[2017] UKFTT 145 (TC)

TC05639

Appeal number:MAN/2009/0331

VAT – intermediary services – agents used by university to recruit non-EU students – whether obligation on university to account for output tax by way of reverse charge – single supply to university or separate supplies to university and students – place of supply in periods up to 1 January 2010 – whether supply in UK or where agent established – Articles 43 and 44 Principal VAT Directive considered – input tax credit – whether residual input tax for purposes of partial exemption special method – appeal allowed in principle and in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

UNIVERSITY OF NEWCASTLE UPON TYNE **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 5-7 September 2016

Mrs Amanda Brown of KPMG LLP for the Appellant

Mr Vinesh Mandalia of counsel instructed by HM Revenue & Customs Solicitor's Office and Legal Services for the Respondents

DECISION

Background

1. This appeal is a lead case for a large number of similar appeals by many universities. It concerns the liability of the Appellant ("the University") to VAT in respect of services supplied by overseas agents in connection with the recruitment of students from outside the EU. References to students in this decision are to students from outside the EU save where the context indicates otherwise. Commission is paid to agents by the University and not by the students. The Respondents contend that the University's VAT liability arises pursuant to what is known as a "reverse charge" under section 8 Value Added Tax Act 1994 ("VATA 1994"). Section 8 provides that in certain circumstances where services are supplied by a person who belongs in a country other than the UK then instead of there being a supply of the services by that person, the supply is treated as if it were a taxable supply made by the recipient. In the present case HMRC contends that the University is liable to account for VAT on the commission which it pays to agents.

2. The University's case may be summarised as follows:

(1) The Split Supply Argument

The University contends that agents make two supplies: a supply to the University of recruitment services and a supply to students of support services. The commission paid by the University should therefore be apportioned so as to reflect in part direct consideration paid by the University for supplies of services to it, and in part third party consideration for services supplied to the students. The supplies to students are not made in the UK and therefore are not subject to VAT.

(2) The Intermediary Arguments

To the extent that services are supplied to the University, the general place of supply rule in Article 43 of the Principal VAT Directive (*Council Directive 2006/112/EC*) ("the PVD") applies in the period up to 1 January 2010. The effect of the general rule was that the place of supply was deemed to be the place where the supplier was established. In the case of the agents, that was outside the EU so that if this argument is right no VAT would be chargeable up to 1 January 2010. Further, the Appellant argues that Article 44, which operated to exclude the general rule in the case of intermediaries supplying services and acting in the name and on behalf of another person, was not applicable. Firstly, because the agents did not act in the name and on behalf of the University; secondly because Article 44 only applies where the services supplied by the intermediary relate to an underlying supply of goods from principal to consumer.

(3) Input Tax Credit

The University contends that to the extent agents' fees are subject to VAT, it is entitled to input tax recovery for a proportion of that VAT on

the basis that it is residual input tax for the purposes of its partial exemption special method calculation.

3. Since 1 January 2010 it is accepted that amendments to Articles 43 and 44 PVD in relation to the place of supply rules mean that agents' commissions for services to the University are deemed to be made in the UK and subject to VAT by way of reverse charge. The Intermediary Arguments are therefore of no relevance post 1 January 2010, but the Split Supply Argument remains relevant because any supplies by the agents to students would still not be subject to VAT. Arguments in relation to input tax credit also remain relevant after that date.

4. The decisions under appeal are set out in letters from HMRC to the University dated 23 February 2009 and 31 October 2012. The first is a decision on liability that all commission payable to a particular agent is subject to VAT under the reverse charge procedure. The second is a decision to refuse a claim for repayment of VAT totalling £226,774 accounted for by the University pursuant to the reverse charge procedure in VAT periods 10/08 to 01/10, together with an assessment to recover input tax credit of £26,472 in relation to the same periods.

5. The parties have raised various different arguments since issues relating to the University's VAT liability on agents' commissions first arose in 2007. I shall only deal in this decision with the arguments that were pursued in the submissions before me. At the invitation of the parties I shall deal with the issues raised in principle only. The consequences in terms of the amount of VAT payable or repayable will remain for agreement between the parties.

6. There was evidence before me in the form of witness statements from the following:

(1) Mr Richard Dale, the Executive Director of Finance at the University.

(2) Dr John Hogan, Registrar of the University

(3) Ms Arath Prabhakar, Managing Director of the MABECS Agency (Malaysian British Educational Cooperation Services) in Malaysia.

(4) Mr Jacob Kandarappallil, a student at the University.

(5) Mr Timothy Maughan, an officer of HM Revenue & Customs.

7. The evidence of the last two witnesses was not challenged and I accept their evidence. The first three witnesses were cross-examined, Ms Prabhakar by way of telephone from Malaysia. Based on their evidence and on the documentary evidence before me I make the following findings of fact.

Findings of Fact

8. The University is based on a 50 acre site in the heart of Newcastle city centre. It is a charity whose object is "for the public benefit, to advance education, learning and research". Pursuant to that object it offers more than 200 undergraduate degree courses and associated postgraduate courses in 53 subject areas grouped into 3

faculties: Medical Sciences; Science, Agriculture and Engineering; and Humanities and Social Sciences. It is consistently ranked in the top 200 universities in the world and the top 20 in the UK. The University is a member of the Russell Group of leading universities in the UK. It has an excellent reputation in terms of student satisfaction and the proportion of students who go on to either employment or further education.

9. The University aims to be a "world class civic university". It has a mission statement which is:

(1) To be a world-class research-intensive university,

(2) To deliver teaching and facilitate learning of the highest quality, and

(3) To play a leading role in the economic, social and cultural development of the North East of England.

10. The University has 3 core academic functions arising out of this mission statement:

(1) Research and innovation,

(2) Learning teaching and the wider student experience, and

(3) Engagement and internationalisation.

11. Most academic staff are involved in both teaching and research. The University's global reputation is primarily driven by the quality of the research it undertakes. That in turn attracts students to the University.

12. "Internationalisation" has involved growing the University's international student population and developing international campuses in Malaysia and Singapore. The international campuses involve both teaching and research activities. In terms of research the University works in collaboration with academics throughout the world In Newcastle it has set out to recruit and retain a strong and diverse cohort of high-quality international staff and students, to develop and maintain international opportunities for staff and students and to attract the highest-quality international researchers for research collaborations. The aim is to create an international ethos, culture and mindset that permeates the University from top to bottom. It considers that a strong diverse student and staff base enriches the educational experience and equips students with the skills needed to flourish in a global economy. The University has students from over 120 different countries and staff from more than 80 countries. Between 2005 and 2013 the number of non-EU students increased from 2,327 to 5,855. This compares to total student numbers of 22,874 in 2013.

13. The University uses local agents to recruit students. Some 40% of those students are studying as undergraduates, 40% as postgraduates on one year "taught" courses and 20% as postgraduate research students studying for doctorates. In 2014 the University had agreements with more than 100 agents worldwide. The agents use their own resources to recruit students for universities around the world, including in the UK. The University enters into contractual arrangements with agents and pays commission to those agents. In 2008 the University paid agent commissions of £1.034m, rising to £2.214m in 2012.

14. In recent years the University has received well over 20,000 applications from non-EU students. In some countries, such as Malaysia, agents will recruit more undergraduate students than postgraduate students. In other countries most of the students recruited are postgraduate students.

15. Agents do not act exclusively for one university, but have similar appointments for comparable UK universities. Agents therefore present students with a range of different universities from which they can choose to make applications. Likewise, the University can appoint more than one agent in any particular region. The largest market is now China where the University has agreements with some 16 agents. Agents have no authority to make offers of places to students.

16. Prospective agents are required to complete a detailed proposal form, provide referees and provide a marketing plan. A member of the University staff will arrange to visit the agent. Agents are only appointed if they have an established track record, have a thorough understanding of UK education institutions, have professional staff and premises and can effectively market the University to students. The University arranges for agents' employees to visit the UK to see the University so that they can understand what the University offers. The costs of such visits are usually shared between the agent and the University. It is not in the interests of the University or of students for agents to put forward students who would not make a "good fit" with the University. An agent is expected to engage extensively with potential applicants to ensure as far as possible that only suitable students apply to the University.

17. Students from some countries are more likely to use agents than students from other countries. For example, most Chinese students applying to the University will use an agent whereas it is very rare for a student from the United States to use an agent. Only relatively small numbers of students from the United States look to study in the UK and those that do are familiar with the system and the language.

18. Non-EU students do not have the same information available to them about UK universities as UK students. In particular schools, colleges and parents in the UK can be relied on to provide information about options for higher education in the UK. The University has an International Office which aims to provide non-EU students with the information needed to make an informed choice of an appropriate university and course. It is responsible for providing information, advice and support to non-EU students before, during and after the application process. It also provides information about using "approved agents", that is agents contracted to the University. Much of this information is available online on the University's website. The website has pages for each country from which the University recruits students giving details of approved agents and information about those agents. It also includes guidance on completing the online application form, on referees and on preparing a personal statement. Advice and guidance is also available in relation to visas, immigration issues, accommodation, travel and studying and living in Newcastle. All this advice is available directly from the International Office or through an agent. Advice is also available through the British Council which publishes a guide to UK education, including articles on how agents help international students in applying to UK universities.

19. The International Office employs 18 people in various roles including recruitment of non-EU students, managing relationships with agents and supporting students in visa applications and generally. 13 of those employees are based in the UK. The other 5 are based abroad in Malaysia, India, China or Hong Kong. Strictly those 5 are employed by a private firm named "INTO University Partnerships" but they are treated as the University's employees and work only on behalf of the University. INTO University Partnerships also has a separate joint venture agreement with the University whereby it provides the services of 60 individual agents around the world. That agreement was not in evidence and this decision does not deal with services supplied by INTO University Partnerships.

20. The International Office develops close working relationships with agents which helps to maintain the number of students the agents recommend to the University. They also monitor the performance of agents. I am satisfied that it would not be practical for the University to provide the same level of advice and assistance to students as is provided by agents, even in countries where the International Office has a locally based employee. The International Office could not hope to cover all countries and areas from where the University attracts non-EU students.

21. The University strongly recommends students to use an approved agent where they are from a country that has such agents. Approximately 50% of students make an application with the help of an agent, the other 50% use resources provided by the University, the British Council or family and friends. Some students will know where they want to study, but want an agent to help them through the application process and to give assistance and reassurance with practical issues such as immigration procedures, travel and accommodation. Others might also want advice as to which course and university to apply to. Undergraduates must apply through UCAS, the Universities Colleges Admissions Service where they are limited to 5 courses/universities. In contrast it is not unusual for a postgraduate student to apply to a dozen or more universities.

22. On occasions where an application throws up particular problems the University will suggest that the student contacts a locally based agent. The University may make the same suggestion if a student encounters difficulties after an offer has been made, such as visa difficulties. Quite recently the University has introduced a flat rate commission of £500 in such circumstances. Approximately 71% of student applications to the University using an agent are successful. This is approximately 10-15% higher than the success rate of those students who do not use an agent. This is because where agents are used the application form is more likely to be filled in correctly, with an appropriate personal statement and the agent filters those students that are more likely to have a better fit with the University.

23. The University expects agents to work in the best interests of potential students. It does not want to end up in a situation where there is a poor fit between the student, the course and/or the University. The University only appoints agents which it considers will offer good advice and guidance to students. It monitors the performance of agents and has in the past terminated agency agreements where an

agency is not sending student applications to the University or where an agency has helped students to apply who should not really have applied to the University.

24. The underlying objective of the University in entering into agreements with agents is to facilitate the recruitment of suitable students by the University. Having said that Dr Hogan emphasised the trust and confidence existing between the student, the agent and the University. I accept that the relationships may be generally characterised in those terms.

25. The University website has an online application portal. This includes the postgraduate application form which requires various supporting documents to be uploaded as part of the application process. At the present time prospective students are required to use the portal, but prior to January 2010 a significant proportion of applications involving agents used the agents' own forms. Processing such applications was extremely time-consuming for the University, hence the move to an online application portal. The application process involves provision of a personal statement, details of referees and visa information.

26. The postgraduate application form requires information as to the name and contact details of any agent who assisted the prospective student in making the application. The form also asks whether the student has paid the agent for the service and if so, how much. Dr Hogan described the purpose of this question as a check to ensure that an agent of the University had not made a charge to a student which had not been approved by the University.

27. Agents have resources and systems in place to assist students through the process of choosing suitable universities and courses, making applications and taking up places if offered. They employ counsellors to give advice to individual students, both in person and by telephone. Counsellors will present various options as to the courses and universities which have appointed them as agents. In this sense the agents act as a shop window for the universities which they represent which may be a large number.

28. Once an application has been made it is entirely a matter for the University whether to offer a place. Offers may be conditional on academic grades, a language test and obtaining a visa for travel. Once an offer has been made the agent will often provide advice on travel to the UK, obtaining a visa, arranging accommodation and opening a bank account. Agents may also liaise with the International Office with a view to housing students in particular accommodation so as to be near friends or other students from the same country. Essentially, agents smooth the whole process which helps reduce the risk that a student will drop out of the application process before taking up a place.

29. The University also provides an International Student Handbook which is directed at students who have been offered a place at the University. It includes advice and guidance on visas, immigration, accommodation and finances including opening a UK bank account.

30. Once a student has been offered and accepted a place, that student will in most cases come to the UK, pay the first year tuition fees and enrol on the course. Only at that stage does the agent become entitled to commission. The commission is typically 10% of the first year tuition fee and 5% of the second year fee, if applicable. In addition, the agent and the university will agree targets for recruitment of students and where the target is exceeded a further payment (presently £150) is payable by the University to the agent. Commission is payable irrespective of the amount of work the agent has had to do in relation to any particular student as long as the agent in some way facilitated that student's application. It occasionally happens that a student will have used more than one agent, in which case the University will decide which agent is entitled to the commission or whether the commission should be split in some way.

31. The evidence before me included the University's standard form agency agreement. That agreement has changed over the years and I was taken to agreements from 2005, 2008 and 2011. It was not suggested that there were any material differences between the various agreements. The relevant clauses from the 2011 agreement which was referred to in detail in the submissions are set out in Annex 1 to this Decision. Once a student has decided to apply to the University agents are required to obtain a signed authority in the form set out in Schedule 3 of the agency agreement evidencing that they are authorised to act by the student. It is notable that:

(1) Each agreement is a bilateral agreement between the University and a named agent.

(2) The agreement sets out the agent's obligations to the University, including promoting and marketing the University to secure applicants for the University's courses (Cl 4.1.1).

(3) The agent agrees to advise and assist applicants in completing application forms, either UCAS forms or the University's own application forms for postgraduate courses (Cls 4.1.4 and 4.1.5).

(4) The agent must only submit applications from suitably qualified students (Cl 4.1.7).

(5) The agent must comply with the University's practical requirements and policies (Cls 4.1.11 and 4.1.12).

(6) The agent must agree annual student recruitment targets with the University (Cl 4.1.16)

(7) The agent must promote and market the University with all due care and diligence and maintain good relations with applicants, and in doing so will look after the interests of the University (Cl 4.1.18).

(8) The University will pay commission to the agent in respect of students who "on the advice and action of the agent" have enrolled with the University and paid their tuition fees (Cl 6.1.5).

(9) Agents are prohibited from charging fees to students, save with the agreement of the University (Cl 5.1.3). In theory therefore an agent can charge a

student if it offers some form of premium service, but only with the agreement of the University.

(10) Agents agree not to describe themselves or hold themselves out as agents or representatives of the University, save as expressly authorised by the agreement. In particular, not to represent themselves as capable of admitting or guaranteeing acceptance on courses (Cl 5.1.6).

32. I was told that the way in which these agreements operate is standard throughout the UK university sector. Agents promote and market a number of universities to the students they are assisting and will be paid commission by whichever university a student enrols at and pays tuition fees. The agents' business model effectively involves payment by results. The agent will not get paid for its work with a student unless that student successfully enrols on a course at a university represented by the agent.

33. The evidence before me included the contractual arrangements between the University and MABECS and the way in which MABECS operates in practice. MABECS was set up in 1985 to assist students in Malaysia to find suitable places at universities in the UK. It gives advice and assistance to students looking to study in the UK. This includes helping students and their parents to research different courses and universities, preparing and submitting application forms, assisting with interviews where necessary, liaising with universities as to any specific requirements and assisting with practical arrangements in moving to the UK. MABECS acts on behalf of about 80 UK universities. It contracts with each university separately and the universities give MABECS general guidelines within which it is expected to operate. Extracts from MABECS website are included at Annex 2 of this Decision and reflect the work MABECS carries out pursuant to its agency agreements. The evidence included similar website material from other agencies. All such material was aimed at attracting students to the particular agency and emphasised a "student-centred approach" offering advice and assistance which is free. I have taken the evidence in relation to MABECS as being typical of agents in general.

34. MABECS provides students with detailed information as to the range of courses and universities available in the UK, their entry requirements and information about the location of specific universities and the lifestyle students might expect, including for example accommodation and transport links. This information is provided generally in guides produced by MABECS as well as prospectuses, guides and other material produced by specific universities and also through individual counselling.

35. Assistance with completing the application form might involve ensuring copies of all qualifications are provided, help in outlining a proposed research topic and preparing a personal statement, ensuring any necessary financial guarantees, sponsorships and referees are in place and providing proof of proficiency in the English language. Malaysian students may have non-standard qualifications and MABECS works closely with universities to review and determine the acceptability of those qualifications. MABECS is a test centre for various generally recognised English language proficiency tests.

36. MABECS has close relationships with local schools and colleges in Malaysia. It provides general information and presentations to students about studying abroad and in the UK in particular. This is followed by subject specific talks and counselling. Universities often visit Malaysia and MABECS assists in setting up visit programmes, making arrangements for university representatives to visit schools and colleges and to meet students individually. It also participates in various exhibitions in Malaysia arranged by bodies such as the British Council. MABECS does not receive any separate payment for this work and Ms Prabhakar considered that such work fell within its obligations under the agency agreements to promote and market the universities.

37. MABECS deals with a mixture of both undergraduate and postgraduate students, but undergraduates comprise the majority of applicants. It is a designated UCAS centre and assists students with their applications. Students seeking undergraduate courses might have approximately 10 "interactions" with MABECS. Interactions include visits to schools and colleges, visits to MABECS' offices and contact via email, telephone and in person. Students seeking postgraduate courses might have anything between 20 and 40 interactions. There are a lower number of interactions with students seeking undergraduate courses because the UCAS system is more streamlined whereas applications for postgraduate courses tend to be tailored to individual student and university requirements. Applications for PhD courses will usually involve the student having interactions and dialogue directly with academic staff at the University rather than through an agent, although the agent may still facilitate the application process.

38. MABECS keeps a counselling record and copies of correspondence for each student and this records each interaction with that student. Universities occasionally ask for evidence that the agency has facilitated a particular application and those records are made available to the university.

39. Once a student has decided which universities to apply to, MABECS will ask the student to sign an authority form each university to which an application is being made. Those forms will be similar to that at Schedule 3 of the University agency agreement. MABECS also uses its own form of authority to be signed by students. The MABECS form reads as follows:

> "This is to confirm that I have submitted the following applications and/or submitted supporting documents through MABECS SDN BHD. I have received counselling from MABECS, with regard to my application. I agree to MABECS contacting these universities on my behalf, should I require any assistance."

40. The form then includes details of the university name, course and the date on which the application was submitted, together with details of the student.

41. There was some confusion as to the circumstances in which the MABECS form was signed. At one stage Ms Prabhakar stated that it was used where a particular university did not have its own standard form. Later in her evidence she suggested that all students signed the MABECS form when they first approached the agency for

advice and assistance. Later still she suggested that it was a form used by postgraduate students and that initially a student would fill in their details on the counselling record referred to above. There was no example of a counselling record in the evidence. It may be that there are variations of the MABECS form for UCAS applications and for postgraduate applications but in any event it does not seem that there is any document signed by a student which sets out any terms and conditions governing the relationship between MABECS and the student.

42. There is no contract between MABECS and the students and it does not charge students for its services. If a student asks about fees, and not very many do, it is explained that the universities where students are placed pay MABECS a commission. Ms Prabhakar stated that students generally understood that it was the universities which would pay MABECS for the services it provided. MABECS does not offer any additional or "premium" service to students for which students make payment. It receives no payments from students themselves.

43. MABECS also advises in relation to applications to Oxbridge and to some London universities where it does not have any agency agreements in place and in respect of which it does not receive any commission. If a student applies to those universities as well as universities where MABECS is an agent the student will receive advice and assistance in relation to all applications. The cost of supplying such advice is absorbed into the business' general overheads. Ms Prabhakar's evidence was that she saw the students as the customer and the whole ethos was to help students to choose a university that is the best fit for the particular student. Her evidence was that for MABECS profit was not the "bottom line". She emphasised that the company was "student-centred" and could not operate in that way if profit was the bottom line.

44. The work done by MABECS includes giving advice and assistance to students after a student has accepted the offer of a place at a UK university. For example, it holds pre-departure briefings for groups of students prior to leaving for the UK. Those students will be going to many different universities in the UK. Quite often there are also sessions with individual students dealing with pre-departure matters such as visa requirements.

45. Mr Kandarappallil is from India and he described his experience of applying for MBA courses in the United States and in the UK, including an application for the University's MBA course. He made applications direct to business schools in the United States but found the process difficult and time consuming. He didn't receive any offers from United States business schools. For applications to the UK he used an agency called Chopras which had been recommended to him by a friend. He understood before he contacted Chopras that their fees would be paid by the universities they represented. He explained the nature of his dealings with Chopras and the advice he received. This was very similar to the services described in relation to MABECS in Malaysia. He found some of the information provided by Chopras was easier to understand than that provided by the University's International Office. Mr Kandarappallil secured a place on the University's MBA course.

46. The size and scope of agents' businesses can vary greatly. Some employ just a few individuals, whilst others are large organisations with over a thousand employees. Some like MABECS focus solely on UK universities whilst others cover universities across the UK, Australia, New Zealand and the United States. Some of the larger agents will organise their own education fairs for students, inviting those universities which they represent to attend the fair. In those circumstances the University might make a payment to the agent towards its costs, including the costs of a stand. Such payments are made by virtue of separate arrangements between the agent and the University and are not paid pursuant to the agency agreement.

47. The use of agents gives both direct and indirect benefits to the University. The direct benefit is that agents attract students who might not otherwise apply for a place at the University. One survey indicates that 38% of students using agents would not otherwise have applied to the University. Attracting those students supports the University's internationalisation agenda. The indirect benefit is that even if a particular student using an agent decides not to apply to the University, the agent is effectively promoting the wider global image of the University.

48. It is clear that the University is financially dependent on tuition fees from non-EU students. Tuition fees from full-time non-EU students were 8% (£29m) of the University's total income in 2008/09, rising to 13% (£52.3m) of total income by 2012/13. This reflects an increase in the number of non-EU students studying at the University. Until recently universities were restricted in the number of UK students they could recruit, but there were no such restrictions on the number of non-EU students, subject to meeting entry requirements. In 2014/15 full time tuition fees from UK and EU students for the University's courses ranged from £4,320 - £10,950 whilst tuition fees for non-EU students ranged from £14,890 - £21,455.

49. Accounting information suggests that in 2011/12 the University made a surplus of £18.1m from non-EU students compared to a surplus of £8.5m from UK students. The surplus generated by non-EU students compensates at least in part for reductions in Government funding of the University. The accounting information comes from a system known as TRAC ("Transparent Approach to Costing") whereby income and expenditure are allocated to different activities, for example between teaching and research. Some 75% of costs incurred are not directly attributable to particular activities and must be apportioned. In that context, Mr Dale described the University as a "unitary business".

Discussion and Reasons

50. Both parties agreed that the various Articles of the PVD had direct effect and that I need not be concerned with the UK domestic implementation of Articles 43 and 44 in section 7 VATA 1994 and in the VAT (Place of Supply of Services) Order 1992. If there was an inconsistency then the position is that F-tT would be bound to give a conforming construction or, if that were not possible to disapply the UK legislation.

51. I shall deal with the University's arguments in the same order they were presented and summarised above.

(1) The Split Supply Argument

52. Mrs Brown relied on the general principle for VAT purposes that the consideration for a supply need not necessarily come from the recipient of the supply. Article 73 PVD provides as follows:

> "73. In respect of the supply of goods or services … the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply"

53. It is clear that in certain tri-partite transactions separate supplies by A to B and by A to C may be paid for by B, the recipient of only one of those supplies. That was the situation considered by the CJEU in *Baxi Group Ltd v Revenue & Customs Commissioners Case C-55/09*. In that case Baxi operated a loyalty reward scheme for its customers, who were installers of boilers, to encourage them to purchase Baxi products. The scheme was subcontracted by Baxi to @1 which chose and purchased the rewards and supplied them to customers redeeming their reward points. Customers had a contractual relationship with Baxi. Baxi paid @1 the retail sale price of the rewards and @1 accounted for VAT on that payment. @1 made a profit by reference to the difference between the retail sale price which it received for the goods and the cost of purchasing the goods. Baxi sought to obtain input tax credit for the VAT it had paid. The CJEU found that the payments made by Baxi to @1 were made in respect of two supplies:

> (1) A supply of services by @1 to Baxi equivalent to the profit margin obtained by @1 in respect of which input tax credit was available to Baxi, and
>
> (2) Third party consideration for a supply of goods by @1 to customers equivalent to the cost to @1 of purchasing the goods and in respect of which input tax credit was not available.

54. In Baxi, it was HMRC arguing that there were two supplies. In the present case the Appellant argues by analogy with Baxi that there are two supplies by agents. A supply of recruitment services by agents to the University and a supply of support services by agents to students, both supplies being paid for by the University.

55. At [39] the CJEU emphasised that the application of the common system of VAT depended on "economic realities" and at [51] that the concept of "consideration" for a supply required the existence of a "direct link between the goods or service provided and the consideration received". Then at [60] it stated:

> "60. In that regard, it is clear from the Court's case-law that, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there were two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply is to be regarded as a supply of goods or services…"

56. Mrs Brown submitted that when the economic reality of the arrangements involving the University, agents and students is considered, there are two distinct supplies with the consideration comprised in one payment by the University to the agents.

57. I was also referred to the decision of the Supreme Court in *Airtours Holidays Transport Ltd v Revenue & Customs Commissioners [2016] UKSC 21*. Airtours concerned the VAT on professional fees of PricewaterhouseCoopers in relation to a refinancing package that Airtours was negotiating with various lending banks. The tri-partite arrangements involved Airtours, PwC and the lending banks. PwC invoiced Airtours for its fees. The First-tier Tribunal had held that Airtours received supplies from PwC that were used for the purposes of its business and therefore it was entitled to input tax credit. The Upper Tribunal disagreed. It concluded that the substance of the transaction was a supply of services by PwC to the lending banks which used those services for the purposes of their own businesses, notwithstanding that Airtours had contracted to pay the fees of PwC. The Court of Appeal dismissed Airtours' appeal by a majority and the Supreme Court also by a majority upheld the Court of Appeal.

58. The issues were summarised by Lord Neuberger at [21] as follows:

> " *21. The first question is whether, under the terms of the Contract, PwC agreed with Airtours that it would supply services, and in particular to provide the Report. If the answer to that question is yes, then the Commissioners accept that there has been a supply of services to Airtours, and that this appeal must be allowed, subject to a question of apportionment. On the other hand, if the answer to that first question is no, then the Commissioners contend that this appeal must be dismissed, but Airtours contends that its appeal should still succeed, subject, again to a question of apportionment. In effect, on this second point, Airtours argues that, in order to show that it received a supply of services from PwC for the purposes of VAT, it does not have to show that it had a contractual right to require the Services to be provided to the Institutions by PwC.*"

59. The first question was essentially a matter of construing the contract to identify whether there was a contractual obligation on PwC to Airtours to supply the report to the lending banks. The Supreme Court held that there was no such obligation. The second question was whether there was nonetheless a supply by PwC to Airtours, taking into account that it was plainly in the commercial interests of Airtours that the services should be provided. Airtours relied on the judgment of Lord Millett in *Commissioners for Customs & Excise v Redrow Group plc [1999] 1 WLR 408* at 418G where he said " *[o]nce the taxpayer has identified the payment the question to be asked is: did he obtain anything - anything at all - used or to be used for the purposes of his business in return for that payment?*". However, Lord Millett's statement was later qualified by the Supreme Court in *Revenue and Customs Commissioners v Loyalty Management UK Ltd* [2013] STC 784 where Lord Reed stated at [67]:

> " 67. … it is also necessary to bear in mind that consideration paid in respect of the provision of a supply of goods or services to a third party may sometimes constitute

third party consideration for that supply, either in whole or in part. The speeches in *Redrow* should not be understood as excluding that possibility. Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods or services to a third party), but that possibility cannot be excluded *a priori*. A business may, for example, meet the cost of a supply of which it cannot realistically be regarded as the recipient in order to discharge an obligation owed to the recipient or to a third party. In such a situation, the correct analysis is likely to be that the payment constitutes third party consideration for the supply."

60. Lord Neuberger went on the summarise the position in Airtours as follows:

" 50. From these domestic and Court of Justice judgments, it appears clear that, where the person who pays the supplier is not entitled under the contractual documentation to receive any services from the supplier, then, unless the documentation does not reflect the economic reality, the payer has no right to reclaim by way of input tax the VAT in respect of the payment to the supplier.

51. On this analysis, it appears to me that, subject to considering a further way in which Airtours' case is put, it also fails on the second question. The Contract, consisting of the Letter and the Terms, did reflect the economic reality, and was not in any way an artificial arrangement. It is true that Airtours benefitted from the Contract, but the benefit which it was getting was not so much the Services from PwC, but the enhanced possibility of funding from the Institutions for its restructuring (a possibility which eventuated into reality thanks, to a substantial extent, to the Report). And it was to improve the prospects of such refinancing that Airtours was prepared to pay for the provision of the Report."

61. The majority in the Supreme Court held that the contract did reflect the economic reality. The benefit obtained by Airtours was not the services from PwC but the enhanced possibility of funding from the lending banks. PwC's services were supplied to the lending banks.

62. Airtours was not a "split supply" case such as Baxi in the sense that it either received the services of PwC or it did not. It was not a case where some services might have been identifiable as being supplied to Airtours with others being supplied to the lending banks. In Baxi however there was a contractual agreement between all three parties. Baxi was obliged to make arrangements to redeem loyalty points and @1 was obliged to provide goods in consideration for the surrender of loyalty points.

63. It was also argued by Airtours that if PwC had contracted to provide services only to the lending banks then there was no supply at all by PwC because there was no reciprocal performance by the banks. That argument was rejected at [57] as follows:

" 57. When the Court of Justice speaks of "reciprocal performance" it is looking at the matter from perspective of the supplier of the services and it requires that under the legal arrangement the supplier receives remuneration for the service which it has performed. It is not necessary that the recipient of the service is legally responsible to the supplier for payment of the remuneration; it suffices that the arrangement is for a

third party to provide the consideration. Were it otherwise, taxpayers could structure their transactions so as to escape liability to pay VAT, so long as they could meet the economic reality test."

64. Mrs Brown also relied on the CJEU judgment in *Town and County Factors Ltd v Customs & Excise Commissioners Case C-498/99*. The taxpayer organised a weekly "spot the ball" competition. There was no contractual agreement between the taxpayer and competitors and the rules of the competition were binding in honour only. The taxpayer contended that it was liable to VAT only on the total amount of entry fees less the value of prizes paid out. The CJEU held that there was a supply of services and reciprocal performance even though there was no legally enforceable obligation on the taxpayer to pay prizes. Reciprocal performance did not require a legally binding obligation because the existence and content of legal relationships varied between member states. The consideration was the entry fees paid by the competitors which was the taxable amount for VAT purposes.

65. The position in relation to reciprocal performance and tri-partite arrangements was succinctly summarised by the Upper Tribunal in *Revenue & Customs Commissioners v DPAS Ltd [2015] UKUT 585 (TCC)* as follows:

> "39. Any transaction, which is not a supply of goods, is a supply of services and, if for consideration, is subject to VAT unless exempt (Articles 24(1) and 2(1)(c) and Chapters 2 to 9 of Title IX of the Principal VAT Directive). The CJEU has held that a supply of services for consideration requires a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden [1994] STC 509* at [14]). Although the CJEU in *Tolsma* used the term 'legal relationship', that should be understood, in the light of Case C-498/99 *Town and County Factors Ltd v Customs and Excise Commissioners* [2002] STC 1263 at [21] - [24], as including a reciprocal arrangement under which the service provider's obligations are not legally enforceable but are binding in honour only.
>
> …
>
> 42. The contractual arrangements introduced by DPAS from 1 January 2012 are, on DPAS's case, tripartite arrangements. Lord Millett observed in *Customs and Excise v Plantiflor Ltd* [2002] STC 1132 at [49] that tripartite arrangements which result from two or three separate but related bilateral contracts call for close analysis in order to determine their tax consequences. As Lewison J explained in *A1 Lofts Ltd v HMRC* [2009] EWHC 2694 (Ch), [2010] STC 214 at [40], quoted with approval by Lord Neuberger in *Secret Hotels2 Ltd v HMRC* [2014] UKSC 16, [2014] STC 937 at [32], the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them. This starting point is a matter of domestic law."

66. In the light of these authorities Mrs Brown correctly submitted that the legal relationships in their widest sense must be analysed. It is necessary to consider what

the agents are doing for the University and the students, when they are doing it and how they are remunerated for it.

67. It was not clear to me that Mrs Brown was relying on the existence of a contractual duty on agents to provide advice and assistance to students as well as economic reality. In other words, both limbs described by the Supreme Court in Airtours. She did submit that "if something is done for somebody and it is paid for, through the eyes of the supplier there will be a supply for VAT purposes". In my view that goes too far and echoes what Millett LJ said in Redrow, but without the subsequent qualifications noted and endorsed in Airtours.

68. Mr Mandalia submitted that there was no contractual relationship between agents and students. Indeed, it is clear from cases such as Town and County Factors that it is not necessary for there to be a legally enforceable contractual relationship to support a supply for VAT purposes. What is required is a "legal relationship" in a wider sense involving reciprocal performance

69. Mrs Brown submitted that on the facts, the economic reality was that students were provided with independent advice by agents and the University paid for that advice. She submitted that reference in the agents' marketing material to the effect that advice to students was free was not significant. In cases of third party consideration the recipient would often consider that goods or services were being supplied free. She suggested that the customers in Baxi would have thought that goods they received by way of redemption of loyalty points were free.

70. Mr Mandalia submitted that in Baxi the redemption of points by customers was consideration for the supply of the goods. I do not consider that it is right to analyse Baxi in that way. I agree with Mrs Brown that the CJEU did not approach the issues on that basis. It looked at the monetary consideration provided by Baxi rather than the non-monetary consideration provided by customers.

71. Mrs Brown submitted that "part of what the University pays to the agent is for the agent to give advice to the student". She pointed to Cl 8.3 of the agency agreement which provides that commission will only be paid in relation to applicants who "on the advice and action of the agent apply and become Students". She also relied on the authority form in Schedule 3 of the agency agreement. There is no reference to advice in the authority form but it does acknowledge that the agent will be assisting the student with the application process. Mrs Brown submitted that the agents were under an obligation to give advice and the direct beneficiary of that advice was the agent.

72. Mrs Brown emphasised the evidence that agents were "student-centred". She described the University as being an "indirect beneficiary" of advice given to students, or at least both University and student being direct beneficiaries, with one benefitting more than the other. In relation to some parts of the agents' activities the University is the predominant beneficiary and in relation to other parts the student is the predominant beneficiary.

73. Mr Mandalia submitted that the payments made by the University to agents were made solely by reference to the agency agreement, pursuant to which the agents provided services to the University. There was no obligation under that agreement for agents to provide services to students. Further, there was no express or implied contractual obligation on agents to provide services to students.

74. Mr Mandalia further submitted that "if there is no obligation on the part of the student to pay for a service, there cannot … be third party consideration". I do not accept that submission. When Article 73 refers to third party consideration it is not referring to payment by a third party which satisfies an obligation of the recipient of a service. As Mrs Brown pointed out, at [57] in Airtours Lord Neuberger states "… It is not necessary that the recipient of the service is legally responsible to the supplier for payment of the remuneration".

75. Mr Mandalia accepts, as he must, that students derived some benefit from work done by the agents pursuant to the agency agreements. However, he submitted that the economic reality was that there was no payment for that benefit, either by the students or by the University.

76. Mr Mandalia suggested that agents continued to provide assistance to students even after they had taken up their place at university and therefore after the agent had become entitled to its commission. In effect he was submitting that this points to a different economic reality, because the agent has no obligation to do that work and will not be remunerated for it. The agent was doing this work to enhance its reputation rather than for the commission. I am not satisfied that the evidence supported Mr Mandalia's submission in terms of work done after a student had taken up a place, or that it helps in identifying the economic reality of the transaction.

77. Dr Hogan emphasised that whilst the agency agreements regulated the relationship between the University and its agents, the agents' services were for the benefit of students as well as the University. If the service provided by the agent fell short of a student's expectations, then the student may decide not to apply to the universities being promoted by that agent. He accepted that the agency agreements do not govern the relationship between the agent and students, but suggested that it was implicit that agents were providing a service to students. In order to maintain their reputation, agents must offer students a high level service. He emphasised that reputation, trust and confidence in the process was essential and pointed to clause 4.1.18 of the agreement.

78. The agreements do not require the agents to do anything other than advise and assist students in making applications. The agreements are silent in relation to any ongoing relationship between agents and students. However, as a matter of fact agents did provide assistance after an application had been made and after a place had been accepted. It seems to me that such assistance was given for two reasons. Firstly, because it was in the interests of the agent to facilitate the student taking up a place offered by the University. Secondly, as Dr Hogan intimated, because it enhances the reputation of the agent. It would not look good if once an application had been made or an offer accepted the agency simply ended its involvement.

79. The agency agreements do not prescribe in any detailed way how the agent should run its business, in particular how the agent should manage its relationships with students. It is clear that the only way in which an agent can successfully earn commission from the universities is by engaging with suitably qualified students. The ability of an agent to attract such students will depend on their own reputation and the contacts the agent has with local schools and universities.

80. When a student seeks advice and assistance from an agent, the student may well not have any particular university in mind. Even when an application is made, the student may well end up accepting an offer at another university. The specific work done by the agency for that student is therefore funded by commission from whichever university the student enrols at, if any. The advice and assistance offered by agents is expressed to be free, in the sense that there is no charge to students. It is not of course free in an economic sense in that the agency incurs costs in providing advice and assistance. Those costs are met by the agent and are effectively paid for by way of commission received from universities. That commission is itself paid for by universities out of the tuition fees they receive from students who enrol on the University's courses.

81. It is clear that agents do take a "student-centred" approach. To do otherwise would diminish the reputation of the agency amongst students, schools and colleges and the universities they represent. Students will only use an agency where they have trust and confidence in the advice and assistance to be provided. However, throughout the process the agent remains exactly that, an agent of the universities it represents. The agent is appointed to market and promote those universities and to solicit suitably qualified applicants for courses offered by those universities. In order to obtain commission the agents must have a pool of students including students that the University will consider suitable. Everything which the agent does pursuant to the agency agreement and over and above its obligations in the agency agreement gives the agent a pool of suitably qualified candidates.

82. Mrs Brown submitted that in relation to counselling and advice it was "the student's hand which was being held tightest". I do not accept that view of the evidence. In my view the student is an indirect beneficiary of the agent's obligation to put forward suitably qualified students. The agents have an obligation under the agency agreements to "advise and assist applicants" in completing applications. However, the reality is that the obligation to advise and assist students is not for the benefit of students. It is for the benefit of the University to ensure that only suitably qualified applicants who will be a good fit apply to the University.

83. In the present case agents know that if they properly advise students and those students are accepted by a university with which they have an agency agreement, then they will be paid a commission. However, I do not accept that any part of the commission is paid for the advice which is given to students. It is paid because an agent has introduced a suitably qualified student who has gone on to take up the offer of a place.

84. The commission in my view is not paid to reflect any service provided by agents to students and is not reciprocal performance for a supply of services to students. It is artificial and does not accord with economic reality to suggest that any services as such are provided by the agent to students. The services are provided directly for the benefit of the University. There is a single supply of services to the University.

85. Mrs Brown further submitted that the fact that the agent is only entitled to commission once a student is enrolled does not mean that work done by agents prior to that time for students who did not enrol is to be disregarded and can amount to reciprocal performance for a payment. She relied on the opinion of the Advocate General in *Odvolaci financni reditelstvi v Pavlina Bastova Case C-432/*15 which concerned in part the supply of racehorses by a racing stables to a race organiser. In particular, the question arose as to whether the prize money awarded only to horses that were placed in a race could amount to consideration for the supply. Since the date of the hearing before me the CJEU has delivered its judgment in that case. In the event Mr Mandalia did not pursue any submission that work done by agents prior to enrolment was to be disregarded and therefore I do not need to consider Bastova.

(2) The Intermediary Arguments

86. The Appellant contends that the general place of supply rule in Article 43 PVD applies to services supplied by the agents in the period up to 1 January 2010, and that Article 43 is not excluded by Article 44 PVD. At the material time and in so far as relevant those provisions read as follows:

> "Article 43
>
> The place of supply of services shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied, or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.
>
> Article 44
>
> The place of supply of services by an intermediary acting in the name and on behalf of another person, other than those referred to in Articles 50 and 54 and in Article 56(1), shall be the place where the underlying transaction is supplied in accordance with this Directive."

87. As stated above, the effect of the general rule was that the place of supply was deemed to be the place where the supplier was established. In the case of the agents, that was outside the EU so that if this argument is right no VAT would be chargeable up to 1 January 2010. The Appellant also argues that Article 44, which operated as a carve out to exclude the general rule in the case of intermediaries supplying services and acting in the name and on behalf of another person, was not applicable. Firstly, because the agents did not act in the name and on behalf of the University; secondly, because Article 44 only applies where the services supplied by the intermediary relate

to an underlying supply of goods from principal to consumer. I deal with the two arguments separately.

(1) Did agents act in the name and on behalf of the University?

88. The Appellant argues that the description of a person acting "in the name and on behalf of another person" has a specific meaning as a matter of EU law and has nothing to do with the concept of "agency" in UK domestic law. In particular, it requires the intermediary to be able to bind the other person through its conduct and actions. In support of that submission Mrs Brown relied on the following decisions of the CJEU.

89. In *De Danske Bilimportorer v Skatteministeriet Case C-98/05* the CJEU was concerned with registration duty for new cars, and whether it should be included in the taxable amount for VAT purposes. The purchaser of a new vehicle contended that it should be excluded from the taxable amount as it was a disbursement paid by the dealer on behalf of the purchaser, relying on Article 11(A)(3)(c) of the Sixth Directive which provided as follows:

> "The taxable amount shall not include:
>
> …
>
> (c) the amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out **in the name and for the account of** the latter and which are entered in his books in a suspense account …"
>
> (emphasis added)

90. It is notable, in passing, that the words used in Article 28b(E)(3) Sixth Directive which was the predecessor to Article 44 were "in the name and for the account of other persons". I consider the Sixth Directive provisions below in relation to the second of the Intermediary Arguments.

91. The CJEU held that the customer was responsible for payment of the registration and when it was paid by the dealer it was an expense paid out in the name and for the account of the customer. Advocate General Kokott in her opinion stated as follows:

> "40. In law the question must be answered by reference to Article 11(A)(3)(c) of the Sixth Directive, that is to say, the Community law notion of acting in the name and for the account of another and not by reference to civil law provisions concerning agency and mandate which vary from one legal system to another.
>
> 41. Moreover, the operation must be categorised by reference to objective criteria and not solely to contractual provisions agreed between the dealer and the purchaser. Otherwise the parties could determine which elements are included in the taxable amount"

92. A similar issue was considered by the CJEU in *TVI Televisao Independente SA v Fazenda Publica Case C-618/11* which concerned a "screening tax" imposed on the screening and broadcasting of advertising which was charged to advertisers but paid to the Portuguese tax authorities by service providers. The case also concerned the application of Article 11(A)(3)(c) Sixth Directive. The CJEU adopted the approach of Advocate General Kokott in Bilimportorer. On the facts the service provider was the "tax debtor", it was required to pay the tax even if the advertisers had not paid for the screening services in question, and the tax authorities could not claim the tax from the advertisers. The CJEU held that it followed "that [the service provider] pays the tax in its own name and on its own behalf". Hence the screening tax did form part of the taxable amount.

93. Mrs Brown observed that the determining factor and focus in TVI, as in Bilimportorer, was who bore the liability to pay the tax or duty. If the supplier had a primary liability to pay the tax or duty then it was not paid in the name and for the account of the customer. I accept that analysis. However, Mrs Brown went on to submit that "in order to be able to fully discharge a duty of the principal, the ability to bind the principal was considered by the Court to be critical". I do not accept that further submission. It is not language used by the CJEU and is more of an argument by analogy. Bilimportorer and TVI were not concerned with the power of an intermediary to bind another person. I do not consider that they assist the Appellant in the present argument, other than to support the submission that Article 44 is concerned with EU law principles rather than domestic principles of agency. Mr Mandalia for HMRC submitted that the term "intermediary" in Article 44 was interchangeable with the term "agent". Having said that he disavowed any suggestion that "intermediary" referred only to an "agent" as that term is used in the law of England and Wales. For the reasons given by Advocate General Kokott I am satisfied that the civil law provisions of any particular member state cannot define the meaning of a term in the PVD. That reasoning includes reference to the "Community law notion" of acting in the name and for the account of another person which suggests that it has a particular meaning in EU law.

94. More relevant for present purposes are various decisions in relation to insurance agents. Mrs Brown submits that these decisions illustrate a fundamental distinction between an intermediary in the wider sense of someone who facilitates a transaction whilst acting for one of the parties and an intermediary acting in the name and on behalf of another person.

95. In *Staatssecretaris van Financien v Arthur Anderson Case C-472/03* the CJEU was concerned with whether certain "back office" activities provided to a life assurance company were "related services performed by insurance brokers and insurance agents". Article 13B(a) Sixth Directive provided exemption from VAT for such services. The activities in question included accepting applications for insurance and handling amendments to contracts and premiums. The taxpayer argued that its activities were those of an insurance agent. It relied on Council Directive 77/92/EEC ("the Insurance Directive") which facilitated the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance

agents and brokers. Article 2(1)((b) of the Insurance Directive provided that it applied to activities including:

> "professional activities of persons instructed under one or more contracts or **empowered to act in the name and on behalf of**, or solely on behalf of, one or more insurance undertakings, in introducing, proposing and carrying out work preparatory to the conclusion of, or in concluding, contracts of insurance …"

96. Before considering the decision of the CJEU in Arthur Andersen, it is helpful to consider a previous decision of the Court in *Taksatorringen v Skatteministeriet Case C-8/01*. In Taksatorringen the CJEU was concerned with the same exemption from VAT for related services performed by insurance brokers and insurance agents. The taxpayer was in business assessing damage to motor vehicles on behalf of insurance companies and one of its arguments was that its activities were those of an insurance agent. At [45] the CJEU declined to rule on whether the term "insurance agent" in Article 13B(a) Sixth Directive was to be construed in the same manner as the Insurance Directive, because even if it was the taxpayer's activities did not fall within Article 2(1)(b) Insurance Directive as it did not have power to render the insurer liable in respect of an insured person who had incurred a loss. By implication therefore the CJEU must have considered that the same requirement applied to the term insurance agent in the Sixth Directive. The CJEU endorsed what was said by the Advocate General where at [91] of his opinion he stated:

> "In order for this assistance to be provided by an insurance agent, however, it must be given within the context of a contract or an authority to act and 'in the name and on behalf of, or solely on behalf of, one or more insurance undertakings'. There must therefore be a power to bind the insurance company in relation to an insured person who has submitted a claim. Once again, this requirement is not met by Taksatorringen."

97. In Arthur Andersen the taxpayer argued that its activities were identical to those described in Article 2(1)(b), and emphasised that it had power to render the insurance company liable with regard to insured parties and beneficiaries. The CJEU noted at [31] and [32] that the Court in Taksatorringen had held that Article 2(1)(b) Insurance Directive required the existence of a power to render the insurer liable. However, that was not the determining factor for recognition of an insurance agent within Article 13B(a) Sixth Directive. It was still necessary to examine the nature of the activities carried out and the activities of Arthur Andersen, whilst contributing to the activities of an insurance company, did not constitute services which typified an insurance agent. Essential aspects of the work of an insurance agent such as finding and introducing prospects to an insurer were lacking.

98. In both these cases one might generally describe Arthur Andersen and Taksatorringen as "intermediaries", but the question being considered by the CJEU in each case was whether the taxpayer was an insurance agent. In neither case was the taxpayer an insurance agent. In Taksatorringen because there was no power to bind the insurer and in Arthur Andersen because the activities were not those of an insurance agent.

99. The words "in the name and on behalf of" are used in the Insurance Directive in the context of insurance activities. However, it seems to me that they are familiar words of general application. It does not seem to me that there is any reason why they should have one meaning in the context of the Insurance Directive and another meaning in the context of Article 44 PVD. Mr Mandalia did not suggest any reason as to why they should have a different meaning. He did not distinguish between the different contexts in which the words appeared. He did however invite me to give Article 44 a purposive construction and criticised Mrs Brown for adopting a literal approach to the construction of Article 44. In identifying the purpose of Article 44 he took me to the preamble of the Principal Directive, emphasising in particular the common system of VAT and fiscal neutrality, both in terms of competition and the burden of the tax.

100. Against that background Mr Mandalia submitted that the particular purpose of Article 44 was to promote the overarching concept of fiscal neutrality. He gave an example of someone using an intermediary to recruit employees from around the world. If the Appellant's argument was right the employer would have to pay VAT if using an EU based intermediary but not if using an intermediary from outside the EU even if recruiting the same employees. He submitted that the non EU based intermediary had a competitive advantage.

101. It does not seem to me that the Appellant's argument gives rise to any breach of the principle of fiscal neutrality. As Mrs Brown submitted, distortions of competition may arise inherently from the way in which a Directive is drafted – see for example *Bridport and West Dorset Golf Club Ltd v Commissioners for Revenue & Customs Case C-495/12*. It must also be remembered that the general place of supply rule in Article 43 is that a supply takes place where the supplier belongs. In cases where an intermediary is in a position to bind its customer, then the service supplied by that intermediary should be an exception to the general rule. The intermediary has a closer connection with the EU than an intermediary with no power to bind the customer. To use Mrs Brown's words, if an agent were able to bind the University then the supply by the agent would be "tethered" to the University.

102. Support for that being a significant distinction may be found in analysing the CJEU decision of *Staatssecretaris van Financien v Lipjes Case C-68/03*. See [128] of my analysis of that decision in the context of the second Intermediary Argument.

103. Mr Mandalia submitted that agents, by virtue of their relationships with the University and students, were able to encourage suitably qualified students to apply for courses with the University. As I understand the submission, an agent was plainly intermediary in the sense that it facilitated the transaction. Mr Mandalia's submission was that as a matter of ordinary language, agents acted in the name and on behalf of the University. They were the University's face abroad promoting the University and using the University's marketing materials. However, that argument gives no legal content to the requirement that the intermediary must be acting "in the name and on behalf of" another person. In my view they are words which must be given some legal meaning.

104. Mr Mandalia relied on the exclusion from Article 44 of supplies referred to in Articles 50, 54 and 56 PVD which provide as follows:

> "Article 50
>
> The place of supply of services by an intermediary, acting in the name and on behalf of another person, where the intermediary takes part in the intra-Community transport of goods, shall be the place of departure of the transport.
>
> [unless the customer of the services is identified for VAT purposes in a Member State other than that of the departure in which case it is deemed to be the Member State of the customer]
>
> Article 54
>
> The place of supply of services by an intermediary, acting in the name and on behalf of another person, where the intermediary takes part in the supply of services consisting in activities ancillary to the intra-Community transport of goods, shall be the place where the ancillary activities are physically carried out.
>
> [unless the customer of the services is identified for VAT purposes in Member State other than the place where the ancillary activities are carried out in which case it is deemed to be the Member State of the customer]
>
> Article 56
>
> The place of supply of the following services to customers established outside the Community, or to taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides:
>
> [(a) – (k) sets out various specific services such as advertising services, professional services and telecommunications services]…
>
> (l) the supply of services by intermediaries, acting in the name and on behalf of other persons, where those intermediaries take part in the supply of the services referred to in this paragraph."

105. As I understand the submission, in the context of the transport of goods an intermediary would be able to bind anyone, so the words "in the name and on behalf of" would be superfluous. It is not clear to me why the intermediary in that case would be able to bind anyone. Nor was it clear to me how Mr Mandalia said that the exclusion of Articles 50, 54 and 56 sheds any light on the meaning of the words "in the name and on behalf of" in Article 44.

106. Mr Mandalia relied on a decision of the F-tT in *Firstpoint (Europe) Limited v Commissioners for HM Revenue & Customs [2011] UKFTT 708 (TC)*. In that case the tribunal was concerned with the amended version of Article 44 (now Article 46). The amended version reads as follows:

> "The place of supply of services rendered to a non-taxable person by an intermediary acting in the name and on behalf of another person shall be the place where the underlying transaction is supplied in accordance with this Directive."

107. The facts of Firstpoint concerned a consultancy providing guidance and advice to students pursuing sports scholarships to colleges in the United States. It is clear that the F-tT found at [47] that the taxpayer met the criteria of Article 46, however there was no finding to the effect that the taxpayer could bind anyone. In relation to the words "in the name and on behalf of another person" the F-tT simply said this at [48]:

> "48. … As well as that the intermediary must also act in the name of and for another person. The Tribunal took the view that is simply ensuring he cannot act as a principal or undisclosed agent."

108. It is not clear to me why the F-tT in Firstpoint made reference to undisclosed agents. That is a concept of the law of agency in England and Wales and Mr Mandalia did not rely on the distinction between disclosed and undisclosed agents. In any event, there was no detailed consideration by the F-tT as to the meaning of "in the name and on behalf of". No detailed consideration was necessary because the taxpayer relied on the domestic legislation which included no equivalent reference Further the tribunal found at [48] that HMRC were not entitled to rely on the terms of the Directive because it had been transposed into domestic law. In those circumstances the decision in Firstpoint does not assist in the present case.

109. Mr Mandalia placed reliance on two authorities – a decision of the CJEU in *JCM Beheer BV v Staatssecretaris van Financien Case C-124/07* and a decision of the Court of Appeal in *InsuranceWide.com Services Ltd v Revenue & Customs Commissioners [2010] EWCA Civ 422*. Both were cases concerning the VAT exemption for related services performed by insurance agents

110. Beheer involved the "sub-agent" of an insurance broker and agent which carried out activities characteristic of those of an insurance agent for insurers. However, Beheer only had an indirect relationship with the insurance companies. The CJEU had to consider whether the exemption under Article 13B(a) Sixth Directive extended to activities done in the name of another insurance broker or insurance agent in connection with the bringing about of insurance contracts. The Court referred to both Arthur Andersen and Taksatorringen. It held that an insurance agent who only had an indirect relationship with the parties to an insurance contract but had been instrumental in concluding that contract could be exempt from VAT if it was contractually bound to another taxable person who was in a direct relationship with the parties.

111. It does not seem to me that this decision bears on the meaning of who is an intermediary for the purposes of Article 44. The CJEU made clear at [7]-[9] of its decision that the agent concluded contracts in the name and on behalf of the insurers and that Beheer carried out its activities in the name and on behalf of the insurance agent. In those circumstances the VAT exemption still applied where there was no contractual relationship between the sub-agent and the insurer, but it still required a

contractual relationship between the insurer and the agent, and the agent and the sub-agent.

112. Beheer was considered by the Court of Appeal in InsuranceWide, the facts of which involved taxpayers who maintained websites which allowed customers to obtain quotes from insurers for car insurance and who were paid commission if the customer entered into an insurance contract. The taxpayers did not have direct relationships with and could not bind insurers or insured. The issue was whether their activities were those of insurance brokers or insurance agents for the purposes of the VAT exemption. The Court of Appeal held that it was not necessary for the purposes of exemption under Article 13B(a) for the taxpayer to have a direct relationship with either of the parties to the eventual insurance contract and that the activity of bringing together insurers and insured was characteristic of an insurance broker or an insurance agent. Etherton LJ made various observations in relation to Beheer and summarised the case law as follows:

> " 80. I agree with Ms Sloane that *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 Article 13B(a) is a direct relationship with both the insurer and the insured or at any event with the insured. I agree with Ms Sloane that *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.
>
> …
>
> 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 Article 13B(a) and the Insurance Intermediary Exemption in Schedule 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, as Ms Foster pointed out, risk infraction of EU legislation by the United Kingdom.
>
> (2) The exemption in Article 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 Article 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 Article 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 Article 13(B) 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 Article 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 Article 13B(a), for the taxpayer to perform precisely the description of activities in Article 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 Article 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 Article 13B(a).

(7) It is an essential characteristic of an insurance broker or an insurance agent, within Article 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 Article 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 Schedule 9 to VATA 1994.

…

87. 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 InsuranceWide 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."

113. It seems to me that Mr Mandalia's reliance on InsuranceWide strays too far from the issue which I must determine, namely what is the meaning of the words "in the name and on behalf of". The Court of Appeal focussed on the activities of the persons claiming to be insurance agents, and whether those activities were characteristic of the general activities of insurance agents. It gave no consideration at all to the meaning of the words in issue in the present appeal. It is true that the taxpayers could not bind the insurers, but the Court of Appeal also held that for the purposes of VAT exemption the definitions of insurance broker and insurance agent in the Insurance Directive were only of limited relevance in the sense that they reflected legal reality and practice in the area of insurance law. That was the point on which the CJEU in Taksatorringen declined to give a ruling. The case does not in my view throw any doubt on the judgment of the CJEU in Taksatorringen and Arthur Andersen that acting in the name and on behalf of another person requires power to bind the other person.

114. It is clear that the agents in the present appeal have no power to bind the University in any way. In my view therefore Mrs Brown rightly submits that they are not intermediaries falling within Article 44 PVD. They are not acting in the name and on behalf of the University.

(2) Did Article 44 apply to Intermediary Services where the underlying transaction was a supply of services?

115. The second Intermediary Argument is whether Article 44 only applied in cases where the "underlying transaction" referred to in Article 44 was a supply of goods. Article 44 applied where an intermediary was providing services to a person with a view to that person entering into another transaction with someone else. The Appellant argues that even if the agents are intermediaries acting in the name and on behalf of the University, because the underlying transaction between the University and the students was a supply of services Article 44 could not exclude the operation of the general rule in Article 43.

116. The starting point for the Appellant's argument is the predecessor to Article 44 PVD which was Article 28b(E)(3) Sixth Directive and which provided as follows:

> " By way of derogation from Article 9(1), the place of the supply of services rendered by intermediaries acting in the name and for the account of other persons, when such services form part of transactions other than those referred to in paragraph 1 or 2 or in Article 9(2)(e), shall be the place where those transactions are carried out."

117. Article 9(1) Sixth Directive established the general rule equivalent to Article 43, that the place where a service is supplied is prima facie the place where the supplier has established his business.

118. The exclusions from the operation of Article 28b(E)(3) are the same as those in Article 44 PVD, namely Article 28b(E)(1) (which is services forming part of a supply of services for the intra-Community transport of goods equivalent to Article 50 PVD above), Article 28b(E)(2) (which is activities ancillary to the intra-Community

transport of goods equivalent to Article 54 PVD above) and Article 9(2)(e) (which is various specific services performed equivalent to Article 56 PVD above).

119. Mrs Brown's submission was that the exclusion from the general rule in Article 9(1) Sixth Directive clearly applied only to intermediaries acting in relation to an underlying transaction which was a supply of goods. She further submitted that the intention of the PVD was to codify the provisions of the Sixth Directive without making any material changes to the law. It was common ground for present purposes that the PVD codified the Sixth Directive without material changes. Mr Mandalia submitted that under both the Sixth Directive and the PVD the exclusion from the general rule applied whether the underlying transaction was a supply of goods or a supply of services.

120. The only authority to which I was referred which might have a bearing on the application of Article 28b(E)(3) Sixth Directive was *Staatssecretaris van Financien v Lipjes Case C-68/03*. It was relied on by Mrs Brown. Mr Lipjes was a yacht broker resident in the Netherlands who acted as an intermediary in relation to the purchase of two yachts by private individuals resident in the Netherlands from private individuals resident in France. Mr Lipjes was assessed to VAT for his intermediary services by the Netherlands tax authorities on the basis that his services were taxable by reference to the general rule in Article 9(1) and his business was established in the Netherlands. Mr Lipjes contended that he fell within the exclusion in Article 28b(E)(3) and his services were carried out in France. The tax authorities argued that Article 28b(E)(3) was not engaged where the underlying transaction was between two individuals and therefore non-taxable. That argument was rejected. There was also an issue as to how the place where the underlying transaction was carried out was to be determined which is not relevant for present purposes.

121. Mr Mandalia's principal submission in relation to Lipjes was simply that it was concerned with a supply of services where the underlying transaction was a supply of goods. That was the context in which the Advocate General's opinion and the court's decision should be viewed, and explains references to intermediary services rendered in connection with a supply of goods.

122. The Advocate General's opinion in Lipjes contains an analysis of the provisions governing the place of supply of intermediary services at [23] – [28] as follows:

> " 23. Generally speaking, intermediary services are supplied in the place where the supplier has established his place of business … That rule embodies the principle of taxation in the country of origin and makes it possible to locate the activity giving rise to the tax obligation in a particular territory and to identify the applicable national legislation.
>
> 24. The point of reference is transferred from the place of establishment of the supplier of the service to that of the customer where an intermediary acts in connection with the transactions referred to in art 9(2)(e), and those transactions are carried out on behalf of persons established in another country.

25. An exception to the general rule also applies where a third party acts as an intermediary in the intra-Community transport of goods or in services ancillary thereto, in which case the taxable transaction is deemed to occur in the place of the principal activity, in other words, in the place where the transport of the goods begins or the place where the ancillary activity is carried out, respectively. However, if the service is performed on behalf of a customer who uses in the transaction an identification number for VAT purposes which was issued by another member state, the territory of that member state becomes the point of reference for determining the place where the taxable transaction is performed.

26. Finally, the same criterion applies to establishing the place of the taxable transaction in relation to other types of intermediary services **in the trade of goods** between member states, in other words, it is the place of the transaction in connection with which the intermediary acts, subject to the exception referred to above in cases where the principal is registered for VAT in another member state.

27. To summarise, the services of an intermediary are subject to tax in the member state where:

1. the intermediary is established (the general rule laid down in art 9(1))[j];

2. the customer is established (final indent of art 9(2)(e));

3. the activity in connection with which the intermediary acts is carried out (first sub-para of art 28b(E)(1), (2) and (3)); or

4. the customer has a VAT identification number which is used in the transaction (second sub-para of art 28b(E)(1), (2) and (3)).

28. The situation in the main proceedings, where an intermediary acted on behalf of two individuals resident in the Netherlands in the acquisition of two yachts located in France, is only capable of being covered by the first or the third possibility.

[j] It appears that the Commission was mistaken in its assertion that art 9(1) does not apply to intermediary transactions. On the contrary, as I have just noted, that provision sets out the main criterion. The final indent of art 9(2)(e) refers only to activity by an intermediary on behalf of persons established in another country where that activity relates to certain services. **For its part, art 28b(E) concerns the activities of intermediaries in the intra-Community acquisition and transport of goods. All other intermediary activities are subject to art 9(1)**."

(Emphasis added)

123. Reference to the final indent of Article 9(2)(e) is to "the services of agents who act in the name and for the account of another, when they procure for their principal the services referred to in this point (e)". In other words intermediaries for the various specific services identified in Article 9(2)(e).

124. To paraphrase the Advocate General in Lipjes, identifying Articles from both the PVD and the Sixth Directive, the services of an intermediary are supplied:

(1) where the intermediary is established - pursuant to the general rule laid down in Article 43 (*Article 9(1)*);

or as exceptions to that general rule:

(2) where the customer is established - in the case of intermediaries taking part in the miscellaneous supplies referred to in Article 56 (*Article 9(2)(e)*) where that customer is established either outside the Community or in another Member State;

(3) in the place of departure of the transport - where the intermediary takes part in the intra-Community transport of goods (Article 50) (*Article 28b(E)(1)*;

(4) where ancillary activities are physically carried out - in case of intermediaries taking part in the supply of services consisting of activities ancillary to the intra-Community transport of goods (Article 54)(*Article 28b(E)(2)*);

(5) where the underlying transaction is carried out - in case of intermediaries providing services in connection with an underlying transaction not mentioned above (Article 44)(*Article 28b(E)(3)*).

But in cases which would otherwise be covered by Articles 44, 50 and 54, if the customer of the intermediary is VAT registered in a different Member State, the services of the intermediary are supplied in that Member State.

125. The approach to that analysis in relation to any particular supply is essentially to start with the exceptions looking to see if the circumstances fall within an exception. If so, the supply does not fall within the general rule (see *Dudda v Finanzamt Bergisch Gladbach Case C-327/94*).

126. In my view footnote (j) of the Advocate General on which Mrs Brown relies is not necessarily intended to be a definitive statement of law or of the Advocate General's reasoning. Firstly, it is a footnote. Secondly, it uses equivocal language in saying that "it appears" the Commission was mistaken. More importantly, in my view the Advocate General may have been making a general point as to the relationship between Article 9(1) and Article 28b(E). The reference to "goods" may not have been intended as a limitation to all three paragraphs of Article 28b(3). It is not clear to me that the Advocate General was addressing his mind to any distinction between underlying transactions in goods and services.

127. It is also instructive to compare the different text in Article 28b(E)(3) and Article 44, accepting that there was no material change in the way Article 28b(E)(3) operated when it was replaced by Article 44. Article 28b(E)(3) applies to intermediary services which "form part of transactions other than those referred to in paragraph (1) or (2) or in Article 9(2)(e)". Article 28b(E)(3) therefore operates in the nature of a "catch all". It appears to catch all intermediary services where the underlying transaction does not fall within the three provisions mentioned. That is perhaps not as clear in Article 44 which applies to intermediary services "other than those referred to in Articles 50 and 54 and in Article 56(1)".

128. If that reading of the two Articles is correct then it does call into question footnote (j) of the Advocate General's opinion. If Article 28b(E)(3) operates as a catch all then intermediary services could never have fallen within Article 9(1) or

within Article 43. However that is only a reference to intermediary services which satisfy the description used throughout these provisions, namely those provided by intermediaries acting "in the name and [for the account of / on behalf of] other persons". That would leave a category of intermediaries providing services who did not fall within that description, namely those who did not have power to bind their customer. That reading is consistent with my conclusion on the first Intermediary Argument that the ability to bind is a significant distinction specifically for the purposes of place of supply.

129. Mrs Brown also relied on what the Advocate General said at [42] as follows:

> " 42. Article 28b(E)(3) of the Sixth Directive applies to intermediary services carried out on behalf of an individual. Under the provision, the intermediary activity is deemed to be performed in the same place as the principal transaction. In view of the general scheme of the provision, para (3) must refer only to intermediary services rendered in connection with **intra-Community acquisitions and with the supply of goods** defined in art 28a(1), (3) and (5), whose location is established in accordance with art 28b(A) and (B)."

130. Mrs Brown submitted that the Advocate General set out the rationale for treating the supply of intermediary services in relation to the intra-community trade in goods as an exception to the general rule at [36] of his opinion:

> " 36. … [Intermediary activities] do not consist of a series of transactions which are all, in principle, subject to VAT, which all take place in different member states, and which must all be co-ordinated to ensure the neutrality of the tax and to safeguard the fiscal autonomy of each state; instead there is a single service, which is supplied on a professional basis, and which begins and ends in itself. Accordingly, **the intervention by a third party in the acquisition and movement of goods** within the Union is, for the purposes of VAT, deemed to occur in the place where the principal transaction is performed; in other words, in the place of departure, where the intermediary activity relates to transport (art 28b(E)(1)); in the place where the activity is physically performed, where the intermediary acts in connection with an ancillary activity (art 28b(E)(2)); and in the place where the operation is carried out, where the intermediary service relates to another type of operation (art 28b(E)(3))."

131. Mrs Brown submitted that despite the apparently wide language of Article 23b(E)(3) the Advocate General could not have been clearer in saying that the nature of the underlying transaction was critical. In particular, that Article will determine the place of supply of services by an intermediary *only* where the underlying transaction is an intra-community supply of goods. She further submitted that the judgment of the CJEU at [16], [17] and [21] implicitly approved footnote (j) and [36] of the Advocate General's opinion:

> " 16. The Court notes, as a preliminary point, that as regards the relationship between Article 9(1) and Article 28b(E) of the Sixth Directive, Article 28b(E) provides, with respect to intra-Community trade, for an exception to the general rule in Article 9(1). Article 9(1) in no way takes precedence, therefore, and the question must be asked in each case which of those two provisions applies (see, regarding the similar relationship

between Article 9(1) and Article 9(2) of the Sixth Directive, Case C-327/94 *Dudda* [1996] ECR I-4595, paragraphs 20 and 21).

17. Since the present case concerns intra-Community trade, Article 28b(E)(3) of the Sixth Directive is, in principle, applicable. It is therefore necessary to consider whether that applicability may be affected by the fact that the object of the intermediary service was a non-taxable transaction.

…

21. As stated by the Advocate General in paragraphs 36 to 40 of his Opinion, for the purposes of determining the place of an intermediary's activities, it does not matter whether the principal transaction is subject to VAT or whether the transaction is non-taxable."

132. It is not clear to me that the Court did implicitly approve footnote (j) and [36] of the Advocate General's opinion. The reference to intra-Community trade is not necessarily limited to trade in goods. Further, the CJEU was specifically concerned with an underlying transaction involving a supply of goods and there is force in Mr Mandalia's submission that what was said by both the Advocate General and the CJEU must be read in that light. It may simply reflect the particular facts of the case. In the final analysis, if Article 28b(E)(3) and Article 44 had been intended to relate only to intermediary services in connection with the supply of goods then one might expect the limitation to have been expressly stated.

133. Mrs Brown suggested, with a measure of understatement, that the opinion and judgment in Lipjes were not at all easy to follow. No doubt that reflects the extremely complicated rules which applied in relation to the place of supply of intermediary services. I was invited to persevere when all might hopefully become clear. Well, I have persevered and I am still not satisfied that the position is clear. In those circumstances if this issue affected the outcome of the appeal then I would have considered referring the question to the Court of Justice. In the light of my decision that the University's agents do not act in the name and on behalf of the University it is not necessary for me to make a reference.

134. I should add for the sake of completeness that Mr Mandalia submitted that the headings of the PVD for Article 43 and Article 44 gave some basis on which to resolve this issue. Both appear in Title V Chapter 3 PVD which is headed "*Place of Supply of Services*". It was suggested that such a heading would not be apt to cover Article 44 if that Article only applied to supplies by intermediaries in relation to underlying transactions involving goods. I don't accept that submission. A supply of services by an intermediary in those circumstances remains a supply of services.

(3) Input Tax Credit

135. I was told that the University recovers between 7-8% of its residual income tax through its partial exemption special method. In financial terms therefore this issue is not as significant as the previous issues, but it is important nonetheless.

136. The principles governing input tax recovery are well established and they were not controversial. I was referred to the analysis in *Mayflower Theatre Trust Ltd v HMRC [2006] EWCA Civ 116* ("Mayflower") and *North of England Zoological Society v HMRC [2015] UKFTT 287* ("Chester Zoo"). It is clear from the authorities that input tax incurred will be recoverable where the input has a direct and immediate link to, or is a cost component of taxable outputs of the business. The link may be to particular taxable supplies made by the business or to the business' supplies generally. In the latter case the inputs are referred to as overheads. Input tax in relation to overheads is recoverable where it has a direct and immediate link to the economic activity as a whole, subject to apportionment. Where an input is not attributable exclusively to taxable or exempt supplies it is treated as "residual input tax" and the amount recoverable must be found by apportionment using an appropriate methodology.

137. Both parties were content to rely on the summary given at [47] of Chester Zoo:

> " 47. The parties agreed that certain principles emerge from the authorities which have particular relevance for the present appeal and which we must apply to the facts found. We can re-state them as follows:
>
> (1) Input tax will be recoverable where it has a direct and immediate link or is a cost component of taxable outputs of the business. The taxable outputs may be individual outputs or part of a class of taxable outputs.
>
> (2) Cost components may be linked to a particular supply or supplies, or they may be linked to supplies generally, in which case they are overheads. Both can generate a sufficient link to lead to input tax being recoverable.
>
> (3) Any given input may be a cost component of more than one category of supply. It may be more closely connected to one supply than another. The search is for a 'sufficient link', not the closest link. In other words the search is for a direct and immediate link, not the most direct and immediate link.
>
> (4) Where an input is a cost component of both taxable and exempt supplies it will be treated as residual input tax and must be apportioned using an appropriate methodology.
>
> (5) The enquiry as to the sufficiency of the link will turn on an economic analysis of the relevant business and the use made of the input in an economic sense.
>
> (6) There is a limit to any enquiry into the subjective motives of the trader in incurring the input. However the economic purpose of the trader in incurring the input, objectively ascertained, is relevant.
>
> (7) Where an input is used to "hook" customers, such as the use of advertising, then it may at least be possible to link the input to all the various categories of supply which benefit from the hook.
>
> (8) The degree to which the cost of an input is borne by the output is highly material.

(9) The degree of profit derived from potentially linked supplies will be a relevant factor in the enquiry as to economic use, as will the relationship between the cost of the input and the price of the output to which it might be linked."

138. The University could not and did not suggest that the agents' fees were linked only to taxable supplies. Clearly there was a link to exempt supplies of education. The overhead analysis is therefore not relevant. If the University is to establish that it is entitled to recover as input tax VAT charged under the reverse charge it must show that the agents' fees had a direct and immediate link to taxable supplies made by the University or were a cost component of those supplies. Mrs Brown submitted that there was a direct and immediate link to all supplies made by the University. She emphasised the unitary nature of the University's economic activities. Exempt income was generated in the form of tuition fees, but according to Mrs Brown the University also had taxable income in the form of income from commercial research, health authorities, parking, farm income, retail, food and catering income. She submitted that all sources of income were used to fund the University's activities as a whole. The recruitment of non-EU students had such an impact on the commercial, social and charitable objectives of the University that the cost of recruiting such students was attributable to all supplies. The whole commercial proposition of the University depended on the students.

139. According to Mrs Brown the principal taxable supply is commercial research and at least some of the students recruited for PhD courses would be carrying out that research. As such the cost of recruitment was clearly a cost component of a taxable supply. Mrs Brown accepted that her argument was stronger in relation to agents' fees for recruiting postgraduate research students than for other students.

140. There was no evidence before me to support Mrs Brown's submission as to the nature of the University's income sources, or at least none was drawn to my attention. Having said that, Mr Mandalia did not take issue with Mrs Brown's description of those sources of income.

141. In *Royal Agricultural College v Customs & Excise Commissioners (Decision 17508)* the VAT Tribunal was concerned with an argument that input tax on marketing expenditure aimed at attracting students was partly recoverable as residual input tax. Reliance was placed on a link to taxable supplies in providing conference facilities and sales from the College's shop and bar. That argument was rejected and the decision was referred to in Mayflower as follows:

" 14. In the course of his judgment [in Dial-a-Phone] Jonathan Parker LJ reviewed the European and domestic case-law. It is of interest to note his reference (without adverse comment) to a decision of the VAT Tribunal which also has some parallels to the present case: *Royal Agricultural College v. Customs & Excise Commissioners* (decision no. 17508, unreported, 11 January 2002). In that case, the College contended that marketing expenditure which was primarily aimed at attracting students had a "direct and immediate link" not only with its (exempt) supply of educational services, but also with its (taxable) supplies in providing conference facilities and in selling goods in its

shop and bar. The VAT Tribunal rejected that contention, saying (in paragraph 42 of its decision):

> 'The direct and immediate link is clearly that of attracting students to the College. The link that thereby they contribute to the College's taxable activities such as, for example, using the bar, is indirect and not immediate …'"

142. Mr Mandalia relied on what was said at [116] – [120] of Chester Zoo and sought to distinguish Chester Zoo from the University. He submitted that the evidence in the present case did not make out a sufficient link between the recruitment of students and the taxable supplies made by the University.

143. I am not satisfied on the evidence before me that there is any sufficient link between the recruitment of non-EU students and the University's taxable income streams. There was no evidence before me as to how the outputs made economic use of those students. That is to be contrasted with the position in Chester Zoo where there was a great deal of evidence as to the nature of the link and the economic use made of the animals in the zoo's operations. Based on the evidence before me I consider that any link between commission paid to agents and the University's taxable supplies and/or its economic activity as a whole is indirect and not immediate.

Conclusion

144. I was asked to determine the appeal in principle, leaving the calculation of any sums due to or from the University to be worked out by the parties in light of the decision. My decision is as follows:

(1) Agents make a single supply of services to the University and make no supplies to students.

(2) The place of those supplies for the periods in question was determined by reference to the general rule in Article 43 PVD. It is where the agents were established. Article 44 had no application because the agents did not act in the name and on behalf of the University.

(3) The University is not entitled to recover as input tax VAT for which it is required to account by means of a reverse charge. There is no direct and immediate link between the commission paid to agents and any taxable output of the University or the economic activities of the University as a whole.

145. To that extent therefore the appeal is allowed in principle. If the parties are unable to quantify the sum due to or from the University in relation to any accounting period under appeal then each shall have permission to apply to the Tribunal within 90 days from the date of release of this decision.

146. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 26 JANUARY 2017

ANNEX 1

Extracts from the University's Standard Form Agency Agreement

2. Appointment

The University appoints the Agent to be the non-exclusive agent of the University for the marketing and promotion of, and solicitation of Applicants in the Territory for, recruitment to the Courses, and the Agent agrees to act in that capacity, subject to the terms and conditions of this Agreement.

4. The Agent's Obligations

4.1 During the Term of this Agreement the Agent will:

4.1.1 promote and market, in the Territory, the Courses and secure Applicants for the Courses complying at all times with the University's reasonable instructions;

4.1.2 provide, publicise and disseminate such information and material relating to the Courses as the University may from time to time provide;

4.1.3 Ensure each Applicant fully completes an Authority Form before receiving any assistance or advice from the Agent and the Agent shall submit all such completed forms to the University without delay;

4.1.4 advise and assist Applicants in completing a UCAS application form for Courses to which applications are made direct to the University;

4.1.5 advise and assist Applicants in completing applications form/s for Courses to which applications are made direct to the University;

4.1.6 maintain adequate records and contact details for prospective students and provide these to the University if requested;

4.1.7 only to submit applications from suitably qualified candidates;

4.1.8 only submit applications from candidates who reasonably intend to register at the university;

4.1.9 use the University's online postgraduate application form for submitting Applicants' applications for the Courses. From September 2011 only online applications will be accepted;

4.1.10 ensure that all application forms submitted by the Agent for enrolment of Applicants, or submitted by Applicants following the Agent's introduction in relation to which the Agent seeks Commission, shall bear a stamp or other identification of the Agent (eg through the University's online application system); For undergraduate applicants, applications should be submitted through UCAS and a signed authority form must be sent immediately to the International Office.

4.1.11 comply with the University's practical requirements as communicated from time to time to the Agent;

4.1.12 follow the University's Policies notified to the Agent from time to time;

4.1.13 invoice the University for payment of commission based on an agreed list of Students and in accordance with clause 8. The Agent will send the proposed list of registered students to the University for this purpose by 31 October, in each year of the Agreement and the Agent will invoice the University within 1 month of the list being agreed by the University;

4.1.14 visit the University at least once every two years to familiarise themselves with the Courses available and to discuss matters of mutual interest and concern with officers of the University and with appropriate members of academic staff. With the exception of accommodation that is provided and paid for by the University, all costs relating to the visit will be borne by the Agent.

4.1.15 provide to the University by 31st October in each year of the Agreement an annual marketing plan including all advertising and promotional activities to be undertaken for the University during the forthcoming Academic Year;

4.1.16 agree annual recruitment Student recruitment targets with the University;

4.1.17 where appropriate, liaise with staff in the British Council and EUKP and foster good working relationships with those groups;

4.1.18 conduct the promotion and marketing of the University and the Courses with all due care and diligence and so as not to damage the reputation of the University and maintain good relations with Applicants and potential Applicants and Sponsors in accordance with sound academic and commercial principles and in doing so will at all times look after the University's interests and act dutifully, honestly, lawfully and in good faith;

4.1.19 where possible complete the British Council agent training programme and attain British Council preferred agent status;

4.1.20 comply with all relevant legislation, regulations and good practice in the Territory (including but not limited to in relation to the premises from which the Agent operates) and obtain any necessary permissions, licences or make payment of any taxes in order to operate legally in the Territory; and

4.1.21 will not engage in any activity, practice or conduct which would constitute an offence under the UK Bribery Act 2010; and

4.1.22 indemnify, keep indemnified and hold harmless the University from and against any and all expenses, whether direct, indirect or consequential loss, damage or liability (whether criminal or civil) suffered and legal fees and costs incurred by the University resulting from a breach of this Agreement or other negligent Acts or omissions by the Agent.

5. Restrictions

5.1 The Agent agrees:

…

5.1.3 not to seek or accept payment (except for UCAS fees) from any Applicant for carrying out their obligations under this Agreement, unless the University has agreed in advance to the charging of fees to Applicants for the specific obligation;

…

5.1.6 not to describe themselves as an agent or representative of the University except as expressly authorised by this Agreement, not to describe themselves as the University's sole agent (except if permitted in writing by the University) and in particular not to represent themselves as capable of admitting Applicants to the Courses or as being able to guarantee enrolment at the University;

6. The Obligations of the University

6.1 The University agrees:

…

6.1.5 to make payment of commission in accordance with schedule 2 for Students who have paid the first instalment of the international tuition fee in full for the current Academic Year as agreed at 31 October in each year of the Agreement …

7. Marketing

7.1 During the Term each of the Parties shall co-operate in the development of the Agent's marketing strategy and the Agent agrees to give reasonable consideration to any comments that the University may have as to such marketing strategy.

8. Commission

...

8.3 Payment of the Commission will only be made for Applicants who on the advice and action of the Agent apply and become Students, and pay the international tuition fee in accordance with clause 6.1.5

…

8.4 If the Applicant changes their Agent, or appoints the Agent after submitting a direct application, the agent must immediately seek the university's permission to claim commission. If commission claims for the same student are received from more than one agency, the University's decision on payment is final.

…

SCHEDULE 3

Authority Form

NEWCASTLE UNIVERSITY
AUTHORITY FORM

This form is to be completed by applicants who wish to use the services of an authorised Newcastle University agent.

It is to be submitted on the understanding that the Agent will assist the applicant with their application, visa processing and any related procedures such as booking accommodation, airport pick-up etc.

Please complete your details below …

…

Details of Agent you wish to use:

…

ANNEX 2

Extracts from MABECS Website

MABECS was set up in 1985, to assist students in Malaysia to find suitable places, at universities in the United Kingdom.

We were one of the first advisory and student placement agencies to be established in the country and the region and we have continued to focus on specialist counselling on higher study options in the UK

Since our establishment, students we have counselled, have been able to take up degree studies at every university in the UK, at both undergraduate and postgraduate level. Working closely with education institutions in Malaysia, MABECS has counselled many thousands of students and helped them to find the most suitable courses and universities for their studies.

Our consultants have all been educated in the United Kingdom and so are able to give first hand information on study and life in the UK. We also draw from the expertise of a variety of professionals – Malaysian and expatriate, who provide added support and expertise, to the services that MABECS provides.

Our strongly student-centred approach to counselling, means that we give students the fullest possible information on all available options, to help them make sensible decisions.

Advice, information and assistance with applications, are given free of charge and our consultants are always ready to sort out any problems that may arise, and to brief you on preparations for travel to the UK.

…

HOW WE CAN HELP

Advice

During your free advisory sessions your consultant will ensure that you have detailed information on the:

- range of courses and universities available to you in your chosen subject
- content and structure of the different courses and the range of specialisations offered
- entry requirements and competitiveness of the different universities
- possible alternative courses you could consider
- application process and how to make it work for you
- procedures for registering and sitting for the PTE Academic at MABECS. MABECS in collaboration with Pearson, is a test centre for the PTE Academic. PTE Academic is a computer-based English language test which measures the core skills: listening, reading, speaking and writing
- procedures for registering for the IELTS at the British Council. MABECS is a British Council IELTS authorised registration agent and will be able to assist you with registering for the IELTS at the British Council

Assistance

Having discussed these issues and the other aspects of making a choice about higher education – please refer to the MABECS Guides on Choosing a Good University – your consultant will then:

- supply you with and help you complete your application form(s) – either paper or electronic based
- send your application form(s) and any accompanying documentation to the UK by courier, at no charge to yourself
- monitor the progress of your application(s) and give appropriate advice at important decision making stages
- act as an intermediary between you and the university should the need arise
- inform you of any visits to the MABECS office by various university representatives
- assist you with the visa application process
- support your application and progress in anyway possible according to our strict rules of conduct, impartiality and trustworthiness

Information

Our resource centre, located in our PJ office, is open to you at all times during office hours and holds:

- A wide range of prospectuses and allied information
- University CDs
- Course leaflets
- Postgraduate research specialisation details
- Application forms for all courses at all levels
- Research Assessment Exercise listings
- Scholarship information

Do call in and make full use of these resources that are at your disposal.