers. Riskstop did not determine the premium to be charged or any other terms of cover, or decide whether to take on a given risk.

56. In *InsuranceWide* Etherton LJ stated (at [85]):

> "In the light of that case law and the domestic and EU legislation, the following principles apply, in my judgment, to the interpretation and application of art 13B(a) and the insurance intermediary exemption in Sch 9, Group 2, item 4 to VATA 1994:
>
> (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 … 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 Community law which

have to be placed in the general context 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 an 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 or potential clients.

(8) It is not necessary, in order to claim the benefit of the exemption in 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."

57. In finding in favour of the taxpayers Etherton LJ stated (at [86]):

"Although HMRC's case is that the relevant functions performed by InsuranceWide and Trader Media were nothing more than the provision of a 'click through' facility to a broker, agent or insurer, it is plain that both taxpayers were doing much more than that. 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. … 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 consumers and with a view to providing

> customers with insurers who would quote competitive prices. Neither of them were … 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 taxpayers in *Skandia*, *Taksatorringen* and *Arthur* [*Andersen*], who were sub-contractors."

58. By contrast, Riskstop was not in "the business of bringing together insurers and those seeking insurance" but instead (like the other appellants listed by Etherton LJ) was a "subcontractor". Riskstop's services were not provided in an intermediary capacity. It was not mediating between Insurer and (potential) Insured.

59. In *Westinsure* the services supplied were described by the First-tier Tribunal as follows:

> "[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. … 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."

60. The Tribunal had concluded (at [98]) (upheld on appeal by the Upper Tribunal) 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 art 135(1)(a) … and accordingly the exemption

in Sch 9 Group 2 of the Value Added Tax 1994 is not available to Westinsure in respect of those services." The Tribunal stated:

> "[94] In the current case Westinsure undoubtedly does provide the services [of] 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.
>
> …
>
> [96] … it remains the case that Westinsure is not part of the chain that leads to particular transactions being effected. …"

61. Riskstop's contractual link was with the Insurer. Riskstop did not have a contractual link was with the Insured. Riskstop's contact with the Insured did not constitute negotiation or mediation; there was no bargain being struck. Riskstop designed the questionnaires in accordance with the Insurer's wishes, and analysed the Insured's responses for the Insurer. There was no evidence that Riskstop's fee depended on the policy being written.

62. The concepts of "services related to insurance" and "preparatory to insurance contracts" were only relevant if Riskstop was an insurance agent. HMRC accepted, for the purposes of the current appeal, that the assessment of risk was sufficiently close to specific policy proposals so as to make it a service "related to" insurance. However, it was clearly a precursor to the insurance contract and did not form part of the insurance service itself. Moreover, although the services are related to insurance and preparatory to the contracts, they are not supplied in an intermediary capacity.

63. There were also the important exclusions set out in Notes 7 to 9 in Group 2.

(1) HMRC accepted that Note 7 was not applicable to the disputed services.

(2) Note 8 excluded "inspection services". That was not limited to physical examination; the term was broad enough to include the process of forming an opinion on the risks disclosed by the Insured's answers to the Questionnaire Survey.

(3) Note 9 excluded "surveyors or other experts". That was congruent with Riskstop's own description of its service – it was an expert in risk assessment and it called its expert personnel "risk surveyors".

64. Riskstop's reliance on *Morganash* was understandable, given the accepted close similarity in the facts to Riskstop's own position. However, *Morganash* (which as a VAT Tribunal case was not binding authority) was not compatible with the test as explained (four years later) by Etherton LJ in *InsuranceWide*. The same was true of the preceding VAT Tribunal case which was heavily relied on in *Morganash*: *C&V Advice Line Services Limited v CEC* (2001) V17310. The Tribunal should follow the extensive guidance given by both the CJEU and the Court of Appeal and other domestic courts since 2006 (when *Morganash* was decided) in preference to the reasoning in *Morganash.*

65. The European law principle of neutrality had no application here. In any event, HMRC had already notified RSL that the VAT status of RSL's supplies would be

reviewed in the light of the outcome of Riskstop's appeal. Similarly, there was no basis for the argument that the disputed services should be exempt merely because their provision inhouse by the Insurers would render them exempt. This was clear from (for example) the comments of the Advocate General in *Sparekassernes Datacenter (SDC) v Skatteministeriet* [1997] STC 932:

> "52. The banks and savings banks have two choices for effecting electronic data-handling and transmission for the purpose of the actual execution of transactions of transfer, payment, management of current accounts and the like: either they use their own staff and equipment, as is done for other bank transactions, or they make a contract with a third party for the actual performance of some of those tasks.
>
> 53. In the second case, with which these proceedings are concerned, the legal relationship between the customer and the savings bank continues unaltered, just as if the bank had actually performed those tasks with its own resources. All that changes is the internal method of working of the financial institution itself, but that has no significance for the customer whose contract is exclusively with the bank or savings bank, which is solely liable to him.
>
> 54. Choosing one option or the other is a business policy decision which has the same fiscal consequences in this sector as in any other. If an undertaking engages the services of another undertaking to perform certain tasks instead of performing them itself with its own staff and equipment, it will have to pay the VAT relating to the performance of those services.
>
> 55. Consequently, it is impossible to accept SDC's argument as to the alleged tax discrimination between banking undertakings which have their own data-handling resources and the others which are obliged to engage the services of a third person for such purposes. As I shall explain later, that is the logical consequence resulting from the tax structure specific to VAT.
>
> 56. The principle of fiscal neutrality, which is at the basis of VAT, is not affected by the exercise of that option. In fact, the chargeable event for VAT, as affecting 'supply of services', is that there should be two independent taxable persons, in a legal relationship, one of whom performs an action on behalf of another."

Consideration and Conclusions

66. We accept Mr Smith's summary of Riskstop's business and make findings of fact as set out at [8-11] above.

67. We agree with Riskstop (and we understand HMRC do not contest this) that to the extent that Item 4 provides a wider scope for exemption than that afforded by art 135 then Riskstop is entitled to rely on the provisions of Item 4.

68. We set out below our understanding of the necessary (cumulative) conditions for Riskstop's services to be exempt under Item 4:

(1) Riskstop must be an "insurance agent" for the purposes of Item 4. (Riskstop accepts that it is not an "insurance broker" for those purposes).

(2) Riskstop's services must be those of an "insurance intermediary" (as clarified by Note 1).

(3) The services must be related to an insurance transaction (including an abortive transaction).

(4) The services must be provided in the course of Riskstop acting in an intermediary capacity (as clarified by Note 2).

(5) None of the exclusions in Notes 7 to 9 must apply. HMRC accept that Note 7 is irrelevant, leaving just Notes 8 & 9.

69. On the first part of that test, Riskstop accepts that it is not an "insurance broker", as that term has been interpreted by the courts (both the CJEU and domestically) but contends that it is an "insurance agent" within Item 4.

70. We have considered in detail the numerous CJEU and domestic cases cited to us, from which it is clear that the issue of what constitutes an insurance broker or insurance agent for the purposes of art 135 and Item 4 is a troubled one. On several occasions the courts and tribunals have attempted to formulate a series of principles from the earlier case law – eg Etherton LJ in *InsuranceWide*, Mann J in *Royal Bank of Scotland v RCC* [2012] STC 797 ("*RBS*") (at [45]), and the First-tier Tribunal in *Westinsure*. The latest formulation is contained in the recent decision of the Upper Tribunal in *Westinsure* (upholding the decision of the First-tier Tribunal): [2014] UKUT 452 (TCC) [2015] STC 238. We understand that permission has been granted for that case to proceed to the Court of Appeal but it is, of course, binding on this Tribunal as it stands, and in any event we have no hesitation in following that case as we respectfully agree entirely with the conclusions and reasoning of Nugee J in that decision. Although that case (on its facts) focuses on the matter of insurance brokers, we consider it provides the answer on the questions of law that are before us in this appeal. We have cited some passages below but to avoid too much lengthy quotation we have cross-referenced our comments to paragraphs in Nugee J's decision as "W[number]".

71. Our first observation relates to a point made near the end of Nugee J's decision (W[77]): "Thus although Mr Southern [taxpayer's counsel] graphically said of Westinsure that its whole business 'oozes insurance', this is not by itself enough." Similarly, in Riskstop's appeal we have no doubt that the Support Service is a valuable product for Insurers in evaluating whether to take on a risk, and on what terms, and that the Assist Service is a valuable product for not only the Insurers (who pay for it) but also the Insureds who obtain assistance in satisfying the Risk Improvement Requirements attaching to their policies. Both Mr Smith and Mr Lillington clearly have many years expert experience in the general insurance market, both in the UK and abroad, and they identify Riskstop as being a part of and a participant in that market. However, that is not by itself enough.

72. Our second observation is that although Riskstop identifies itself with the concept of an "insurance intermediary", that does not displace the requirement to be an insurance agent (or a broker, which Riskstop accepts is not applicable here). That is clearly expressed in W[47] to W[51]:

> "[47] Mr Southern's submissions ran together the concepts of insurance broker, insurance agent and insurance intermediary, suggesting that the ECJ had 'deformalised' the concepts in the legislation. He suggested that Westinsure came within the general phrase 'insurance brokers and insurance agents' and did not specify whether he was contending that Westinsure was a broker or an agent: rather he suggested that they were a sort of 'broker-agent' and an intermediary. He pointed to the fact

that the French and Italian versions of the VAT Directive used words such as 'intermédiaires' and 'intermediari'; and that VATA referred in Item 4 to the services of an intermediary.

[48] I think one should be careful about treating the phrase 'insurance brokers and insurance agents' in art 135(1)(a) as if it were a composite expression equivalent to 'insurance intermediaries.' Insurance brokers and agents clearly are intermediaries and engaged in acts of mediation, but this does not mean that one can simply equate 'insurance brokers and insurance agents' with 'insurance intermediaries.' I do not read any of the ECJ cases as supporting such an approach. I fully accept that the ECJ has said that what is important is whether the activities that a person carries out are typical or characteristic of a broker or agent (or, as it is put by Etherton LJ at [85](4) of *InsuranceWide*, whether a person is a broker or agent depends on what they do, not on how they describe themselves), and to this extent the ECJ has 'deformalised' the concepts. But I do not read the cases as treating brokers and agents as a single class, or as treating this class as interchangeable with insurance intermediaries. On the contrary it seems to me the European jurisprudence proceeds on the basis that the roles of insurance agent and insurance broker are conceptually distinct.

…

[51] … (1) I accept that the ECJ has made it clear that in order to be a broker or agent the person concerned must be acting as an intermediary: see *Taksatorringen* ([2006] STC 1842, [2003] ECR I-13711 (para 44 of the judgment)) and the Advocate General (para 87 of the opinion). But it does not follow that every intermediary is a broker or agent, and Advocate General Fennelly in *CPP* was clearly of the view that the fact that exemption was limited to brokers and agents meant that not all intermediaries came within the exemption. I cannot see any subsequent decision which takes a different view.

(2) I do not think the wording of the exemption in VATA takes the matter any further. Item 4 refers to the 'provision by an insurance broker or insurance agent of any of the services of an insurance intermediary.' On a natural reading of these words they require both that the person concerned is an insurance broker or agent and that the services they provide are those of an intermediary, the latter concept being expanded by Notes 1 and 2. No doubt the reference here to broker and agent are to be understood as referring to the European law concepts of broker and agent; but this does not provide any textual support for regarding anyone providing the services of an insurance intermediary as thereby qualifying as a broker or agent."

73. On the central question of what constitutes an "insurance agent" for the purposes of art 135 and Item 4, Nugee J set out the relevant legislation (W[5] to W[11]) and the CJEU authorities (W[13] to W[30]), and then summarised the principles to be derived from the European authorities (W[31]):

"Before coming to the domestic cases, I will try and summarise what seem to me the principles to be derived from these decisions:

(1) In order to come within the second limb of the insurance exemption the services have to be provided by an insurance agent or insurance broker.

(2) To determine whether the taxpayer is an insurance agent or insurance broker, it is necessary to examine its activities: *Arthur*

Andersen ([2005] STC 508, [2005] ECR I-1719 (para 32)), *Beheer* ([2008] STC 3360, [2008] ECR 2101 (para 17)) (paras [24], [30] above). Such examination may show that the services provided by the taxpayer do not constitute 'services that typify an insurance agent' (as in *Arthur Andersen*); or conversely may show that the services are 'the characteristic activities of an insurance broker or agent' (as in *Beheer*). In other words if you want to know whether a person providing services is an insurance agent or broker, you have to look and see whether what they are doing is what an insurance broker or agent typically or characteristically does.

(3) The ECJ has given various guidance as to what an insurance broker or agent does. The description of the activities in the Insurance Directive is of some assistance but should not be automatically assumed to be directly applicable to the VAT Directive. An insurance broker or agent is a professional who has 'a relationship with both the insurer and the insured, the broker [being] no more than an intermediary' (*Taksatorringen* ([2006] STC 1842, [2003] ECR I-13711 (para 44))—para [20] above); essential aspects of the work of an insurance agent include 'the finding of prospects and their introduction to the insurer' (*Arthur Andersen* (para 36)—para [24] above); an intermediary 'engages actively in finding and introducing customers and insurers' (Advocate General M Poiares Maduro in *Arthur Andersen* (para 32 of the opinion), endorsed by the ECJ, para 36 of the judgment—para [26] above).

(4) More guidance is given by the Advocates General even if not expressly endorsed by the ECJ. Thus Advocate General Fennelly in *CPP* said that insurance brokers and agents describe persons whose professional activity 'comprised the bringing together of insurance undertakings and persons seeking insurance' ([1999] STC 270, [1999] ECR I-973 (para 31 of the opinion)), a phrase picked up in the submissions of the Danish and UK governments and accepted by Advocate General J Mischco in *Taksatorringen* ([2006] STC 1842, [2003] ECR I-13711 (paras 79–86 of the opinion)) (paras [17], [21] above). Advocate General Saggio in *Skandia* said that the business engaged in by brokers and agents 'entails putting insurance companies in touch with potential clients for the purpose of concluding insurance contracts, or bringing insurance products to the attention of the general public or even the collection of premiums' (para [19] above). Advocate General M Poiares Maduro in *Arthur Andersen* referred to the relationship between an insurance agent and a policyholder necessarily implying 'the existence of an agent's own declarations, adopted as such and addressed to the policyholder before whom he presents himself as an insurance agent acting on behalf of and possibly in the name of the insurer.' (Advocate General's emphasis—para [25] above.)

(5) The role is further elucidated by the analogy of 'negotiation'. Negotiation is a 'distinct act of mediation' by an intermediary 'who does not occupy the position of any party to a contract'; it may consist in 'pointing out suitable opportunities for the conclusion of such a contract, making contact with another party or negotiating, in the name of and on behalf of a client, the detail of payments to be made', the purpose 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 …' (*CSC* ([2002] STC 57, [2001] ECR I-10237 (para 39 of the judgment))—para [28] above).

> (6) It is not however negotiation where a contracting party subcontracts part of its business to a sub-contractor who thus 'occupies the same position as the party … and is not therefore an intermediary who does not occupy the position of one of the parties to the contract' (*CSC* ([2002] STC 57, [2001] ECR I-10237 (para 40 of the judgment))—para [28] above).
>
> (7) This explains why it was rightly accepted that Skandia was not an insurance broker or agent, and why it was held that Arthur Andersen was not an agent. In each case Skandia and Arthur Andersen were effectively occupying the position of the insurer (Livbolaget and UL respectively), and carrying out the insurer's activities for it, not performing distinct acts of mediation between the insurer and insured. It also explains why Taksatorringen was not an insurance agent: it too was acting solely for the insurer and had no kind of relationship with the insured persons.
>
> (8) On the other hand Beheer, who was also a sub-contractor, did qualify as an insurance agent. It was not occupying the position of one of the parties to the contract but was a sub-contractor for VDL which was itself an agent. And although in *Skandia* Advocate General Saggio had referred to the need for a 'direct relationship' with the insured, *Beheer* establishes that an indirect relationship with one of the parties is sufficient."

74. Pausing there, we have concluded that Riskstop is not an insurance agent within art 135 for the following reasons. Looking at what Riskstop does (so far as relevant to the matters under appeal) we make the following findings: Riskstop composes the risk evaluation questionnaire (using Riskstop's expert knowledge and experience of general insurance risks, and in conjunction with the risk philosophy and appetite of the particular Insurer); it evaluates the questionnaire response and generates the Risk Improvement Requirements for the Insurer to stipulate to the Insured as a condition for acceptance or continuation of cover; and it liaises with the Insured to monitor compliance with the Risk Improvement Requirements, providing help and assistance where requested. There is no element of finding prospects or introducing them to the Insurer, nor of putting the Insurers in touch with potential Insureds for the purpose of concluding insurance contracts, or bringing insurance products to the attention of the potential Insureds. Instead, the policy opportunities come to the Insurer either from the Insureds themselves (perhaps through the advertising or reputation of the Insurer) or via a broker; Riskstop plays no part in that process. That means, we conclude, that Riskstop does not satisfy the test to be an "insurance agent" within art 135.

75. Returning to *Westinsure*, Nugee J then goes on (W[32-40]) to examine the domestic caselaw and Item 4, including (W[35]) Etherton LJ's list of principles from *InsuranceWide* – as quoted at [56] above. Nugee J also cited two other passages from InsuranceWide; first, Etherton LJ's comment (at [80]):

> "… *Beheer* marks an important shift in the jurisprudence of the ECJ. The earlier cases indicate that a vital characteristic of an insurance broker or an insurance agent within art 13B(a) is a direct relationship with both the insurer and the insured or at any event with the insured. … *Beheer* shows that, while there is a need to exercise the characteristic functions of an agent or broker, what is not required is a direct legal relationship with both or either of the ultimate parties, namely the insurers and those seeking insurance. It is sufficient that the

> insurance agent or insurance broker is carrying out a vital intermediary role in a chain of intermediaries."

Secondly, Longmore LJ (at [99]):

> "In these circumstances it is necessary to ascertain an autonomous European law meaning for the terms insurance broker and insurance agent. I agree with my Lord's analysis of the authorities and his conclusion (at [86]) that the activities of an insurance broker or agent can fairly be described as the business of bringing together insurers and those seeking insurance. …"

76. Nugee J then (W[38-40]) contrasted *InsuranceWide* with *RBS*. That analysis mainly concerns the meaning of "broker", which is not relevant to the appeal before us (which concerns the meaning of "insurance agent") but Nugee J did highlight (W[40]) a comment by Mann J in *RBS*:

> "At [49] he said that the customer doubtless thinks it is approaching the insurance company for insurance, not a broker for broking purposes; and that in truth the customer is not receiving broking services …"

77. As we have already stated ([67] above) where item 4 is wider than art 135 then Riskstop is entitled to rely on the broader provision in Item 4. However, we conclude that on the question of whether Riskstop is an insurance agent there is no assistance for Riskstop in Item 4. The test is effectively the same as for art 135. That follows from Etherton LJ's analysis in *InsuranceWide* (see [85(9)] – quoted at [56] above).

78. One of the points that we put to Mr Connell concerned Note 9 to Group 2. That excludes from the Item 4 exemption, *inter alia*, "services by loss adjusters … except where, (*a*) the services consist in the handling of a claim under a contract of insurance …; (*b*) the person handling the claim is authorised when doing so to act on behalf of the insurer …; and (*c*) that person's authority so to act includes written authority to determine whether to accept or reject the claim and, where accepting it in whole or in part, to settle the amount to be paid on the claim." So the services of a loss adjuster who does meet those three conditions are, apparently, intended to be exempt under Item 4. But a loss adjuster typically performs none of the introduction services that the CJEU have stated are the defining feature of being an insurance broker or agent for exemption purposes. On the contrary, a loss adjuster's services are required only in relation to a claim on an existing policy – the contract of insurance and (*a fortiori*) the putting-in-touch of the parties thereto is history by that time. So it was, on that basis, difficult to see how a loss adjuster could ever get as far as Note 9 – it would, like (as we have found) Riskstop, not even be within Item 4 because it could not be a broker or agent. Mr Connell very properly reminded us that HMRC accept (and so state in the Manual) that the provisions of Item 4 seem to range wider than the scope delineated by the CJEU in its caselaw on art 135 (and its predecessor art 13B). We do consider it unsatisfactory that, a decade after the *Andersen* decision, the UK domestic legislation still appears to be so far adrift from the CJEU's interpretation of art 135. However, for current purposes none of that assists Riskstop. Although Item 4 may range wider than art 135, we have found that Riskstop is not an insurance agent for Item 4 purposes and that is sufficient to determine the appeal against Riskstop.

79. Our conclusion (for the reasons stated at [74] above) that Riskstop is not an insurance agent within Item 4 means that we will dismiss the appeal. We have considered carefully whether we should go on to consider the other conditions that –

if we are wrong in that conclusion – would still need to be satisfied in order for the Support Service and the Assist Service to be exempt under Item 4: ie those in (2) to (5) of [68] above. However, we have decided that we will not go further on those points beyond our findings of fact made at [66 & 74] above. Any other comments would be *obiter* and relate to points of law that would, if the appeal progresses to a higher level, be amenable to re-examination by a higher court or tribunal. We consider our findings of fact above are sufficient to inform the analysis of any such points of law that may arise.

Decision

80. The appeal is DISMISSED.

81. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 1 OCTOBER 2015