Neutral Citation: [2022] UKFTT 00134 (TC)

Case Number: TC 08465

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2017/02434

VAT – insurance intermediary exemption – whether services supplied by associated company were within that exemption – service of generating insurance leads – InsuranceWide and other case law considered – held, services within the exemption – global assessment for long accounting period from 2009 to 2015 – whether time limit ran from two years from the end of that long period or from the end of each three month period within that longer period – penalty charged – whether reasonable excuse – whether mitigation – appeal allowed

Heard on: 15-18, 24, 26 November 2021
Judgment date: 21 April 2022

Before

TRIBUNAL JUDGE REDSTON

Between

STAYSURE.CO.UK LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Valentina Sloane QC and Ms Khatija Hafesji of Counsel, instructed by Brian White Ltd

For the Respondents: Mr Peter Mantle of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION AND SUMMARY

1. The hearing of this appeal took place by video. A face to face hearing was not held because the hearing had been listed during the coronavirus pandemic. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.

2. Staysure.co.uk Ltd ("Staysure" or "the Appellant") is an insurance intermediary based in the UK which specialises in providing travel insurance for people aged 50 or over. It receives certain supplies from Intervest Limited ("Intervest"), a related company in Gibraltar. On 28 October 2016, HM Revenue & Customs ("HMRC") decided that the supplies received by Staysure from Intervest were standard rated and that the reverse charge provisions at Value Added Taxes Act 1994 ("VATA") s 8 applied. HMRC registered Staysure for VAT with effect from 1 April 2009.

3. On 26 January 2017, HMRC issued Staysure with a "global" VAT assessment of £7,915,276 ("the Assessment") for the period from 1 April 2009 to 31 March 2015 ("the relevant period") under VATA s 73(1).

4. On 6 February 2017, HMRC issued Staysure with a belated notification penalty ("the Penalty") of £1,187,290. In the course of the hearing, HMRC informed Staysure and the Tribunal that they had reconsidered the Penalty, and asked the Tribunal to mitigate it to £216,821.

5. The appeal raised the following issues, each of which are summarised below

   (1) whether the Tribunal had the jurisdiction to hear the appeal against the Assessment, as Staysure made a VAT return after it had filed its Notice of Appeal;

   (2) whether Intervest's supplies to Staysure were exempt or standard rated;

   (3) whether the Assessment was out of time; and

   (4) whether to uphold, cancel or mitigate the Penalty.

Issue One: jurisdiction

6. VATA s 83(1)(p)(i) provides that a person such as the Appellant who has been issued with an assessment under s 73(1), only has a right of appeal "in respect of a period for which the appellant has made a return under this Act". Staysure filed its Notice of Appeal with the Tribunal on 17 March 2017 and made its VAT return on 22 January 2018. Staysure therefore did not have a right to appeal the Assessment at the time it filed the Notice of Appeal.

7. I decided that a Notice of Appeal is only valid if a person has a right of appeal at the date of filing the Notice, and it was not possible retrospectively to validate a Notice by making a subsequent VAT return. However, Staysure applied for permission to make a late appeal against the Assessment; HMRC did not object, and having considered the relevant case law I allowed that application. The Tribunal therefore had the jurisdiction to decide Staysure's appeal against the Assessment

Issue Two: the insurance intermediary exemption

8. Intervest was contractually obliged to provide insurance leads to Staysure and was paid only when a lead resulted in a concluded sale. It fulfilled that obligation in the following ways:

(1) It placed targeted advertising in the press, on television and online.

(2) It owned and operated the domain staysure.co.uk and the related website ("the Website"). After potential Staysure customers were attracted to the Website by advertising, they were encouraged to ask for an online insurance quotation.

(3) It had designed, maintained and operated a bespoke quote engine which employed complex algorithms to produce a personalised price for each customer. The quote engine took into account the person's age, medical history. personal details and other risks, and resulted in an offer which was competitive from the customer's perspective while also maximising profit for Staysure, the underwriter, and Intervest.

9. Having considered the facts and the relevant case law, including *InsuranceWide and TraderMedia* [2010] EWCA Civ 422 ("*InsuranceWid*e"), I decided that Intervest's services were within the insurance exemption, essentially because they were linked to essential aspects of the work carried out by Staysure, namely the finding of prospective clients and their introduction to the insurer with a view to the conclusion of insurance contracts.

10. That conclusion was sufficient to allow Staysure's appeal. However, the other Issues were carefully argued by both Counsel, who asked that the decision cover all Issues in case this appeal goes further.

Issue Three: whether the Assessment was out of time

11. The Assessment was issued on 26 January 2017 for a single long period which began on 1 January 2009 and ended on 31 March 2015. In issuing the Assessment, HMRC relied on Reg 25(1)(c) of the VAT Regulations 1995, which gives them the discretion to "vary the length of any period or the date on which any period begins or ends".

12. VATA s 73(6)(a) allows HMRC to make an assessment two years after the end of the prescribed accounting period and s 73(6)(b) allows them to make an assessment one year after evidence of facts sufficient to justify the making of the assessment comes to their knowledge.

13. In this case, HMRC relied only on the two year time limit in s 73(6)(a). Mr Mantle submitted that this time limit ran from the end of the long accounting period. Ms Sloane said that such a reading undermined the purpose of the provision, because HMRC would always satisfy the two year time limit if it directed a long accounting period. In other words, on HMRC's reading, the time limit effectively fell away. Ms Sloane submitted that the two year time limit instead ran from the end of the first three month period which fell within the long period.

14. Both parties referred extensively to case law, but none of the cited judgments was binding. I therefore considered for myself the statutory interpretation of the relevant provisions. I decided Ms Sloane was correct, and that the term "prescribed accounting period" in s 73(6) means a three month period. The Assessment was thus invalid except in relation to the last three month period. To that extent, I would therefore have allowed the appeal on this alternative ground.

Issue Four

15. Assuming I am right on Issue Two, the Penalty does not arise. However, were I to be wrong on Issue Two, the Penalty remains in issue, even if the Assessment was out of time (Issue Three), see §309.

16. I therefore considered whether there was no Penalty because Staysure had a reasonable excuse. Both parties agreed that Staysure's owner, Mr Ryan Howsam, had taken professional advice, and that as a result genuinely believed the supplies were exempt.

17. However, I agreed with Mr Mantle that Staysure had not shown that this belief was reasonable: there was no evidence at to when the advice had been taken, from whom, on the basis of what information or whether it was in any way caveated. I found that Staysure did not have a reasonable excuse.

18. HMRC accepted that the Penalty should be mitigated from £1,187,290 to £216,821. Ms Sloane submitted that it should be further mitigated to nil. I decided that it should be further mitigated to £159,171, to take into account the extent of Staysure's co-operation during the extremely lengthy enquiry period.

Overall conclusion

19. For the reasons summarised above, this appeal is decided as follows:

(1) the Tribunal has the jurisdiction to decide the appeal against the Assessment (Issue One);

(2) Intervest made single supplies of services which come within the exemption for insurance intermediary services, with the result that Staysure was not required to register for VAT in the relevant period, and the Assessment was not valid (Issue Two);

(3) if the services had instead been standard rated, the Assessment would have invalid because it was out of time (Issue Three); and

(4) were I to be wrong on Issue Two, so that Intervest's supplies were standard rated, Staysure would be liable to the Penalty because it did not have a reasonable excuse, but the amount of the Penalty would be mitigated to £159,171.

EVIDENCE

20. The Tribunal was provided with Bundles, other documents, and witness evidence.

The Bundles

21. The Bundle was organised by the Appellant, but put into pdf form and served by HMRC. It included:

(1) communications between the parties and between the parties and the Tribunal;

(2) certain internal HMRC communications, redacted in part;

(3) the witness statements (see further below);

(4) exhibits to the witness statements, including a service agreement signed by Staysure and Intervest dated 1 June 2013 ("the Contract"), and a draft of the Contract prepared in 2012;

(5) a contract with the underwriter, Europäische Reiseversicherung A.G. ("ERV"), dated October 2013; and

(6) various extracts from the Website.

22. At the same time, I was provided with a Supplementary Bundle containing the background papers relating to two case management decisions published under references [2018] UKFTT 584 (TC) and [2019] UKFTT 0524 (TC). In the event, neither party referred to the Supplementary Bundle.

The other documents

23. On the first day of the hearing, HMRC applied to admit print outs of historical versions of staysure.co.uk webpages for different points during the relevant period, which had been obtained using "The Wayback Machine" website. Ms Sloane did not object, and these were admitted into evidence.

24. During the hearing both parties provided extracts from HMRC's VAT Civil Penalty Manuals ("VCP"), and HMRC provided a copy of VAT Notice 700/41 on late registration penalties. No objection was raised to these documents, and they were admitted into evidence.

The witness evidence

25. Mr Ryan Howsam founded and continues to own both Staysure and Intervest. He provided a witness statement, gave oral evidence led by Ms Sloane, was cross-examined by Mr Mantle and answered questions from the Tribunal. His evidence was entirely honest, straightforward and credible, as Mr Mantle accepted.

26. Mr Hans Stocker is an employee of Intervest and a specialist in information technology ("IT"). He was first engaged by Intervest on a consultancy basis in 2010, and moved to a full-time role in 2012 as interim Chief Technology Officer, focusing on improving the insurance websites and administration systems. Between April 2013 and January 2015 he was interim Head of Pricing, with responsibility for the redesign and optimisation of the pricing systems and quote process. Since January 2015 he has worked on IT and pricing. Mr Stocker provided a witness statement, gave oral evidence led by Ms Sloane, was cross-examined by Mr Mantle and answered questions from the Tribunal. His evidence was entirely honest, straightforward and credible, and Mr Mantle agreed this was the position.

27. Ms Forsyth is a Senior Officer at HMRC. She led the enquiry into the supplies made by Intervest to Staysure, and issued the decision letter dated 28 October 2016, on the basis of which the Assessment was issued; she also made the decision to issue the Penalty. Ms Forsyth provided a witness statement, gave oral evidence led by Mr Mantle and was cross-examined by Ms Sloane. She too gave entirely honest, straightforward and credible evidence.

Findings of fact

28. On the basis of the evidence provided and summarised above, I make the findings of fact in this decision. Those findings are set out under each of the four Issues in dispute.

ISSUE ONE: JURISDICTION OF THE TRIBUNAL

29. Issue One was whether the Tribunal had the jurisdiction to decide the Appellant's appeal against the Assessment, given that the Notice of Appeal was filed before Staysure had made a VAT return.

THE LAW

30. The Assessment was raised under VATA s 73(1). A person's right to appeal against an assessment raised under that subsection is given by VATA s 83(1)(p), which so far as relevant to this decision, reads (emphasis added):

> "…an appeal shall lie to the tribunal with respect to any of the following matters:
>
> …
>
> (p) an assessment
>
> (i) under section 73(1) or (2) in respect **of a period for which the appellant has made a return under this Act;** …"

31. In *R (oao TN (Vietnam)) v FTT (Immigration and Asylum Chamber)* [2018] EWHC 3546 (Admin)*,* ("*TN (Vietnam)*"), Singh LJ gave the only judgment, with which Sharp and Jackson LJJ both agreed. He said at [32]:

> "…questions of jurisdiction cannot be determined by consent, still less by default. The question whether or not a tribunal has jurisdiction to determine a question is a question of law. The answer to it depends upon the correct interpretation of the legislation creating its jurisdiction and cannot depend on the conduct of one of the parties."

FINDINGS OF FACT

32. Staysure is an FCA regulated insurance broker based in the UK. From 1 January 2009, Intervest, a related company based in Gibraltar, began providing services to Staysure. Both Staysure and Intervest considered these services to be exempt from VAT, but the position changed on 1 April 2015, when the businesses reorganised and the services were standard rated.

33. Meanwhile, on 17 December 2013, HMRC wrote to Staysure seeking information about the services supplied by Intervest. After a lengthy period of discussions between Ms Forsyth and Staysure, and internally within HMRC (see Issue Four), Ms Forsyth finally issued her decision letter on 28 October 2016. Under the heading "Next steps" she said that Staysure's registration would be backdated to 1 January 2009, and she would issue a single VAT return covering the period from 1 January 2009 to 31 March 2015, the day before Staysure registered for VAT. She also set out a schedule setting out the value of Intervest's services supplied to Staysure for each year from 2009 to 2014, and the VAT calculated on the basis of those figures.

34. On 19 December 2016, Ms Forsyth sent Staysure a manual VAT return together with a letter which said "please send the completed VAT return to me by 16 January 2017…if we do not receive a return for this date, we will raise an assessment for this period". No return was received, and on 26 January 2017 HMRC issued the Assessment, based on the single long VAT period from 1 January 2009 to 31 March 2015.

35. On 23 February 2017, Mr Bird, an HMRC Senior Review Officer, issued a review decision, in which he stated that as there was no right to appeal the Assessment, it was not

covered in his review decision. He reviewed only (a) HMRC's decision that Staysure was required to register for VAT and (b) the decision that Staysure was liable to a penalty.

36. On 17 March 2017, Staysure filed a Notice of Appeal to the Tribunal which stated that the amount in dispute was £9,102,567. That figure was the sum of the Assessment and the Penalty. HMRC's decision letter and the review letter were attached to the Notice of Appeal. The Tribunal did not identify that the Appellant did not have a right to appeal the Assessment.

37. On 22 November 2017, HMRC filed and served their Statement of Case. This said at paragraph 3 that the Appellant was not entitled to appeal the Assessment as it had not filed a VAT return.

38. On 22 January 2018, the Appellant filed a VAT return, which stated that the VAT was nil, and that the value of purchases and all other inputs was £40,182,187.

39. On 19 September 2018 and 6 August 2019 interlocutory hearings took place. Both concerned disclosure of documents, and neither the parties nor the Tribunal considered whether the Appellant had a right to appeal the Assessment.

40. On 14 October 2020, HMRC issued an amended Statement of Case. This repeated the passage that the Appellant was not entitled to appeal the Assessment, but added (without further comment) that "the Appellant filed a nil return on 22 January 2018".

41. On 2 November 2021, HMRC filed and served their skeleton argument. This included the following passage:

> "When Staysure commenced this Appeal on 25 March 2017 it had not filed a VAT Return for the Period. Staysure only filed a VAT return for the Period, a 'nil' return, on 22 January 2018. Thus, when Staysure commenced this appeal it did not fulfil the requirement imposed by s 83(1)(p)(i) VATA that the appeal must be 'in respect of a period for which the appellant has made a return under the Act.' However, in all the circumstances of this case, given that a VAT Return for the Period has now been made by Staysure, HMRC does not pursue any point it may have based on the initial failure to make a VAT return for the Period."

THE ISSUE

42. The Tribunal is a creature of statute, and only has the jurisdiction given by statute. VATA s 83(1)(p)(i) provides that a person such as the Appellant who has been issued with an assessment under s 73(1), only has a right to appeal "in respect of a period for which the appellant has made a return under this Act".

43. It is clear from the findings of fact that Staysure filed its Notice of Appeal with the Tribunal on 17 March 2017 and filed its VAT return on 22 January 2018. Thus, at the time the Notice of Appeal was filed, Staysure did not have a right to appeal the Assessment.

44. Although by the time of the hearing, HMRC said that it was not "pursuing any point it may have based on the initial failure to make a VAT return", that does not decide the issue. As Singh LJ said in *TN (Vietnam),* whether or not a tribunal has jurisdiction to determine a matter is a question of law which cannot be determined between the parties by consent.

45. I considered:

(1) whether the Notice of Appeal had been retrospectively validated as the result of Staysure's later filing of its return; and if not

(2) whether Staysure should be given permission to make a late appeal.

Retrospective validation?

46. Ms Sloane submitted that the Notice of Appeal had been retrospectively validated; Mr Mantle said only that HMRC were reserving their position on whether retrospective validation sufficed to meet the statutory test. .

Case law

47. A small number of Tribunal judgments have involved appellants who had been assessed under VATA s 73(1) but had not made a VAT return. These include my own decision in *Yun He v HMRC* [2020] UKFTT 317 and two others: *Withington v HMRC* [2020] UKFTT 319 (TC) (Judge McNall and Ms Stott) and *Shaft Sports Ltd v CCE* [1983] VATTR 180, a decision of the VAT and Duties Tribunal.

48. The appeals of all those appellants were struck out for lack of jurisdiction under Rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), which provides:

> "the Tribunal must strike out the whole or a part of the proceedings if the Tribunal does not have jurisdiction in relation to the proceedings".

49. However, none of those appellants had subsequently filed a VAT return for the period in dispute. I was unable to identify any case which had considered the position of an appellant who had filed a VAT return, as Staysure had done, after filing the Notice of Appeal.

The Tribunal's view

50. In my judgment, the natural reading of the statutory provision is that a person has to have a right of appeal before they make the appeal, and a Notice of Appeal cannot be retrospectively validated.

Permission to make a late appeal?

51. Ms Sloane said that if the Notice of Appeal already filed was held not to encompass the Assessment, then Staysure was making an oral application for permission to make a late appeal. Mr Mantle said that HMRC did not object either to the application being made orally, or to the Tribunal granting permission.

Oral application

52. Rule 20 of the Tribunal rules requires that "A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal", and goes on to specify certain other requirements. However, Rule 7 is headed "Failure to comply with rules etc", and provides:

> "(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

> (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—
>
> (a) waiving the requirement;
>
> (b) requiring the failure to be remedied;
>
> (c) exercising its power under rule 8 (striking out a party's case);
>
> (d) restricting a party's participation in proceedings;…"

53. In the light of all the circumstances of the case, I decided it was in the interests of justice to waive the requirement that the appeal be made in writing. I took into account in particular that (a) this Issue had not been raised by the Tribunal until the beginning of the hearing, and (b) HMRC did not object.

Grant of permission

54. The principles to be applied when deciding whether or not to give permission to make a late appeal are set out in *Martland v HMRC* [2018] UKUT 178 (TC) at [44], in summary:

(1) establish the length of the delay and whether it was serious and/or significant;

(2) establish the reasons why the default occurred; and

(3) balance all the circumstances of the case.

55. VATA s 83G(1)(a) provides that an appeal is to be made within thirty days from the date of the decision being appealed. The Assessment was issued on 26 January 2017, and permission was sought in the course of this hearing, over four years later. In *Romasave v HMRC* [2015] UKUT 254 (TCC), the UT said at [96] that:

> "In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

56. The length of the delay was therefore both serious and significant. The reason for the delay is that Staysure did not consider it necessary to take any steps to rectify the position other than filing its VAT return, and the Tribunal also did not identify the problem. Although HMRC did flag the point, they withdrew their objections once the return had been filed.

57. The circumstances of the case include the length of the delay, the reasons for the delay, the need for statutory time limits to be respected and the merits of the case, which HMRC's own internal emails had concluded were strong (see further §269). Another relevant factor was that the original Notice of Appeal encompassed HMRC's decisions that Staysure was required to be registered for VAT, and the facts and law relevant to that issue were essentially the same as those which would be relevant to whether the Assessment had been correctly raised on the basis that the supplies were standard rated. Allowing the late appeal would thus not impact on the time or cost involved in considering Issue Two, and Issue Four was part of the original grounds of appeal. It is true that, if permission were refused, Issue Three would fall away. However, taking into account all relevant factors, I decided that the balance favoured giving Staysure permission to make a late appeal against the Assessment.

ISSUE TWO: WHETHER THE SUPPLIES WERE EXEMPT

FINDINGS OF FACT

58. In this part of my decision, I make findings of fact about Staysure and Intervest about the nature of their businesses and the relevant background. Findings of fact about the issuance of the Assessment have already been set out as part of Issue One, and findings about the enquiry period are considered as part of Issue Four.

The companies and the underwriter

59. Staysure specialises in providing travel insurance for people aged 50 or over, including those with medical conditions who are likely to find it more difficult to get insurance from other providers. Staysure also provides home insurance and cover for holiday homes and motor vehicles, but taken together these formed less than 5% of its business. Mr Howsam owns and controls Staysure.

60. The insurance was underwritten by a single underwriter. At the beginning of the relevant period, the underwriter was ERV; ERV was later replaced by Mutualidad de la Agrupación de Propietarios de Fincas Rústicas de España ("MAPFRE"). In 2013, ERV in turn replaced MAPFRE. I return to the circumstances of this change at §78. Each of these underwriters contracted with Staysure to provide insurance to Staysure's customers.

61. Mr Howsam also owns and controls Intervest, which in turn owns Intervest Software Technologies (Pvt) ("IST"), a company based in Sri Lanka which provides Intervest with programming and software. By the end of the relevant period, Intervest employed 19 staff based in Gibraltar, and IST employed 21 staff in Sri Lanka**.** Intervest was licensed by Staysure to use the Staysure brand.

62. On 1 June 2013, Staysure and Intervest signed the Contract. This opened by stating that its purpose was to "confirm the existing arrangements that have been in place since 1 January 2009 and to specify in more detail the obligations of both parties". HMRC did not seek to argue that the position had been different in any material respect between 2009 and the signing of the Contract. The Tribunal was also provided with a draft of the Contract, which had been created at some point in 2012. Both the draft and the Contract included a statement that the parties "consider the supplies under this Agreement to be VAT exempt".

63. The Contract provides that Intervest be paid commission of 28% of written premium (excluding insurance premium tax) per insurance contract transaction arranged, including renewals and repeat business. In 2009, Intervest charged Staysure £1.45m, by 2014, this had risen to £10.97m**.**

Intervest's contractual obligations

64. The Contract provided that Intervest had the following obligations:

(1) To generate insurance leads for Staysure from off line and on line sources based on criteria specified by Staysure.

(2) To operate an online quote service with 99.9% availability; to filter the leads based on criteria specified by Staysure, and to provide automated quotes where additional underwriting is not required.

(3) To provide estimates of planned lead generation in order to assist Staysure's resource planning, and to moderate the plans if Staysure does not have the resources to deal with the planned leads;

(4) To report on where prospective customers are falling out of the quotation and lead selection process, and in so doing demonstrate opportunities for further product development.

65. I accepted Mr Howsam's and Mr Stocker's evidence, supported by the Contract, that Intervest's primary obligation was the generation of insurance leads for Staysure from both off line and on line sources based on criteria specified by Staysure, and that the other contractual requirements were integral parts of that same obligation: the quote service filtered the leads; the process of generating the leads had to be managed so as to fit with Staysure's available resources, and provided opportunities for further product development. Intervest carried out these obligations in the ways explained below.

The Website

66. The Bundle included a registration certificate dated 6 April 2016 from Nominet which stated that the domain name staysure.co.uk was owned by Intervest. Mr Howsam was asked in cross-examination when that domain name had been purchased and by whom. Mr Howsam was unsure as to the date, but said he probably purchased it in his own name before Intervest was set up, and had subsequently transferred it to Intervest.

67. Both he and Mr Stocker gave evidence that, although the Appellant's name is Staysure.co.uk Ltd, it was Intervest which owned the staysure.co.uk domain name and the Website throughout the relevant period. Mr Mantle challenged that evidence on the basis that there was no documentation as to the date of transfer from Mr Howsam to Intervest, but he agreed that both Mr Howsam and Mr Stocker were honest and reliable witnesses. He also did not seek to argue that the terms and conditions ("T&C") page of the Website, which is discussed at §85-§87, was relevant in this context. I accept Mr Howsam's and Mr Stocker's evidence and find as a fact that Intervest owned the staysure.co.uk domain name and the Website throughout the relevant period.

68. Intervest also owned and operated a small number of other websites which provided leads for Staysure, including TravelInsuranceMedical.co.uk and InsureMe4.co.uk and, but these were little used. The Website was the most significant by far.

Search engine optimisation

69. Search engine optimisation means using targeted placement of announcements and links in order to improve the quality and quantity of potential customers who connect with a website; this is also known as "organic search".

70. Intervest established a strategy for search engine optimisation to attract customers which fitted Staysure's market. For example, in advance of "world hypertension day" on 17 May 2014, Intervest issued a news item which by careful usage of key words and other triggers within its first few lines led to it being selected as the best match for a user searching for information when the words "world hypertension day" were input into the Google search engine. Clicking on that link in Google leads to the Website, which not only contains information about hypertension, but also says (where the underlining indicates a link):

"**Need a quote today?**

Don't forget to take out travel insurance when you are travelling in the UK or abroad. Talk to our travel insurance experts on [number] or visit us online for a quote."

71. Intervest's team, together with third party suppliers contracted to Intervest, identified opportunities for this type of targeted search optimisation. Designing news items so they come at or near the top of a user's search requires a combination of skills, including use and understanding of algorithms as well as an awareness of external events and topical issues, such as world hypertension day. Other examples included "stroke awareness month" and "Parkinson's awareness week". It takes time to design links which effectively use organic search, but there are few external costs: for example, Intervest's marketing budget for 2014 allocated £25,199 to organic search out of a total of £7,652,347**.**

Other advertising and marketing

72. In addition to search engine optimisation, Intervest generated leads targeted at the customer segments which fit Staysure's market using the methods set out below. Traffic to the Website "spiked" after a marketing campaign, so demonstrating a direct link between the advertising the Website and the generation of leads. The advertising and marketing services were supplied to and utilised by Intervest, not by Staysure.

Paid search

73. Intervest pays search engines such as Google to place adverts and links at or near the top of the first page of search results. The more people click on these links to reach the Website, the higher the cost to Intervest. It is therefore important that the adverts and links are targeted at potential clients with profiles matching Staysure's target market, as Intervest would otherwise incur heavy costs without receiving any related remuneration; it is paid only when Staysure contracts with a customer to sell insurance (see §82). Intervest allocated almost 50% of its 2014 marketing budget to paid search (£3,688,357 out of £7,652,347).

Other advertising and marketing

74. Intervest also used the following types of advertising and marketing, all of which gave the link to the Website and a phone number for Staysure's call centre:

(1) the placement of appropriate advertisements in newspapers, magazines and on television; in 2014 these totalled around 33% of the total marketing budget;

(2) digital advertising on social media sites such as Facebook, so that when a person clicked on a link, he would be taken to the Website;

(3) email and SMS adverts to potential customers; and

(4) advertising via affiliates who specialised in certain parts of Staysure's market.

The online quote engine

75. As set out in the Contract, Intervest was required to "operate an online quote service…which will filter the leads based on criteria specified by [Staysure] and provide automated quotes for risks where additional underwriting is required". IST worked with Intervest to develop an online quote engine entirely from scratch. The quote engine took into account a person's age, medical history. personal details and other risks, and either provided an insurance quotation, or rejected the person as an uninsurable risk. The quote engine was

thus a key way of filtering leads and generating sales for Staysure. Staysure did not have the staff or the technology to design, build and operate its own quote engine.

76. The critical elements of the quotation process lay in the setting of (a) the price paid to the underwriter (the "Net Price"), and (b) the price charged to the customer (the "Retail Price"), as explained below.

The Net Price

77. When setting the Net Price, Intervest used statistical methods to understand the probability of a customer making a claim and the probable cost of that claim. It did this by using information captured during the quotation process i.e. the customer's age, any pre-existing medical conditions, whether they were travelling alone, their destination and the length of the trip. The quote engine put this information together to generate a personalised price that covered the risk of a claim being made leaving a profit margin for the underwriter. It also established the levels at which Intervest would decline to offer the customer a quotation.

78. The importance of this part of the quote engine was demonstrated by the negotiations around the change of underwriter from MAPFRE to ERV. It was well-known in the insurance market place that MAPFRE had lost significant money underwriting business brokered by Staysure, and had decided to terminate its contract with Staysure for that reason. Mr Stocker was able to show ERV that the online quote engine could be used to set pricing parameters so as significantly to reduce the risk that ERV would be in a similar position. The contract between Staysure and ERV included detailed provisions as to the creation and calculation of the Net Price so as to achieve that end, using pricing machinery within the quote engine. It was unusual for an underwriter to rely on pricing machinery both provided and operated by an intermediary, but it was essential in this case because Staysure would otherwise have been "an unappealing risk".

79. Although Schedule 2 to the contract between ERV and Staysure provided for regular meetings attended by representatives of those two companies, I accepted Mr Stocker's evidence that he also attended as representing Intervest, because of the very significant role played by the quote engine in the pricing of the products. Without Intervest's involvement in those meetings, it would not have been possible for ERV and Staysure to resolve issues about pricing, which constituted a fundamental element of the business being written..

The Retail Price

80. Some insurance brokers set the Retail Price of a product by adding an uplift to the Net Price payable to the underwriter. Intervest did not do that, but instead calculated the optimum Retail Price using complex statistical methods, including Generalised Linear Models, based on the elasticity of demand. Mr Stocker explained this as follows:

> "as you increase prices, you will reduce the number of price enquiries that convert into sales. The reverse is also true, as you reduce prices you will increase the proportion that convert into sales. The amount a price increase or reduction influences sales conversion alters from customer segment to segment, and for things like different travel destinations and durations."

81. Intervest's statistical algorithm also took into account the careful balancing act between maximising the return from a particular customer at a particular point in time, versus obtaining repeat customers in the future. For example, increasing the price would increase profits today,

but reduce the likelihood of customers renewing their contracts. The model therefore also took into account opportunities for renewal business.

The Broker Margin

82. The difference between the Retail Price and the Net Price (after Insurance Premium Tax) is the "Broker Margin". The purpose of the quote engine was to produce an optimal price point which maximised both the Broker Margin per sale, and the number of customers acquired in total. The Broker Margin was shared between Staysure and Intervest, with Intervest being entitled to 28% of each sale. Intervest was only remunerated if the leads were converted into sales: it received no fee for operating the Website and did not recharge any of the significant marketing costs it incurred.

The importance of the pricing

83. The quote engine was designed to produce a personalised price for each customer which was competitive from the perspective of the potential customer and also maximised profit for Staysure, the underwriters, and Intervest. The quote engine also identified the levels at which Intervest would refuse to offer a customer a quotation, and thus decline the business. It was thus a key element in ensuring leads were filtered so as to generate both sales and profits. As Mr Stocker said, "The pricing work that Intervest performed went to the heart of whether a contract was concluded or not, within the profit constraints set by [Staysure] and the underwriter".

Operation of the Website

84. Part of Mr Stocker's role at Intervest was to ensure that the Website was usable by customers. The Website offered information to consumers about travel and insurance, promoted Staysure's products and provided the personalised quotation and pricing process both for online sales and those purchasing through the call centre (see §90), and it supplied payment facilities for customers.

85. The branding on the Website was that of Staysure. The T&C page of the Website began by stating that the terms and conditions apply:

> "to your use of this site and provide a legal document which sets out your rights and obligations, and those of Staysure Travel in relation to the holiday services offered through this site. Reference on this website to 'our', 'we' and 'us' are references to Staysure Travel and Staysure.co.uk Ltd."

86. Pausing here, the reference to Staysure.co.uk Ltd is plainly to the Appellant, see §67; it is that company which provides the "holiday services" to the customers. From mid-2013, the T&C was amended to add the following paragraph, under the heading "Website Operation":

> "The Website is operated by Intervest Limited, registered in Gibraltar (Incorporation Number 95406) as an intermediary. Your data will be passed to Staysure.co.uk limited, and become the property of staysure.co.uk, at the point your quote is complete."

87. Mr Howsam's and Mr Stocker's evidence was that the inclusion of this passage in the T&C simply formalised the existing position, which was that Intervest operated the Website and when the quotation was complete, the customer data passed Staysure, and I accepted that evidence.

88. As is clear from the citation above, the passage ends by saying that "your data will be passed to Staysure.co.uk limited, and become the property of **staysure.co.uk**, at the point your quote is complete" (my emphasis). As noted at §67, Mr Howsam and Mr Stocker gave clear and consistent evidence that this domain name was owned by Intervest, not by Staysure and that that the customer data transferred from Intervest to Staysure at the point where the quotation was complete. I find, in reliance on that evidence, that the usage of the domain name (without the "Ltd") in this part of the T&C is a typographical mistake.

89. The position is thus that before 2013, customers would have thought that they were using Staysure's website, and would have been unaware it was owned and operated by Intervest. After the change in 2013, customers would only have been aware of Intervest if they had clicked on the T&C page. They would also not have known that the domain "staysure.co.uk" was owned by Intervest.

The customer journey

90. Sales were made in three ways:

(1) Customers contacted the Website, which encouraged them to complete an online form. The quote engine rejected around 1% of customers, either because of age limits or because of medical conditions (see below). For the remainder, the quote engine used the customer's details to produce a final insurance quotation along with any conditions and exclusions. The customer was required to confirm the accuracy of the information provided and then to enter his payment details on the relevant webpage. At this point, his details were passed to Staysure, which purchased the related insurance contract from ERV on behalf of the customer. As stated in the T&C, after that transfer Staysure owned that customer data, while Intervest continued to own the data on Website visits, search terms and similar, which formed part of its intellectual property.

(2) Customers telephoned the call centre. This was owned and operated by Staysure in the UK. The call centre staff used the quote engine to produce a price in exactly the same way as if the customer had used the Website.

(3) Customers first contacted the Website and completed some or all of the online form, and then telephoned the call centre; the staff there used the quote engine to produce a price for the customer. This happened in three situations:

(a) the online quote engine told the customer that further details of certain medical conditions were needed before a quotation could be provided (see further below), and the customer decided to check the position with the call centre;

(b) the customer had other questions he wanted to ask before purchasing the insurance; or

(c) the customer wanted to accept the quotation offered by the Website, but felt more secure making the payment by speaking to a customer service representative rather than doing so online.

91. Intervest designed the webpages with the aim of preventing people dropping out of quotation process, either because they were not at ease with online processes or because they were worried about a medical condition: the webpages therefore repeatedly give messages along the lines of "if at any time you are unsure contact the call centre".

92. The telephone number for Staysure provided on the Website was different from that provided on the advertising material, and this helped Staysure and Intervest to track how many leads were filtered via the Website.

93. Once the insurance contract has been entered into, any queries or claims made by the insured were dealt with by Staysure. Intervest had no further involvement.

Medical conditions

94. Customers were required to declare medical conditions, but the quote engine was able to take many of those into account within the algorithmic process. When a customer declared one of those conditions, he received an online message saying "this condition is covered free. You can continue with your purchase".

95. Customers who declared certain more serious conditions were offered the choice of continuing with cover but excluding coverage of those conditions, or completing a more detailed online medical screening questionnaire about all conditions. The quote engine would then process the extra information, with one of the following results:

(1) the customer was offered the choice of an insurance quotation:

(a) including that pre-existing condition at an extra cost;

(b) excluding cover for that condition; or

(2) the customer was informed that cover had been declined, because the risk was outside acceptable parameters.

The number of leads provided by Intervest

96. The Tribunal was provided with figures for the period January to April 2014; neither party argued that this period was unrepresentative. Those figures showed that:

(1) there were 838,342 unique visits to the Website; that figure included some returning customers.

(2) the call centre responded to 186,586 calls; this figure too included some returning customers;

(3) Intervest provided 386,303 quotations online, compared to 157,319 quotations provided by the call centre;

(4) as a direct result of the online quotations using the Website, Staysure sold 34,506 policies, being 28.2% of total polices written; after contact with the call centre, Staysure sold 86,858 policies, being 71.8% of total policies;

(5) the Website directly generated 16.6% of Staysure's total gross written premiums ("GWP") and 83.4% of GWP was generated by sales concluded by the call centre.

97. However, the figures at (4) and (5) above do not take into account the number of call centre customers whose initial contact was with the Website. I considered the evidence to see how many such calls there were.

98. Mr Howsam's unchallenged oral evidence under cross-examination was that:

(1) in 2014, the "vast majority" of callers had first contacted the Website; and

(2) about 25% of visitors to the Website went on to telephone the call centre,

99. This second statement was not made in the context of 2014, and it is clear from the numbers set out above that it cannot apply to that year. In 2014 there were 838,342 web visits, so 25% would have been around 200,000. However, the *total* number of calls to the call centre that year was only 186,586. Mr Howsam's 25% figure is therefore unrelated to 2014, but I nevertheless find as a fact, in reliance on his unchallenged evidence, that throughout the relevant period the "vast majority" of callers first contacted the Website.

100. The total number of leads generated by the Website was thus (a) 386,303 quotations provided to customers without any call centre involvement, and (b) the vast majority of call centre sales. Thus, almost all Staysure's sales were directly or indirectly the result of the customer contacting the Website. The small balance of other sales resulted from targeted marketing and advertising placed by Intervest.

Co-operative process and Intervest's purpose

101. Intervest and Staysure worked on a collaborative basis to ensure that Intervest effectively delivered the maximum number of suitable leads to Staysure. Key staff of both companies held regular meetings, at least monthly, but often weekly, to discuss:

(1) feedback on why certain leads were not converted into customers, to improve future lead generation;

(2) other opportunities for increasing leads;

(3) improvements to the design of existing Staysure products and the identification of opportunities for new products; and

(4) Intervest's "estimates of planned lead generation" so that Staysure could manage the number of staff in the call centre required to respond to contacts as the result of Website contacts, online and offline advertising.

102. Mr Stocker and Mr Howsam both gave evidence about the nature of the relationship between Staysure and Intervest. Mr Stocker described it as a "partnership" in which both Intervest and Staysure had a common interest in ensuring that quality leads were generated. Mr Howsam's evidence was that:

> "The reality is that the call centre and the Website were not viewed by Intervest or Staysure as separate means of attracting and filtering prospects, since the Website and the call centre were part of an overall, integrated supply by Intervest of identifying and attracting prospects. The call centre would not have completed the volume of transactions it did if there had not been the Website operated by Intervest, the activities of Intervest in driving suitable prospects to the Website, the quotation process on the Website and the facilitation of the passage of suitable prospects from the Website to the call centre."

103. I accepted that the descriptions given above by Mr Stocker and Mr Howsam were accurate.

THE LAW

104. The parties agreed that Intervest was making a single supply; the dispute was whether the supply fell within the exemption for insurance intermediary services as set out in statute

and explained in the related case law. However, it emerged in argument that the parties had different views as to the basis on which Intervest had made a single supply. I therefore set out the relevant provisions here, and discuss this issue at §144ff.

Case law on single supplies

105. In *Card Protection Plan Ltd v C&E Comrs* (Case C-349/96) [1999] STC 270 ("*CPP*") at [30] the CJEU held:

> "28. However, as the court held in *Faaborg-Gelting Linien A/Staysure v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774 at 783, [1996] ECR I-2395 at 2411-2412, paras 12 to 14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place.
>
> 29. In this respect, taking into account, first, that it follows from art 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.
>
> 30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied..."

106. In *Levob Verzekeringen BV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766 ("*Levob*"), the CJEU reiterated the points made in *CPP* at [28]-[29] and continued:

> "21. In that regard, the Court has held that there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded, by contrast, as ancillary supplies which share the tax treatment of the principal supply (*Card Protection Plan* [1999] STC 270, [1999] 2 AC 601, para 30…).
>
> 22. The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split."

107. In *Město Žamberk v Finanční ředitelství v Hradci Králové* (Case C18/12) [2014] STC 1703 ("*Město*"), the facts are at [9] of the judgment:

> "In return for payment of an entrance fee Město Žamberk provides a municipal aquatic park, in which there are, in particular, a swimming pool divided into several lanes and equipped with diving boards, a paddling pool for children, water slides, a massage pool, a natural river for swimming, a beach-volleyball court, areas for table tennis and sports equipment for hire."

108. The Court had to decide whether this was a single complex supply which was exempt from VAT as "the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education". It said at [29], citing *Levob* and other authorities:

> "In order to determine whether a single complex supply must be categorised as a supply closely linked to sport within the meaning of art 132(1)(m) of the VAT Directive although that supply also includes elements not having such a link, all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and its predominant elements must be identified…"

109. The Court continued at [30], again citing *Levob* and a number of further authorities:

> "It follows from the case law of the court that the predominant element must be determined from the point of view of the typical consumer…and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements falling within the exemption provided for under art 132(1)(m) of the VAT Directive in relation to those not falling within that exemption…"

110. In *Metropolitan International Schools Ltd v R&C Commrs* [2017] UKUT 431(TCC), STC 2523 ("*Metropolitan*") Ms Mitrophanos, Counsel for HMRC, submitted that the CJEU had now introduced a new "overarching" test. The UT made the following *obiter* observations about those submissions:

> "[76] There are good reasons for saying that [the overarching test] has or may have a part to play in at least some cases. First, it seems to have been the sort of point taken by the majority of the House of Lords in [*College of Estate Management v C&E Comrs* [2005] UKHL 62] . Second, in some cases at least it may reflect how the typical consumer (whose viewpoint is critical - see *Mesto)* views a transaction. It would be entirely consistent with a regime in which a supply question has to be answered by reference to the view of the typical consumer of the supply. Third, in many cases a consideration of the point may assist in deciding whether a given element predominates or not in the eyes of the typical consumer for the purposes of the legislative provision in question. Thus in the circumstances of [*Byrom v R&C Comrs* [2006] EWHC 111], the *Mesto* question would be what the typical consumer thinks he or she is acquiring. In order to determine that, a *Mesto* analysis has to consider the elements in the supply, and whether they fall predominantly within the relevant characterisation or not by judging their relative importance from the point of view of the typical consumer. It may be that, as in *Byrom*, there is a main element which, at least quantitatively, predominates over the others. But if the consumer thinks that he or she is acquiring something larger, that is to say massage parlour services, then the licence of the room cannot be said to predominate for the purposes of the *Mesto* test. Whether or not it is a separate test, the factor is at least capable of being a counterweight to an element that might otherwise be thought to predominate or, within a *Mesto* test, an indication of the qualitative importance attached to other elements by a typical consumer. It may be that *Beynon* is an example of that. We do not think that if the consumer would have an overall perception it could be ignored consistently with *Mesto*.

> [77] To that extent, therefore, the reasoning underpinning a separate 'overarching' test has a part to play in the reasoning in other tests. We would, were it necessary, be minded to go further and say that there may be some cases where the economic realities justify its application as a separate test. We say this for two reasons. First, as appears above, the CJEU has recognised the difficulties in prescribing definitive tests for all cases in relation to the 'number of supplies' point, and that is capable of applying to the characterisation point as well, bearing in mind its close relationship to the 'number of supplies' point. Second, there may well be cases in which the economic realities, which again underpin the exercise, require it to be adopted. Whether or not the present case is one of them is not something we have to decide, because we can reach our decision on other grounds by reference to the other tests, where available.
>
> [78] On the basis of those authorities we find:
>
> > (1) The *Mesto* predominance test should be the primary test to be applied in characterising a supply for VAT purposes.
> >
> > (2) The principal/ancillary test is an available, though not the primary, test. It is only capable of being applied in cases where it is possible to identify a principal element to which all the other elements are minor or ancillary. In cases where it can apply, it is likely to yield the same result as the predominance test.
> >
> > (3) The 'overarching' test is not clearly established in the ECJ jurisprudence, but as a consideration the point should at least be taken into account in deciding averments of predominance in relation to individual elements, and may well be a useful test in its own right."

The statutory provisions about the insurance exemption

111. Article 13B(a) of the Sixth Directive 77/388 EEC provided that Member States should exempt "insurance and reinsurance transactions, including related services performed by insurancebrokers and insurance agents". Directive 2006/112/EC ("the PVD") reproduced that provision as Article 132(1)(a).

112. VATA s 31 implements Article 132(1) of the PVD by providing that a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9. Item 4 of Group 2 of that Schedule provides exemption from VAT for:

> "The provision by an insurance broker or insurance agent of any of the services of an insurance intermediary in a case in which those services
>
> (a) are related (whether or not a contract of insurance or reinsurance is finally concluded) to an insurance transaction or a reinsurance transaction; and
>
> (b) are provided by that broker or agent in the course of his acting in an intermediary capacity."

113. Note 1 to Item 4 reads:

> "For the purposes of item 4 services are services of an insurance intermediary if they fall within any of the following paragraphs
>
> > (a) the bringing together, with a view to the insurance or reinsurance of risks, of

(i) persons who are or may be seeking insurance or reinsurance, and

(ii) persons who provide insurance or reinsurance;

(b) the carrying out of work preparatory to the conclusion of contracts of insurance or reinsurance;

(c) the provision of assistance in the administration and performance of such contracts, including the handling of claims;

(d) the collection of premiums."

114. Note 2 reads:

> "For the purposes of item 4 an insurance broker or insurance agent is acting in an intermediary capacity wherever he is acting as an intermediary, or one of the intermediaries, between
>
> (a) a person who provides insurance or reinsurance, and
>
> (b) a person who is or may be seeking insurance or reinsurance or is an insured person."

115. Note 7 reads:

> "Item 4 does not include
>
> (a) the supply of any market research, product design, advertising, promotional or similar services; or
>
> (b) the collection, collation and provision of information for use in connection with market research, product design, advertising, promotional or similar activities."

The case law on the insurance exemption

116. I first set out the main authorities on which the parties relied, followed by my summary of the relevant principles, see §139.

Taksatorringen

117. In *Assurandør-Societetet, on behalf of Taksatorringen v Skatteministeriet* Case C-8/01 [2006] STC 1842 ("*Taksatorringen*"), the CJEU held at [44] that the expression "related services performed by insurance brokers and insurance agents" refers only to services "provided by professionals who have a relationship with both the insurer and the insured party".

Andersen

118. In *Staatssecretaris van Financien v Arthur Andersen* (C-472/03), [2005] STC 508 ("*Andersen*"), an insurer, Universal Leven NV ("UL") subcontracted certain back office services to Andersen under what was described as a "collaboration agreement". These were set out at [10] of the judgment as follows:

> "the acceptance of applications for insurance, the handling of amendments to contracts and premiums, the issuing, management and rescission of policies, the management of claims, the setting and paying of commission to insurance agents, the organisation and management of information technology, the supply of information to UL and to insurance agents and the drafting of reports for insured parties and third parties….When the information supplied by an applicant for insurance shows that a medical examination is necessary, the

> decision on acceptance of the risk is made by UL, otherwise that decision is made by [Andersen] and binds UL. [Andersen] is in charge of almost all contact with the insurance agents."

119. The CJEU decided that at [36] Andersen were not carrying out any of the "essential aspects of the work of an insurance agent, such as the finding of prospects and their introduction to the insurer", and at [38] that there was also no contractual relationship between Andersen and the insured parties. Instead, UL had simply subcontracted its own back-office activities, and so the services supplied by Andersen did not come within the exemption.

Beheer

120. In *Beheer BV v Staatssecretaris van Financiën* [2008] Case C-124/07 [2008] STC 3360 ("*Beheer*"), the CJEU held at [29] that:

> "…the fact that an insurance broker or agent does not have a direct relationship with the parties to the insurance or reinsurance contract in the conclusion of which he has been instrumental, but merely an indirect relationship with them through the intermediary of another taxable person who is, himself, in a direct relationship with one of those parties, and to whom that insurance broker or agent is contractually bound does not prevent the service provided by the latter from being exempt from VAT under that provision."

InsuranceWide

121. In *InsuranceWide and Trader Media* [2010] EWCA Civ 422 ("*InsuranceWid*e"). Etherton LJ gave the leading judgment, with which Longmore LJ agreed and Pitchford LJJ delivered a concurring judgment. As in this appeal, Ms Sloane represented the appellants.

122. Etherton LJ first considered the earlier EU case law on the scope of the exemption, saying at [80]:

> "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."

123. He set out the following principles at [85]:

> "(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...
>
> (2) The exemption in art 13B(a) must be interpreted strictly since it constitutes an exception to the general principle that VAT is to be levied on all services supplied by a taxable person. This does not mean, however, that the words and expression in art 13B(a) and the Insurance Intermediary Exemption are to be given a particularly narrow or restricted interpretation. It is for the supplier to establish that it and its activities come within a fair interpretation of the words of the exemption.
>
> (3) The exemption for 'related services' under art 13B(a) only applies to services performed by persons acting as an insurance broker or an insurance

agent. Although those expressions are not defined by EU legislation, they are independent concepts of Community law which have to be placed in the general context of the common system of VAT.

(4) Whether or not a person is an insurance broker or an insurance agent, within art 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 art 13B(a) to the extent, but only to the extent, that they should be taken into consideration as reflecting legal reality and practice in the area of insurance law. It is not necessary, in order to invoke the exemption in art 13B(a), for the taxpayer to perform precisely the description of activities in art 2(1)(a) or (b) of the Insurance Directive.

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

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

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

(9) All the above principles are capable of being applied, and must be applied, to the Insurance Intermediary Exemption in Sch 9 to VATA 1994."

124. At [86] he applied those principles to the appellants in that case:

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

> They identified, and provided those looking for insurance with access to, insurers who provided a range of competitive insurance products.
>
> In both cases the evidence indicated that the insurers were appraised and selected bearing in mind the competitiveness of their pricing and products and their level of consumer service.
>
> …InsuranceWide provided those seeking insurance with a means of directing them most effectively and efficiently to the most appropriate insurers, whether directly or through another intermediary, to match their requirements.
>
> In the case of Trader Media the evidence was that it not only had an input into the questions to be answered by those seeking insurance, but,

> importantly, it made suggestions for the composition of the insurance panel based on its understanding of the experience and demographics of the consumers and with a view to providing customers with insurers who would quote competitive prices.
>
> Neither of them were, as Ms Sloane emphasised, a mere "conduit". Their relevant activities can fairly be described as the business of bringing together insurers and those seeking insurance, by contrast with the taxpayers in *Skandia, Taksatorringen* and *Arthur Anderson*, who were sub-contractors."

125. He continued at [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."

Royal Bank of Scotland

126. In *RBS v HMRC* [2008] VATTR 20856 the VAT Tribunal decided that commission received by RBS from Prudential did not fall within the exemption, and RBS appealed to the High Court; the case was heard by Mann J, see *Royal Bank of Scotland v HMRC* [2012] EWHC 9 ("*RBS*").

127. The facts were complex. In summary Prudential transferred its general insurance business to Winterthur Swiss Insurance Company ("Winterthur"). The terms of the transfer included the following (see [6] of the Tribunal decision and [14] and [35] of the High Court judgment):

> (1) Prudential provided Winterthur with the exclusive right to the details of Prudential's general insurance customers for a period of 15 years;
>
> (2) Prudential was to redirect enquiries for general insurance policies to Winterthur;
>
> (3) Winterthur was to maintain a website within Prudential's website so that customers who intended to find out about or buy general insurance products could do so by clicking on links on Prudential's website to connect to sites owned by Winterthur; and
>
> (4) Winterthur paid commission to Prudential. Around 80% of the commission was on the renewal of existing Prudential insurance policies (called "Leads B to D" sales), and the remainder ("Lead A" sales) were new policies.

128. By the time of the VAT dispute, Winterthur had novated the agreement to UK Insurance, of which RBS was a part. The Lead A sales referred to in (4) above were described by Mann J at [36] as follows:

> "this would be just from a click-through on a link on Prudential's website…A click leads to a series of 'Prudential' pages which are in fact maintained by UKI, and when the customer clicks the 'buy' button he then enters into UKI's own website. But the important thing to note is that before he gets there, all the other relevant general insurance pages are maintained by UKI, not by Prudential."

129. The VAT Tribunal rejected RBS's submission that the commissions it received from Prudential were exempt, because Prudential was acting as an insurance intermediary. The Tribunal held at [15]:

> "First, and most importantly, in relation to bringing the parties together (or introducing them), Prudential did not do this. Any bringing together (or introduction) of Prudential and the insured has happened in the past and may have been performed by a broker at the time."

130. At the High Court, Mann J upheld that decision. He found at [47]:

> "…When seeing if Prudential was doing the same sort of thing that a broker does one starts with a key distinction. A customer engaging with, or dealing through, a broker (or other intermediary) is likely to know that that person is an intermediary, or at least likely to know that that person is not the end insurer. Even the customers in *InsuranceWide* will have known that somehow they moved on from the website providers and had gone on to deal with someone else. Contrast the apparent position in this case. So far as the original renewals of Prudential general insurance policies were concerned, there is no relevant dealing at all between customer and Prudential. Prudential merely passes on the renewal information to UKI, who take it from there. There is nothing at all akin to the sort of approach that a customer makes to a broker. So far as Lead A customers are concerned, Prudential does nothing in relation to the individual customers in question except to provide a click-through facility on its website so that the customer is in fact looking at pages maintained on the Prudential website by UKI, until he clicks the 'buy' button when he enters UKI's own website. The parties did not fall over themselves to make sure that it was suddenly made apparent that the customer was not dealing with Prudential as soon as he clicked on to the first general insurance page. Nor is it apparent that he would suddenly have the realisation when he 'buys'. That would have gone completely against the whole purpose of using the Prudential branding. So far as Leads B to D are concerned, there is no suggestion that Prudential made it clear to the customer that it was no more than an intermediary, and again it would seem to go against the purpose of the exploitation of the brand that it should do so. The customer has not approached Prudential as an intermediary. All this does not, in my view, amount to bringing the parties together, or amount to introducing them, as a broker does."

131. He then continued:

> "[49] The matter can be put in various ways, deploying the factors that I have identified above.

(i) It would not be an inaccurate metaphor to describe Prudential as a mere conduit. That is particularly clear in relation to Lead A customers, and is apparent in relation to the other categories of lead as well. In all cases Prudential hands over customer details, apparently without more, and then lets UKI get on with it. UKI undertakes all subsequent activity in relation to that customer, whether or not a contract of insurance results.

(ii) Prudential has no freedom of choice as to whom the customer should be referred to. Every inquiry is passed to UKI, and to UKI alone.

(iii) If one contrasts Prudential's activities with the activities of referring companies in *InsuranceWide*, one can plainly see that Prudential's activities fall far short of the sort of activities which made the relevant companies 'brokers' in *InsuranceWide*. Of course, it would not be an acceptable way of deciding this point to say that Prudential did not behave like those other companies, therefore they cannot be brokers, without more. But it is instructive to see what it was that made those other companies something other than conduits, and those factors do not exist in this case.

(iv) Again, one can look at it in terms of whether Prudential is supplying the *services* of a broker in the course of carrying on the *business* of a broker. From its own point of view it does not really conduct a separate business, or supply services. So far as the customer is concerned, this takes up the point made above. A pure renewals customer does not really know that anything material has happened at all. A Lead A customer clicks away on the website, with no-one telling him that he is, in substance, now dealing with another insurance company, and he certainly does not know that Prudential has done anything useful. From the point of view of the customer in relation to Leads B to D, it will not be apparent that Prudential is providing any services at all. Although I was not shown the sort of material that passed between Prudential and those approaching it, as I have already observed it would undermine the whole point of maintaining the Prudential brand were the customer to be clearly told that Prudential would not be providing insurance, and some other completely different company would. The customer doubtless thinks it is approaching an insurance company for insurance, not a broker for broking purposes. The customer will not believe that he/she is receiving broking services, and in truth he/she is not. His/her inquiry is being passed on to another company which provides insurance that Prudential no longer provides. That is all. There is only the business of an insurer; there is no business of broking.

[50] The other positive activities of Prudential, described above, do not stand in the way of that conclusion. Most of those activities have nothing to do with the introductions or the individual policies. An analysis of them reveals that they help to refine policy terms, to refine the marketing necessary to sell policies and to maintain the Prudential brand when it is applied to non-Prudential policies. If anything, they fall on the same side of the line as the activities in *Arthur Andersen*…they are the sort of activities that insurance companies do, not insurance brokers."

Aspiro

132. In *Minister Finansów v Aspiro SA* (Case C - 40/15) [2016] STC 1255 ("*Aspiro*"), the CJEU set out at [9] a list of the activities carried out by Aspiro, and then held at [36], by reference to *Andersen* and *Beheer*, that "it is necessary to examine the content of the activities in question", The Court continued:

> "37. For the purpose of this examination, two conditions are required to be met. In the first place, the service provider must have a relationship with both the insurer and the insured party (judgment in *Taksatorringen*, para 44). That relationship can be only indirect if the provider is a sub-contractor of the broker or agent (see, to that effect, judgment in *Beheer*, para 29). In the second place, its activities must cover the essential aspects of the work of an insurance agent, such as the finding of prospective clients and their introduction to the insurer (see, to that effect, judgment in *Arthur Andersen*, paras 33 and 36).
>
> 38. The first of those conditions is met by a service provider such as Aspiro. That service provider is in a direct relationship with the insurance company, since it performs its activities in the name and on behalf of the insurance company, and it has an indirect relationship with the insured party, in the context of the examination and management of claims.
>
> 39. On the other hand, as regards the second of those conditions, relating to the services provided by insurance brokers and agents, or their sub-contractors, those services must be linked to the essential aspects of the work of an insurance broker or agent, which consists in the finding of prospective clients and their introduction to the insurer with a view to the conclusion of insurance contracts (see, in particular, judgments in *Taksatorringen*, para 45; *Arthur Andersen*, para 36, and *Beheer*, para 18). As regards a subcontractor, it is necessary for it to be involved in the conclusion of insurance contracts (see, to that effect, judgment in *Beheer*, paras 9 and 18)."

Dollar Financial

133. In *Dollar Financial UK v HMRC* [2016] UKFTT 598 (TC), [2016] SFTD 953 ("*Dollar*") the taxpayer provided payday loans. HMRC had decided that certain services provided by an overseas company to the taxpayer were not exempt under Article 135(1)(b) because they were not "the granting and the negotiation of credit and the management of credit by the person granting it". The facts, as set out in the Simons Taxes headnote, were as follows:

> "The overseas transactions in question fell into two respective categories, namely 'L' and 'A'. In the L transactions, a potential borrower used a website belonging to the overseas entity completed an online application form which was subsequently sent to the taxpayer, which could choose whether to accept the lead or not. The A transactions involved 'conversions' and 'live chat'. Conversions involved the overseas entity calling a borrower who had been made an offer of a loan by the taxpayer but had not accepted it to try to persuade the borrower to take out the loan. Live chat involved the overseas entity's staff providing online help and support to actual and potential borrowers."

134. Thus, the case considered a different exemption than that in issue before this Tribunal. However, in coming to her conclusions, Judge Mosedale also considered the case law on Article 135(3)(a), saying at [48] "the similarities between the two exemptions in both EU and UK legislation were such that it is appropriate, in my view, to draw some principles from insurance cases about intermediaries when looking at the finance intermediary exemption".

135. Judge Mosedale confirmed at [69] and [79] that "mere advertising" was not sufficient to come within the exemption, adding at [97(12)] that something "extra" was required, which "could be assessing the suitability of the service provider to provide the loan or the suitability of the borrower to receive the loan".

136. She considered at [74]ff HMRC's proposition that unless the intermediary carried out some kind of assessment of the suitability of the lenders to which it introduced borrowers, then its services were not exempt. She accepted that the appellant in *InsuranceWide* did carry out such an assessment, but pointed out that "the Court of Appeal did not say it was essential for an intermediary claiming exemption on the basis of introductory services to do so" and that there was no authority for such a proposition, adding at [78]:

> "Moreover, HMRC's suggested proposition would seem to me to remove exemption from persons who have always clearly been seen as financial and/or insurance brokers in the original meaning of the word. It is well known, not to say notorious, that historically some brokers have selected as the service provider to recommend to the borrower the one paying them the best rate of commission. That is one of the reasons why there has been regulation of brokers and a requirement for transparency about rates of commission earned. But it seems to me that that is a matter for regulation and not for VAT law: if brokers who make recommendations to borrowers based on the broker's self-interest were intended to be liable to charge VAT on their commission I would expect the Directive to have said so."

137. She went on to say at [96] that although "a mere introduction is not enough", the exemption was satisfied if the intermediary assessed whether the borrower was a suitable customer for the insurance being sold.

Q-GmbH

138. The most recent CJEU judgment on the insurance intermediary exemption is *Q-GmbH v Finanzamt Z* (Case C-907/19) [2021] STC 696 ("*Q-GmbH*"). At [37] the CJEU held that for the exemption to apply:

> "…it is necessary to ascertain whether two criteria are fulfilled. In the first place, the supplier of services must be related to the insurer and the insured party, since that relationship may be indirect only if the supplier of services is a subcontractor of the broker or agent. In the second place, its activities must cover the essential aspects of the work of an insurance agent, such as the finding of prospective clients and their introduction to the insurer, with a view to concluding insurance contracts."

The principles from the case law

139. From the case law set out above, I derive the following principles as being particularly relevant to the issue in dispute between the parties in this case:

(1) Whether or not a person is an insurance broker or an insurance agent depends on what they do. How they choose to describe themselves or their activities is not determinative (*IW* at [85(3)]).

(2) It is not necessary for a person to be carrying out all the functions of a insurance agent or broker for the exemption to be satisfied (*IW* at [85(8)]).

(3) However, it is essential that the person has a relationship with both the insurer and the insured party (*Taksatorringen*) but this does not need to be a contractual relationship (*Beheer,* confirmed in IW at [80]).

(4) The requirement that the person has a relationship with the insurer is satisfied where the person is the subcontractor of a broker, which in turn has a relationship with the insurer (*Aspiro* at [37]).

(5) Where the person is a subcontractor of a broker, the exemption is satisfied:

(a) where the relationship with the customer is indirect (*Aspiro at* [37]; *Q-GmbH* at [37]), or where the subcontractor is one of a chain of persons bringing together an insurance company and a potential insured (IW at [85]); but

(b) the subcontractor's services must be linked to the essential aspects of the work of an insurance broker or agent, namely the finding of prospective clients and their introduction to the insurer with a view to the conclusion of insurance contracts (*Andersen* at [36]; IW at [85(7) and *Aspiro* at [39]).

THE PARTIES' SUBMISSIONS AND MY VIEW

140. I have set out first a summary of the parties' overall position and my own view, followed by their main submissions on particular areas, together with my conclusions.

The overall position

141. Ms Sloane submitted that the supplies made by Intervest satisfied the requirements for the exemption. Intervest drives leads to the Website using advertising, it provides a quote engine to filter those leads both on the Website and in the Staysure call centre; it is paid commission per successful take-up of insurance and it actively collaborates with Staysure to maximise the match of prospective insurance customers and the insurer. These services were clearly linked to the essential aspects of the work of an insurance broker or agent, namely the finding of prospective clients and their introduction to the insurer with a view to the conclusion of insurance contracts.

142. HMRC's overall case was that Intervest's services only *assisted* Staysure, and that Intervest itself was not an insurance intermediary. Mr Mantle said that Intervest's interaction with potential customers was "too passive and slight" to meet the statutory requirements, and he made submissions on the "predominant element" of the supply and the overarching test, which I consider at §145-§146 and §149-§151.

143. I agree with Ms Sloane for the reasons she gives, and for the further reasons set out below. I find that Intervest is making a single supply to Staysure which consists in the provision of appropriate leads, and this supply is plainly essential aspect of the work of an insurance agent or broker. In summary, but as further developed below, this is because:

(1) The provision of leads is Intervest's primary obligation under the Contract. Its other obligations were integral parts of that same obligation: the quote service filtered the leads; the process of generating the leads had to be managed so as to fit with Staysure's available resources, and it also provided opportunities for further product development.

(2) Almost all the sales made by Staysure were directly or indirectly the result of the Website, which was owned and operated by Intervest.

(3) The nature of the supply can also be seen from the way Intervest is remunerated: it is paid only when a lead generates an insurance contract. Intervest did not charge Staysure the costs it incurred for advertising, marketing, webhosting, or the development and operation of the quote engine.

Marketing and advertising

Mr Mantle's submissions

144. Mr Mantle accepted that the marketing and advertising placed by Intervest had the purpose of attracting potential customers to call Staysure's call centre and/or to the Website. However, he submitted that in so doing, Intervest was acting as a passive conduit between potential customers and Staysure. He said that it was clear from *IW* and from *RBS* that a company acting as a mere conduit cannot satisfy the exemption.

145. In his skeleton argument, he submitted that Intervest's provision of marketing and advertising to Staysure was "the predominant element" of the supply made to Staysure, and it was clear from Note 7 to Sch 9, Group 2 Item 4 of VATA that advertising fell outside the exemption. He relied on the fact that in 2014, the total charge by Intervest to Staysure under the Agreement was £10.97 million (see §63) and in the same year Intervest's marketing spend was £7.65 million (see §73), and thus almost 70% of Intervest's income was spent on marketing and advertising.

146. By the end of the hearing, Mr Mantle's position had changed. He now submitted that marketing was *one* of the predominant elements, with the others being the "operation of the website and pricing", and that even if (which he did not accept), the quote engine taken alone did fall within the exemption, that element was insufficient for the supply to be characterised as exempt. Mr Mantle also submitted that the although there was no "overarching test", it was permissible to take an "overarching perspective" into account, and that approach would give the same outcome.

Ms Sloane's submissions

147. Ms Sloane's position was that marketing and advertising formed part of Intervest's single supply of leads, and it was artificial to separate the individual parts of the supply. She said that Intervest was not just providing advertising, but was using targeted placement online and offline to maximise the chance of qualifying leads from Staysure's particular demographic accessing the Website and/or contacting the call centre.

148. She referred to *Dollar* where Judge Mosedale had said that "mere advertising" was not sufficient for the exemption to apply; instead something "extra" was required. In Intervest's case, potential clients were first targeted by Intervest's advertising and marketing and then assessed by the quote engine, which rejected some applicants and offered others alternatives depending on the nature and extent of different levels and types of insurance cover. This was more than sufficient to meet Judge Mosedale's "something extra" requirement. In short, Intervest was not supplying advertising, but qualified leads.

The Tribunal's view

149. I agree with Ms Sloane. In *Město,* the CJEU held that in order to determine where there was a single supply so as to meet the exemption, "the predominant element must be determined from the point of view of the typical consumer…and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements falling within the exemption". In *Metropolitan* the UT said that "the *Město* question would be what the typical consumer thinks he or she is acquiring" and that "it may be that…there is a main element which, at least quantitatively, predominates over the others. But if the consumer thinks that he

or she is acquiring something larger…then [that element] cannot be said to predominate for the purposes of the *Město* test".

150. On the fact of this case, the typical consumer, having considered all the elements of the single supply made to Staysure, would decide that the predominant element was the supply of leads, not the supply of advertising. That is because:

(1) The Contract is for the supply of leads.

(2) Intervest is remunerated only when a lead has led to a sale. Intervest does not recharge its advertising or marketing costs.

(3) It is up to Intervest how it decides to deliver those leads.

(4) Intervest uses a mixture of different methods to attract appropriate leads, including search engine optimisation, paid search, and adverts placed in newspapers and magazines.

(5) Those leads are then filtered using the search engine, whether (a) the customer operates the search engine directly, by accessing the Website, or (b) the customer phones the call centre.

(6) Almost all the sales made by Staysure directly or indirectly followed from the customer's contact with the Website, which was owned and operated by Intervest.

151. It is true that, as Mr Mantle said, Intervest spent 70% of its total income on marketing and advertising, but that is to take a quantitative approach instead of considering the point of view of the typical consumer, see *Město* cited at §109. Ms Sloane is instead correct that Intervest was not supplying "mere advertising" but instead used the advertising as an element in its single supply of qualifying leads to Staysure.

Invisibility

152. Mr Mantle emphasised that Intervest would have been invisible to the customer before the T&C were changed in 2013, and submitted that it was all but invisible after that, given that few people would have read the T&C. The customers would have seen that the Website used Staysure's branding, and the domain name was staysure.co.uk. He relied in particular on *RBS,* where Mann J had said at [47] that:

> "A customer engaging with, or dealing through, a broker (or other intermediary) is likely to know that that person is an intermediary, or at least likely to know that that person is not the end insurer. Even the customers in *InsuranceWide* will have known that somehow they moved on from the website providers and had gone on to deal with someone else."

153. Mr Mantle said that although visibility was "not essential", Mann J was giving "a clear steer" that for the exemption to apply "you would expect visibility". In his submission, it would be wrong of the Tribunal "to ignore the clear economic reality" that the customers think they are dealing directly with Staysure.

154. Ms Sloane submitted as follows:

(1) It was plain from the CJEU case law that there was no requirement for an insurance intermediary to be visible to the customer in order to fall within the exemption.

(2) Instead, one of the key principles emerging from the case law is that whether a person is an insurance broker or an insurance agent depends on "what they do".

(3) Moreover, it would be contrary to the EU principle of fiscal neutrality if one company was within the exemption and another outside it, simply on the basis that the first was a disclosed agent and the second an undisclosed agent.

(4) HMRC's own guidance rightly accepts that claims handlers fall within the insurance exemption, irrespective of whether they are acting as a disclosed or undisclosed agent: the VAT manual at chapter VATINS5510 says that the exemption applies whether the intermediary is acting "in the name of its principal, the insurance company, as an undisclosed agent or informs the claimant that it is acting as the agent of the insurer". Ms Sloane submitted that this was entirely correct, and there was no reason to apply a different approach to insurance intermediaries such as Intervest.

(5) The role of Prudential in the *RBS* case was very different to that played by Intervest: Prudential provided a mere click-through function on its website and provided no "services" at all, see [49(iv)] of that decision; it was a "mere conduit" for that reason.

155. I agree with Ms Sloane for the reasons she gave, that a person does not need to act as a disclosed agent to come within the insurance exemption. I also agree that *RBS* does not compel a different conclusion for the following reasons:

(1) The facts were different. In *RBS,* customers thought they were insuring with Prudential, and were unaware, until the contract was completed, that the insurer was in fact Winterthur. In other words, in *RBS* the insurer was invisible, hidden behind the Prudential branding. As Mann J said, a customer dealing through an intermediary "is likely to know that that person is an intermediary, or at least likely to know that that person is not the end insurer".

(2) Those are not our facts. Here the customers know they are dealing with an intermediary (Staysure); they do not think they are dealing directly with the insurer. The *RBS* judgment is not an authority for the proposition that the insurance exemption applies only if the identity of an *agent* of the intermediary has been disclosed to the customer. Such a conclusion would, as Ms Sloane submitted, be contrary to (a) the case law, which provides that the exemption depends on "what they do", and (b) the EU principle of fiscal neutrality.

(3) In addition, Mann J sets out at [49] his reasons for finding that the commission charged by Prudential to RBS was not within the exemption, see §131. Each of those reasons is based on what Prudential was doing, and was not doing. This is entirely in accordance with the rest of the case law, namely that whether a person comes within the exemption depends on what they do, not on whether they are visible to the customer.

The quote engine

156. Mr Mantle accepted that the quote engine was "essential to Staysure" because without it, Staysure would be unable to broker the insurance to customers, but he submitted that the quote engine did not form "part of the chain" between Staysure and the customer, because it is "not about finding prospective clients but about filling the gap in the technical and human abilities available to Staysure".

157. In his submission, the quote engine provided "technical assistance" allowing Staysure to offer quotations to the customer. He said that in the pre-digital age, a broker would price contracts by reference to a physical book of prices, and the quote engine was simply a modern version of that tool. Intervest constructed the quote engine within parameters set by Staysure, not by Intervest. Mr Mantle said that "at most" the provision of the quote engine amounted to "some limited sub-contracting of pricing by Staysure to Intervest, within the criteria set by Staysure".

158. Ms Sloane emphasised that Intervest's online quote engine, which incorporated pricing, was an essential element of the insurance intermediary service being provided to the customer and formed part of the single supply of qualifying leads. The quote engine formed part of every sale, whether the customer (a) only used the Website, (b) used the call centre, or (c) used a mixture of both. In her submission, the quote engine was not simply a modern form of pricing book, but instead sophisticated technology which interacted with potential customers to assess whether they should be accepted for insurance, and if so, on what conditions (for example, excluding or including a health condition) and at what price. I agreed with Ms Sloane for the reasons she gave.

No selection or recommendation

159. Mr Mantle contrasted Intervest's position with that of IW. The successful appellants in *IW* provided recommendations to customers as to which insurer would be most appropriate, whereas Intervest only offered Staysure's products.

160. Ms Sloane invited the Tribunal to agree with Judge Mosedale's observations in *Dollar* that the Court of Appeal did not say it was essential for an intermediary claiming exemption on the basis of introductory services to provide recommendations to customers: there was no authority for such a proposition; and "if brokers who make recommendations to borrowers based on the broker's self-interest were intended to be liable to charge VAT on their commission I would expect the Directive to have said so". I agree with Judge Mosedale and thus with Ms Sloane.

CONCLUSION ON ISSUE TWO

161. For the reasons set out above, I find that Intervest was making a single supply to Staysure which consisted of the provision of suitable leads. As a result, Staysure succeeds in its appeal. However, as the other two Issues were fully argued, and in case this appeal goes further, I have set out the Issues, the parties' arguments and my conclusions below.

ISSUE THREE: THE SINGLE ASSESSMENT

162. The Assessment was issued on 17 December 2013 for a single long period which began on 1 January 2009 and ended on 31 March 2015. Issue Three was whether, as the Appellant contended, the Assessment was out of time, as it had been issued more than two years after the end of the quarterly accounting periods which fell within that single accounting period, or whether, as HMRC argued, the two year time limit ran from the end of that single accounting period. It was common ground that there was no authority directly on this Issue.

THE LEGISLATION

163. The Assessment was made under VATA s 73(1), which is headed "Failure to make returns etc", and subsection (1) reads

> "Where a person has failed to make any returns required under this Act…or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

164. Section 73(6) reads, so far as relevant:

> "An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge."

165. HMRC could have avoided the Appellant's Issue Three challenge to the Assessment, had it been issued within "one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge". However, HMRC explicitly disclaimed reliance on s 73(6)(a), presumably because, as Ms Sloane submitted, they had delayed in issuing the Assessment until after the end of that one year period.

166. As set out in s 73(6), assessments under s 73 had to be within the time limits set by VATA s 77. At the relevant time, s 77(1)(a) provided for a four year time limit, having been increased from three years by FA 2009, and read:

> "(1) Subject to the following provisions of this section, an assessment under section 73…shall not be made
>
> (a) more than 4 years after the end of the prescribed accounting period…concerned…"

167. Section 77(4) provided that:

> "In any case falling within subsection (4A), an assessment of a person ("P"), or of an amount payable by P, may be made at any time not more than 20 years after the end of the prescribed accounting period."

168. Subsection (4A) provided:

> "Those cases are:
>
> (a) a case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf),
>
> (b) a case in which P has participated in a transaction knowing that it was part of arrangements of any kind (whether or not legally enforceable) intended to bring about a loss of VAT,
>
> (c) a case involving a loss of VAT attributable to a failure by P to comply with a notification obligation, and

(d) a case involving a loss of VAT attributable to a scheme in respect of which P has failed to comply with an obligation under paragraph 6 of Schedule 11A."

169. Thus, by s 77(4A)(c), a 20 year time limit applies to "a case involving a loss of VAT attributable to a failure by P to comply with a notification obligation", and it also applies where the person acted "deliberately". In years before 2009, the equivalent provisions imposed a 20 year time limit where the person's conduct "involved dishonesty". In *Tooth v HMRC* [2021] UKSC 17 ("*Tooth*") the Supreme Court considered the meaning of "deliberately" in Taxes Management Act 1970, s 29, and found that such a person had acted intentionally, knowing that the action was wrong. I have taken it that the same meaning applies for the purposes of s 77(4A).

170. Like the time limit in s 73(6), those in s 77(1) and (4) run from "the end of the prescribed accounting period". This term is explained at VATA s 25, which is headed "Payment by reference to accounting periods and credit for input tax against output tax" and subsection (1) reads:

"A taxable person shall

(a) in respect of supplies made by him

(b) in respect of the acquisition by him from other member States of any goods

account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances."

171. Regulation 25 of the VAT Regulations 1995 is headed "Making of returns", and reads, again so far as relevant, and with emphases added:

"(1) Every person who is registered or was or is required to be registered shall, in respect of every period of a quarter or in the case of a person who is registered, **every period of 3 months** ending on the dates notified either in the certificate of registration issued to him or otherwise, not later than the last day of the month next following the end of the period to which it relates, make to the Controller a return in the manner prescribed in regulation 25A showing the amount of VAT payable by or to him and containing full information in respect of the other matters specified in the form and a declaration, signed by that person or by a person authorised to sign on that person's behalf, that the return is correct and complete;

provided that

(a) …;

(b) the first return shall be for the period which includes the effective date determined in accordance with Schedules 1, 1A,1 2, 3 and 3A to the Act upon which the person was or should have been registered, and the said period shall begin on that date;

(c) where the Commissioners consider it necessary in any particular case to **vary the length of any period or the date on which any period begins or ends** or by which any return shall be made, they may allow or direct any

person to make returns accordingly, whether or not the period so varied has ended;"

FINDINGS OF FACT

172. As I have already found at §34, on 19 December 2016, Ms Forsyth sent the Appellant a manual VAT return for an accounting period which ran from 1 January 2009 to 31 March 2015 ("the Accounting Period"). Her letter said "please send the completed VAT return to me by 16 January 2017…if we do not receive a return for this date, we will raise an assessment for this period".

173. No return was received, and on 26 January 2017 Ms Forsyth issued the Assessment. It ran from 1 January 2009 and ended on 31 March 2015, the day before the Appellant registered for VAT because of a change of circumstances, see §32. .

174. Ms Forsyth was asked in cross-examination why she had issued the Assessment for a single long period rather than for 25 separate periods, each of three months. She said that in cases where HMRC establish that a trader should have registered for VAT, HMRC's normal practice was that the first period ran from the date the trader should have registered to the date of actual registration. She added that she had previously worked in HMRC's VAT registration section, and she had never seen a case where HMRC had acted differently.

175. Ms Sloane accepted that Ms Forsyth had not issued Staysure with this single global assessment in order to avoid the consequences of falling outside the time limit provided by s 73(6). I agree, and find as a fact that Ms Forsyth issued the Assessment for a single long accounting period because this was HMRC's normal practice in the circumstances.

THE PARTIES' SUBMISSIONS AND THE TRIBUNAL'S VIEW

176. I first set out the overall position, and then the parties' submissions on each of the case law authorities on which they relied, together with my view. My conclusions on the case law are summarised at §225, followed by view as to the meaning of the statutory phrase "the prescribed accounting period" in s 73(6).

Overall position

177. The Assessment issued on 26 January 2017 ran from the registration date of 1 January 2009 to 31 March 2015. Had Ms Forsyth instead issued assessments for each of the 25 periods which fell between the registration date and 31 March 2015, all but the last of those assessments would have been out of time, being issued more than two years after the end of the relevant accounting period, see s 73(6)(a).

178. Ms Sloane accepted that Reg 25(1)(c) empowered HMRC to vary the length of any period or the date on which any period begins or ends, where they considered it necessary in any particular case. However, she submitted that this power could not be used so as to circumvent the statutory time limits in VATA s 73(6), and the Assessment was therefore invalid.

179. Mr Mantle submitted that HMRC were acting within the powers given to them by the regulations, and the Tribunal could only find the Assessment invalid if HMRC had acted improperly or had abused their power, which was not the position.

180. Both parties made submissions on the case law. I have first summarised the domestic case law on which they relied, in chronological order, followed by the single CJEU authority.

Grange

181. In *Grange v C&E Commrs* [1979] 1 WLR 239 ("*Grange*"), the Court of Appeal reversed the decision of Neil J (as he then was), see *Grange v C&E Commrs* [1979] STC 183. The background was as follows:

(1) the appellant had submitted returns for three month periods;

(2) HMRC decided that some sales had been omitted from those returns, but were unable to identify the period in which the sales had taken place, and so issued a single global assessment for a 21 month period;

(3) the applicable statutory provisions considered were those in Finance Act 1972, s 31; it is clear from the judgment that s 31(1) and (2) were essentially the same as VATA s 73(1) and (6).

(4) HMRC relied on the assessment as having been made "within one year of facts sufficient…to justify the making of the assessment, came to their knowledge"; and

(5) the appellant submitted that it followed from that subsection that assessments had to be made for three month periods, and the assessment was thus invalid.

182. Lord Denning gave the leading judgment. He considered the wording of s 31(2) that an assessment can be made no later than "(a) two years after the end of the prescribed accounting period; or (b) one year after evidence of facts, sufficient in the opinion of the commissioners to justify the making of the assessment, comes to their knowledge". He said that to avoid the "impractical result" of HMRC being unable to make an assessment on a global basis, it was necessary to add, after the words "for any prescribed accounting period", the words "which is included in the notice of assessment". He held at p 242:

> "So read, it means that in all cases where it is impossible for the commissioners to split the assessment up into three-monthly periods, they can assess the amount of tax for any period of time which they specify, be it six, 12, 15 or 21 months, and such assessment will be good. They must do it within one year after they get evidence of the facts sufficient to justify the nature of the assessment: see section 31(2)(b)."

183. Bridge and Templeman LJJ delivered concurring judgments, with Templeman LJ adding at p 245 that the effect of reading in the additional words was as follows (emphasis added):

> "far from this being disadvantageous to the trader, it means that **the limitation period starts with the very earliest prescribed accounting period of three months which is covered by the assessment** which has been made on him, so that if the commissioners take that course under no circumstance can the trader be prejudiced."

The parties' submissions

184. Ms Sloane submitted that it was clear from Lord Templeman's judgment in *Grange* that HMRC could not circumvent the time limits provided by s 73(6) by issuing a global assessment. Given that the two year time limit must run from "the very earliest prescribed accounting period of three months which is covered by the assessment"**,** the whole of the Assessment was invalid because it had not been made within two years of the end of the first

period contained within it. HMRC were relying on the regulations to bypass the statute, and it was clear from *Grange* that this was not permitted.

185. Mr Mantle submitted that *Grange* was not a case where the appellant had failed to register for VAT, but instead one where returns had already been made. It was therefore not a relevant decision for the purposes of this appeal.

The Tribunal's view

186. I agree with Mr Mantle that the facts of *Grange* were significantly different to those of Staysure. In *Grange,* the appellant had **already filed returns** for three month periods, and there would have been no basis on which HMRC could have directed, in reliance on the regulations, that it file a single return.

187. In this case, the position was different. The Appellant had never filed VAT returns, and HMRC issued a direction that it file a return for a single period. When it failed to do so, HMRC raised the Assessment for that same single period.

188. *Grange* is therefore not an authority for a finding that, where a person is directed to file a single return for a long period, the time limit runs from the dates of three month periods within that period. I thus agree with Mr Mantle and find that the case does not assist the Appellant.

Le Refifi

189. In *C&E Commrs v Le Refifi* [1995[STC 103 ("*Le Refifi*"), Balcombe LJ gave the leading judgment, with Millett LJ and Sir Ralph Gibson delivering concurring judgments. Balcombe LJ first considered *Grange*, and then said at p 107:

> "It is undoubtedly permissible for the commissioners to make a single or 'global' assessment which covers more than one accounting period. In practice this may be necessary when it is impossible or impracticable for the commissioners to identify the specific accounting period or periods for which the tax claimed is due… The power for the commissioners to make a global assessment is, however, not confined to those cases where it is impossible or impracticable to identify the specific accounting period or periods for which the tax claimed is due"

190. It was common ground that *Le Refifi* was authority for HMRC to issue global assessments not only where (as in *Grange*), it was "impossible or impracticable" for HMRC to issue assessments for the normal three month periods.

Bjellica

191. The appellant in *Bjellica v C&E Commrs* [1995] STC 329 ("*Bjellica*") had not registered for VAT and so had not filed a return. HMRC issued a single global assessment for a period of twelve years and six months. The appellant submitted that this was a breach of Article 22(4) of the Sixth Directive, which required that a return period should not exceed one year; it also argued that the VAT Regulations were *ultra vires* in permitting a long period.

192. Ms Sloane submitted that *Bjellica* was not relevant to Staysure, because in *Bjellica* the assessment had been made within "one year of evidence of facts" etc. The Court of Appeal therefore did not consider whether HMRC could issue a single global assessment if (a) they

were relying on the alternative two year time limit, and (b) one or more of the three month periods within that assessment was out of time.

193. I agree that time limits were not in issue in *Bjellica*; it is clear from the facts as set out in more detail by Leonard J in the High Court judgment under reference [1993] STC 730, that the one year time limit was satisfied.

Pegasus Birds

194. In *Pegasus Birds v C&E Commrs* [2000] STC 91 ("*Pegasus Birds*"), Aldous LJ gave the only judgment, with which Scott-Baker J and Henry LJJ both agreed. He said at [7] that:

> "It is accepted that only the final assessment was in the time limit set out in s 73(6)(a). Therefore the question for determination is whether the remainder were within the time limit set out in s 73(6)(b)."

195. Under the heading "The first issue" he said at [10] that "the first issue turns upon construction of s 73(6)(b) of the 1994 Act", and he then set out the submissions made on behalf of the appellant. He continued at [11] (emphasis added):

> "Section 73 has to be construed as a whole. Section 73(1) provides that the commissioners 'may assess the amount of VAT due from him to the best of their judgment and notify it to him'…**Subsection (6) is to protect the taxpayer from tardy assessment,** not to penalise the commissioners for failing to spot some fact which, for example, may have become available to them in a document obtained during a raid. Against that background, sub-s (6)(b) is clear. The relevant evidence of facts is that which was considered, in the opinion of the commissioners, to justify the making of the assessment. The one-year time limit runs from the date when the facts constituting the evidence came to the knowledge of the commissioners. That was the construction adopted by the tribunal and the judge. It accords with similar views expressed in other cases in respect of similar provisions in earlier legislation."

196. Ms Sloane relied on the highlighted phrase, on the basis that it encompassed s 73(6) in its entirety, and not only s 73(6)(b). She said that it followed that the purpose of the time limit in s 73(6)(a) was similarly to protect the taxpayer from tardy assessment. If HMRC could issue a global assessment for a single long accounting period on the basis that the two year time limit in s 73(6)(a) ran from the end of that long period, this would be entirely contrary to the purpose of the provision as stated by Dyson LJ.

197. Mr Mantle submitted that *Pegasus Birds* was binding only in relation to s 73(6)(b), and read in context, it was clear that the phrase relied on by Ms Sloane referred only to that subsection. *Pegasus Birds* did not prevent HMRC from issuing a direction under Reg 25 that a taxpayer who had failed to register should have a single long accounting period, with the result that the two year time limit ran from the end of that period

198. I agree with Mr Mantle that the only issue being considered in *Pegasus Birds* was the meaning and effect of s 73(6)(b), and the reference to protecting the taxpayer from tardy assessment was made in that context, as is clear from the rest of that sentence. The judgment is not an authority where (as here) HMRC issue a direction under Reg 25 that a person who has not registered for VAT has a single long first accounting period.

Hindle

199. The appellants in *Hindle and another v C&E Commrs* [2004] STC 412 ("*Hindle*") had failed to register for VAT. On 27 September 1999, HMRC issued a global assessment for the 10 month period from 1 December 1995 to 30 September 1996, on the basis that it was made "within one year of evidence of facts" etc, see the VAT Tribunal judgment at VATTR 17868 at [74]. At that time, s 77 provided for a three year time limit rather than the current four years, see §166.

200. Neuberger J (as he then was) held that the assessment was validly made because:

(1) nothing in Reg 25 prevented HMRC issuing an assessment for a ten month period, see [42]; and

(2) Reg 25(1)(c) was applicable both to cases where a trader actually makes a return and where no return had ben made, see [43].

201. That was sufficient to decide the case against the appellant. However, HMRC had also argued that they could have relied on the 20 year limitation period for an assessment, because the appellant had been dishonest, albeit that no penalty for dishonesty had been levied, see [24] of the judgment; the related statutory provision is referenced to at §169.

202. Neuberger J said at [47]:

> "The third point does not strictly arise and did not indeed arise on the tribunal's view of the facts, but I shall deal with it shortly because it has been argued. It is whether the commissioners could have relied on s 77(4) of the 1994 Act against Mr and Mrs Hindle. It does not arise, because in this case there is a single assessment on Mr and Mrs Hindle. If the single assessment had been construed as a series of assessments in respect of the three lots of three months, then, in respect of at least two of those periods, it would have been outside the three-year period permitted by s 77(1) and it would, therefore, have been necessary for the commissioners, if they could, to have brought themselves within s 77(4). I do not think it is open to me (even if I thought it right, which I do not) to hold that the single assessment should be treated as four separate assessments in respect of the three lots of three months from 1 December 1995 and the one month of September 1996."

The parties' submissions

203. Mr Mantle relied on the paragraph set out above, saying Neuberger J had found that the time limit for s 77 purposes ran from the end of the long accounting period, and that as a result there was no need for HMRC to rely on the longer time limits in s 77(4). Ms Sloane invited me to disregard that passage because it was *obiter*. Mr Mantle did not disagree, but submitted that it was nevertheless persuasive.

The Tribunal's view

204. In *An NHS Trust v X* [2021] EWHC 65 Sir James Mundy said in at [59] that "there are *obiter dicta* and *obiter dicta"*, adding that Megarry J in *Brunner v Greenslade* [1971] Ch ("*Brunner*") had said at pp 1002-3:

> "A mere passing remark or a statement or assumption on a matter that has not been argued is one thing, a considered judgment on a point fully argued is another, especially where, had the facts been otherwise, it would have formed

> part of the ratio. Such judicial *dicta*, standing in authority somewhere between a *ratio decidendi* and an *obiter dictum*, seem to me to have a weight nearer to the former than the latter."

205. I considered whether Mr Mantle was right, that this was the sort of *obiter dicta* which has some persuasive force. However, the third issue before the Court was not about whether the time limit ran from the end of the long accounting period. Instead, it was whether, in a case where there had been no penalty for dishonesty, HMRC could nevertheless rely on the 20 year time limit. There is no mention in the judgment about any submissions as to the time limit running from the end of the long accounting period. Thus, although Neuberger J says the point was "argued", it was a different point form the one with which we are concerned. I thus agree with Ms Sloane that the *dictum* should not be regarded as persuasive.

Raj Restaurant

206. In *Raj Restaurant v HMRC* [2008] CSIH 68, [2009] STC 729 ("*Raj*") the judgment included this passage at [16]:

> "Where a person is registered late for VAT, it is open to the Commissioners to make a 'long period' direction under reg 25(1)(c), directing that the first return should cover the entire period from the date when the person ought to have been registered until a point in time after the date of registration. The practice is illustrated by such cases as *Bjellica* (*t/a Eddy's Domestic Appliances*) *v Customs and Excise Comrs* [1995] STC 329 and *Hindle* (*t/a D J Baker Bar*) *v Customs and Excise Comrs* [2003] EWHC 1665 (Ch), [2004] STC 412. By issuing such a direction the Commissioners can avoid periods becoming out of time for assessment under provisions of the 1994 Act (such as ss 73(6) and 77(1)) which allow an assessment to be made only within a specified period following the end of a prescribed accounting period."

207. However, having considered the facts and the submissions, the Court also held at [20]:

> **"**It follows from the foregoing that there was no prescribed accounting period lasting from 18 September 1995 to 31 July 2002: the respondents were, instead, required to make returns in respect of each quarterly period, and for the final period of one month, which elapsed between those dates (the first period being somewhat shorter by virtue of reg 25(1)(b)). If the Commissioners considered it necessary that a single return should be made in respect of the entire period from 18 September 1995 to 31 July 2002, it was open to them to make a direction to that effect under reg 25(1)(c). They did not do so."

208. Thus, the Court explicitly stated at [16] that in cases of failure to register, HMRC can avoid the time limits at s 73(6) and s 77 by directing a single long accounting period. It was common ground that this passage was *obiter*, as no such direction had been given to the appellant. Mr Mantle submitted that it was nevertheless relevant to note that the Court had concurred with the third finding made by Neuberger J in *Hindle.*

209. Ms Sloane asked me to place no weight on the passage as there had been no discussion or argument about the time limit issue, and adding that as a Scottish case, it was not a binding precedent. In making that submission, she relied on *Premier Foods v HMRC* [2015] EWHC 1483, which in turn relied on *Clarke and Frank Staddon Ltd v Marshalls Clay Products Ltd* [2004] EWCA 422 ("*Clarke*").

210. I agree that with Ms Sloane that, taken alone, the passage carries little weight. Like Neuberger J's third finding, it was "a mere passing remark or a statement or assumption on a matter that has not been argued", see *Brunner* cited above.

211. For completeness, I disagree with Ms Sloane as to the status of a Scottish judgment. Although the Court of Appeal held in *Clarke* at [32] that decisions of the Scottish Court are not binding "in the strict sense", they also held at [31] that they should be followed "as a matter of pragmatic good sense" where they were deciding the same issue. The UT came to the same conclusion in *HMRC v NEC* [2015] UKUT 0053 at [30]-[34], saying that "whilst not formally bound by the decision of the Inner House of the Court of Session…in the absence of conflicting authority we should follow it".

Cozens

212. The issue in *Cozens v HMRC* [2015] UKFTT 582 ("*Cozens*") was whether a "global" excise duty assessment had been issued out of time under FA 1994 s 12(4), which provided as follows:

> "An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say–
>
> (a) …the end of the period of three years beginning with the time when his liability to the duty arose; and
>
> (b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;…"

213. Thus, the time limit in *Cozens* did not run from the end of a "accounting period", as that concept was not relevant to excise duty. However, the FTT considered the VAT case law on global assessments, and then said:

> "123…The principle that if part of a global assessment is out of time then the whole assessment fails was clearly established to protect the taxpayer against the prejudice that could by caused to him by the Respondents choosing to use a global assessment rather than a series of separate assessment and thereby bundling together demands that would be out of time if made separately with those that were in time. As the Court of Appeal in *Pegasus Birds* observed in the passage quoted at [20] above, the time limit provisions are there to protect the taxpayer from tardy assessment; permitting the Respondents to use a global assessment…to defeat assessments in respect of particular excise duty points that would otherwise be out of time is inconsistent with that principle.
>
> 124. In my view the VAT authorities demonstrate that when a global assessment is made, so as to create an accounting period which covers a number of prescribed accounting periods, then for the assessment to be valid it must be in time for all of the prescribed accounting periods that it covers. This is readily apparent from the way the Court of Appeal formulated the principle in *Grange*: see the passage from Templeman LJ's judgment quoted at [31] above where the statutory wording was interpreted so as to read in words permitting an assessment to be expressed to cover a period including a number of prescribed accounting periods."

214. These passages encapsulated the Appellant's case on this Issue. Mr Mantle pointed out that *Cozens* was an excise duty case, and did not involve a failure to register.

The Tribunal's view

215. The FTT's judgment in *Cozens* relies essentially on *Grange* and *Pegasus Birds,* both of which I have considered above.

(1) In *Grange,* the appellant had already filed returns, and so could not be issued with a direction under Reg 25(1)(c) that it file a return for a single accounting period. In contrast, Ms Forsyth issued Staysure with a direction under that Regulation, and it is HMRC's case that the two year time limit runs from the end of that period.

(2) It is true that in *Pegasus Birds,* Dyson LJ said that the purpose of s 73(6) is "to protect the taxpayer from tardy assessment", but that statement was made in the context of the "one year from evidence of facts" time limit in s 73(6)(b), not in the context of the two year time limit in s 73(6)((a).

216. I therefore respectfully disagree with the FTT's findings in *Cozens.* The earlier case law in *Grange* and *Pegasus Birds* has not "clearly established" the principle that "if part of a global assessment is out of time then the whole assessment fails"; or that "for the assessment to be valid it must be in time for all of the prescribed accounting periods that it covers".

FII Test Claimants

217. The only CJEU case to which I was referred was *Test Claimants in the Franked Investment Income Group Litigation v HMRC* (C-362/12) [2014] STC 638 (("*FII Test Claimants*"). This case arose from the change in the law introduced by FA 2004, s 320. Previously, the time limit for making a claim for recovery of tax levied under mistake of law ran from the later of six years and the date the mistake was discovered. Section 320 removed the right to make the latter type of claim, and the provision was retroactive to 8 September 2003, the date on which the change was announced.

218. The CJEU held that by introducing this change retroactively and without any transitional arrangements, the UK had breached the EU principles of effectiveness, legal certainty and the protection of legitimate expectations. In the course of the judgment, the CJEU held at [33]:

> "As regards the latter principle [of effectiveness], the Court has held that it is compatible with EU law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the authorities concerned. Such time-limits are not liable to render impossible in practice or excessively difficult the exercise of rights conferred by EU law. However, in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance (*Marks & Spencer*, paragraphs 35 and 39 and the case-law cited."

219. In relation to the principles of legal certainty and the protection of legitimate expectations, the CJEU held at [44] (Ms Sloane's emphasis):

> "according to settled case-law, the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires **that rules involving negative consequences for individuals should be clear and precise and that their application should be predictable for those subject to them** (see, inter alia, Case C-17/03

> *VEMW and Others* [2005] ECR I-4983, paragraph 80). As has been observed in paragraph 33 of this judgment, limitation periods must be fixed in advance if they are to serve their purpose of ensuring legal certainty."

220. Ms Sloane submitted as follows:

(1) VAT limitation periods had been fixed in advance by s 73 and s 77.

(2) HMRC's use of long accounting periods undermined those fixed periods and therefore:

(a) failed to comply with the EU principles of principles of legal certainty and the protection of legitimate expectations; and

(b) breached the requirement that "rules involving negative consequences for individuals should be clear and precise and their application should be predictable for those subject to them".

(3) Although HMRC was not required to apply those principles in cases of abuse, this was not such a case.

221. Mr Mantle confirmed that HMRC were not alleging that the Appellant had engaged in any abusive practice within the meaning of *Halifax v C&E Commrs* (Case C-255/02) and subsequent case law. However, he said that the principles relied on by the CJEU in *FII Test Claimants* were "welded to" the protection of the taxpayer's rights, and the position was different where, as here:

(1) a taxpayer had incorrectly failed to register for VAT; and

(2) HMRC had the right under the regulations to issue a return for a single long period.

222. In his submission, the taxpayer could not rely on EU law principles of effectiveness, legal certainty and legitimate expectations, because it had breached its obligation to register. However, he did not refer to any EU case law in support of that submission.

Discussion

223. The key question here is whether a taxable person who is required to register for VAT but has not done so, can rely on EU principles of legal certainty and the protection of legitimate expectations so as to prevent HMRC from issuing a direction under Reg 25(1)(c) for an initial long accounting period, and/or to prevent the limitation provisions in VATA ss 73(6)(a) and s 77 from running from the end of that accounting period.

224. I found this a difficult question. On the one hand, it is clear from the CJEU's judgment at [44] that that rules involving negative consequences for individuals should be clear and precise and their application should be predictable for those subject to them, and it is also clear that this applies to limitation periods. On the other hand, I agree with Mr Mantle that a person who has failed to register is not in the same position as the appellants in *FII Test Claimants,* who had not breached any legal requirement and plainly had a right to rely on the principles of EU law.

The case law in summary

225. I summarise my findings on the case law as follows:

(1) HMRC has the power to issue global assessments where it is "impossible or impracticable" to issue assessments for the normal three month periods, but the power is not confined to those situations, see *Grange* and *Le Refifi.*

(2) HMRC can direct a long accounting period under Reg 25(1)(c) in a case such as this, where a person has not registered for VAT, see *Hindle* at [43].

(3) There is no binding authority for Ms Sloane's submission that the time limit runs from the end of the first three month period within the long period. Although she relied on *Grange* and *Pegasus Birds*, in the former there was no direction to file a return for a long accounting period, and the latter concerned only s 73(6)(b), in relation to which the long period was irrelevant.

(4) Equally, no binding authority supports Mr Mantle's contrary view. Although in *Hindle*, Neuberger J held that the statutory time limit ran from the end of a long accounting period, and in *Raj* the Court of Session came to the same conclusion, both these findings were *obiter*, and there had been no argument on the point.

(5) A person who failed to comply with his legal obligation to register was in a different position from the taxpayers in *FII Test Claimants.* It was therefore unclear whether the EU law principles of effectiveness, legal certainty and the protection of legitimate expectations applied so as to prevent the time limit being extended by the use of a long accounting period.

226. As the case law is inconclusive, I went on to consider for myself the statutory interpretation of the relevant provisions.

Statutory interpretation

227. Section 73(6)(a) sets the time limit of "2 years after the end of the prescribed accounting period", and the key phrase is "prescribed accounting period". I first summarise key principles of statutory interpretation, then consider the relevant legislation.

The relevant principles

228. In *R (Quintavalle) v SoS for Health* [2003] UKHL 13, Lord Bingham held at [8] that in construing a statutory provision "the court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose". In *Lambeth LBC v SoS for HCLG* [2019] UKSC 33, Lord Carnwarth said that:

> "the starting-point - and usually the end-point - is to find 'the natural and ordinary meaning' of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

229. In *Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2020] UKSC 47 at [155] Lord Reed and Lord Hodge held that "it is the court's duty "to favour an interpretation of legislation which gives effect to its purpose rather than defeating it".

230. The authoritative text, Bennion, Bailey and Norbury on Statutory Interpretation, says at Section 21.3:

> "Legislation is generally assumed to be put together carefully with a view to producing a coherent legislative text. It follows that the reader can reasonably assume that the same words are intended to mean the same thing and that different words mean different things. Like all linguistic canons of

> construction this is no more than a starting point. These presumptions may be rebutted expressly or by implication."

Section 25 and the related regulations

231. Section 25(1) provides that "in this Act" the term "prescribed accounting period" means the periods by reference to which a person shall "account for and pay VAT", and those periods may be determined "by or under regulations and regulations may make different provision for different circumstances". Reg 25(1) provides that this is "every period of 3 months"; "that the first return will begin on the date that a person "was or should have been registered", and by subparagraph (c), that:

> "where the Commissioners consider it necessary in any particular case to vary the length of any period or the date on which any period begins or ends or by which any return shall be made, they may allow or direct any person to make returns accordingly, whether or not the period so varied has ended;…"

Section 77

232. Section 77 provides that HMRC may not make an assessment under s 73 "more than 20 years after the end of the prescribed accounting period" where there is "a loss of VAT attributable to a failure by [the person] to comply with a notification obligation".

233. I considered whether the term "prescribed accounting period" in s 77 can be read as a reference to single long accounting period. I found it helpful to use a hypothetical example, in which HMRC identify in 2022 that a person should have registered in 2000, so 22 years previously, and then apply their normal practice (see §175) of directing a long first accounting period.

(1) If s 77 sets a 20 year time limit from the end of each three month period, HMRC can assess from 2002 to 2022, because the end of each of those three month periods falls within the previous 20 years.

(2) If s 77 sets a 20 year time limit from the end of a single long accounting period HMRC can assess back to 2000, because the 20 year time limit stretches forwards in time from 2022.

234. If the hypothetical trader had instead been operating since 1973, and HMRC realised in 2022 that he should have always have been registered, option (2) above would allow HMRC to assess as far back as the introduction of VAT, because the 20 year time period would run forwards from 2022.

235. Thus, the effect of reading "prescribed accounting period" in s 77 as meaning a long accounting period means that in failure to notify cases where HMRC direct a long first period, there would be no time limit at all. Once HMRC issue the direction, they have 20 years from that date to assess the trader, and the assessment can go back in time as far as 1973.

236. In my judgment, this reading of the statutory provision cannot be correct, because:

(1) if Parliament had intended there to be no time limit in failure to notify cases, it would not have prescribed a 20 year time limit;

(2) a 20 year time limit applies to those who act deliberately (dishonestly) in relation to their VAT liabilities, see s 77(4) and (4A)(a) at §167-168; and

(3) Parliament cannot have intended that the position of a trader who through failed to register would be significantly worse than that of a deliberate defaulter.

237. Those conclusions are consistent with *Tooth*, where the Supreme Court held at [45]-[46] that Parliament would not have intended to impose harsher penalties on a person who had acted in ignorance than on one who had acted deliberately.

238. I therefore find that the term "prescribed accounting period" in s 77 cannot mean a long accounting period. The only alternative reading suggested by the parties (or by the case law) is that the term means each period of three months which falls within a single long period, and I so find.

Section 73

239. Section 73(1)-(3) empowers HMRC to make assessments. As set out earlier in this judgment, Section 73(6) reads, so far as relevant to this Issue (my emphasis):

> "An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period **must be made within the time limits provided for in section 77** and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge."

240. The time limits in s 73(6) are therefore explicitly linked to those in s 77. It would be inconsistent with the normal canons of parliamentary drafting if "prescribed accounting period" in s 73(6) had a different meaning from precisely the same term used in s 77. It would also undermine the purpose of the provision, which plainly is meant to operate *within* the time limits set by 77.

HMRC's discretion under Reg 25?

241. Although Reg 25(1)(c) gives HMRC the discretion to "vary the length of any period or the date on which any period begins or ends", Parliament has set out clear time limits in s 77 and s 73, and cannot have intended to give HMRC the power to remove those time limits by the exercise of their discretion.

The effect of this statutory interpretation

242. The term "prescribed accounting period" in s 77 and s 73(6) cannot therefore refer to a period of longer than three months. If follows that HMRC can make an assessment under s 73 providing that assessment:

(1) is made by the later of:

(a) two years of the end of a given three month period; and

(b) one year "after evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge"; and

(2) is also issued within the time limits set by s 77, namely four years of the end of that three month period, or 20 years if the conditions in subsection (4A) are met.

243. Where HMRC wish to assess a period which is more than two years after the end of the three month accounting period, they must therefore do so within one year of receiving evidence of facts sufficient to make the assessment.

HMRC's guidance

244. That conclusion is echoed in HMRC's published guidance. Chapter VAEC1160 of their VAT Assessments and Error Correction Manual is headed "Time limits for assessments involving long first period returns" and, so far as relevant to this issue, reads as follows (my emphases):

> "When making an assessment **in respect of a long first period** the provisions of Section 73 and Section 77 VATA 94 will normally allow us to assess for the whole of the prescribed accounting period.
>
> Where possible officers should raise their assessments in recognition of the appropriate time limits as follows;
>
> - Section 73(6)(a) VATA 94 if the end of the prescribed accounting period is within 2 years of the date of the assessment
> - Section 77(1)(a) VATA 94 if the end of the prescribed accounting period is more than 2 years but within 4 years of the date of the assessment
> - Section 77(4) VATA 94 if the end of the prescribed accounting period is more than 4 years after the date of the assessment….
>
> When making an assessment under Section 77(1)(a) or 77(4), remember that **you are still required to make your assessment under the one year evidence of facts rule contained in Section 73(6)(b) VATA 94**."

245. Thus, HMRC's own published guidance (contrary to the position taken in this case) is that where a long accounting period has been directed under Reg 25, HMRC "are required to" assess within the one year evidence of facts rule. The clear implication is that HMRC cannot issue an assessment on the basis that the two year rule runs from the end of the single long accounting period.

Is the whole Assessment invalid?

246. The Assessment was issued on 26 January 2017 for a long period which began on 1 January 2009 and ended on 31 March 2015. It follows from the analysis above that the Assessment is invalid at least in relation to the period up to 31 December 2014, because those periods ended more than two years before the Assessment was issued.

247. Ms Sloane submitted, in reliance on the judgment of Templeman LJ in *Grange*, that "the limitation period starts with the very earliest prescribed accounting period of three months which is covered by the assessment", and that if any one of the three month periods were out of time, the whole assessment falls. In other words, global assessments are either all valid, or all invalid.

248. However, as I have already found, *Grange* was not a case where a single long accounting period had been directed and so the judgment had no direct relevance to the situation of the Appellant.

249. On the basis of the statutory interpretation set out above, the phrase "prescribed accounting period" in s 77 and s 73(6) cannot be a reference to a long accounting period, and the only alternative meaning is the normal three month period. It follows that the part of the Assessment which relates to the period from 1 January 2015 to 31 March 2015 would be in time, as that three month period ends less than two years before 26 January 2017, when the Assessment was issued. The rest of the Assessment is invalid.

CONCLUSION ON ISSUE THREE

250. For the reasons set out above, I agree with Staysure on Issue Three in relation to all but the last three months of the Assessment. Were I to be wrong on Issue Two, so that Staysure was making taxable supplies, all but that part of the Assessment would have been invalid.

ISSUE FOUR: THE PENALTY

251. On 6 February 2017, Ms Forsyth issued Staysure with the Penalty which was levied under VATA s 67 for failure to notify liability to VAT. In the course of the hearing, HMRC informed Staysure and the Tribunal that they had reconsidered the Penalty and asked the Tribunal to mitigate it from £1,187,290 to £216,821.

252. Since I have found that Staysure was not liable to be registered for VAT (Issue Two), its appeal against the Penalty also succeeds. However, as Issue Four was fully argued, and in case the appeal goes further, I set out below:

(1) the relevant legislation;

(2) findings of fact relevant to the calculation of the penalty and to mitigation;

(3) the basis for HMRC's proposed mitigation of the penalty;

(4) the law, evidence, submissions and findings on whether Staysure had a reasonable excuse; and

(5) the parties' submissions and my conclusion on whether the Penalty should be mitigated.

LEGISLATION ON THE PENALTY CHARGE AND ITS MITIGATION

253. VATA s 8 provides that a person receiving supplies of services from outside the UK must account for VAT under the reverse charge procedure. VATA, Sch 1, para 1(b) provides that a person who makes taxable supplies is liable to be registered, if the value of his taxable supplies is expected over the next 30 days to exceed, the VAT threshold. VATA Sch 1, para 6 provides that such a person must notify HMRC of its liability to be registered "before the end of the period by reference to which the liability arises".

254. None of these provisions were in dispute: both parties accepted that if Staysure were liable to register for VAT because of the operation of the reverse charge provisions, it should have done so before the end of its first quarter in 2009.

255. . VATA s 67 was headed "Failure to notify and unauthorised issue of invoices" and reads:

"(1) In any case where—

(a) a person fails to comply with any of paragraphs 5, 6…of Schedule 1…

he shall be liable, subject to subsections (8) and (9) below, to a penalty equal to the specified percentage of the relevant VAT or, if it is greater or the circumstances are such that there is no relevant VAT, to a penalty of £50….

(3) In subsection (1) above "relevant VAT" means (subject to subsections (5) and (6) below)—

(a) in relation to a person's failure to comply with paragraph 5, 6 of Schedule 1, the VAT (if any) for which he is liable for the period beginning on the date with effect from which he is, in accordance with that paragraph, required to be registered and ending on the date on which the Commissioners received notification of, or otherwise became fully aware of, his liability to be registered…

(4) For the purposes of subsection (1) above the specified percentage is—

(a) 5 per cent where the relevant VAT is given by subsection (3)(a) or (b) above and the period referred to in that paragraph does not exceed 9 months or where the relevant VAT is given by subsection (3)(c) above and the failure in question did not continue for more than 3 months;

(b) 10 per cent where that VAT is given by subsection (3)(a) or (b) above and the period so referred to exceeds 9 months but does not exceed 18 months or where that VAT is given by subsection (3)(c) and the failure in question continued for more than 3 months but did not continue for more than 6 months; and

(c) 15 per cent in any other case….

(8) Conduct falling within subsection (1) above shall not give rise to liability to a penalty under this section if the person concerned satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for his conduct."

256. Section 67 therefore provided that Staysure would be liable to a 15% penalty under subsection (4)(c), subject to Staysure having a reasonable excuse, that the 15% would be charged "for the period beginning on the date with effect from which he is, in accordance with that paragraph, required to be registered and ending on the date on which the Commissioners received notification of, or otherwise became fully aware of, his liability to be registered". The parties disputed when that end date had arisen, see further §279 and §303 below,

257. Section 70 was also relevant. This was headed "Mitigation of penalties under sections 60, 63, 64, 67, 69A and 69C" and read:

"(1) Where a person is liable to a penalty under sections 60, 63, 64, 67, 69A or 69C…, the Commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper.

(2) In the case of a penalty reduced by the Commissioners under subsection (1) above, a tribunal, on an appeal relating to the penalty, may cancel the whole or any part of the reduction made by the Commissioners.

(3) None of the matters specified in subsection (4) below shall be matters which the Commissioners or any tribunal shall be entitled to take into account in exercising their powers under this section.

(4) Those matters are—

(a) the insufficiency of the funds available to any person for paying any VAT due or for paying the amount of the penalty;

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of VAT;

(c) the fact that the person liable to the penalty or a person acting on his behalf has acted in good faith."

FINDINGS OF FACT ABOUT THE PENALTY

258. On 17 December 2013, Mr Wicker of HMRC wrote to Staysure seeking information about the services being supplied by Intervest. On 17 January 2014, Staysure replied, saying it received no "taxable supplies which would constitute reveres charge supplies" but instead only "exempt intermediary services from abroad".

259. On 10 May 2014[1], Mr Wicker held a meeting with Mr Savelli, Staysure's interim Finance Director, and Mr White of Brian White Ltd, Staysure's adviser. Mr Wicker said that the purpose of the meeting was for HMRC to obtain all relevant facts, and that he would visit the business at a later date "to look at the processes involved…and Intervest's involvement in that process". At the end of the meeting, it was agreed that Staysure would take 6-8 weeks to provide further information, and this was provided on 22 May 2014.

260. On 28 May 2014, Mr Wicker wrote to Mr Savelli with a list of further questions and asked for a response within 15 working days. On 11 June Mr Savelli responded, saying that Staysure could not meet that deadline, and suggesting a new date of 22 August 2014. Meanwhile, Mr Wicker was taking internal advice from within HMRC "from a tax avoidance angle".

261. On 27 August 2014, Mr Savelli replied to Mr Wicker's questions and agreed to a meeting on 10 September 2014. At that meeting, Ms Forsyth was introduced as taking over from Mr Wicker. At the end of the meeting, Staysure agreed to provide further information under ten "action points".

262. On 30 October 2014, Ms Forsyth wrote to Intervest asking three questions to which she asked for a reply by 21 November 2014; on the same day, she wrote to Mr Savelli asking that he provide the information requested at the meeting by 21 November 2014. Both Intervest and Staysure replied by that date. Yet more information was requested by Ms Forsyth in a letter dated 2 December 2014; this was provided on 12 December 2014.

263. On 20 January 2015, Mr Wicker and Ms Forsyth agreed that the case be referred to HMRC's Policy team. The referral submission said that "no arguments have been put forward by HMRC to date" but that "there may be tax at stake of £2m p/a therefore need to be sure of the correct liability of the supplies received from Intervest". On 18 February 2015, Ms Forsyth informed Mr Savelli that she had made the referral to Policy, and their response "may take a little while".

[1] Ms Forsyth's witness statement said that this meeting was held on 10 April 2014, but as is clear from the meeting notes, this was a mistake

264. Those internal HMRC discussions lasted until 16 October 2015, when Ms Forsyth was told that the case should be considered as a liability issue, not as an avoidance issue. Ms Forsyth wrote to Mr Savelli on 30 November 2015, and began her letter by apologising for the delays. She asked for a response by 6 January 2016.

265. On 7 December 2015 Mr Julian Kearney wrote to Ms Forsyth saying he had taken over from Mr Savelli and was now Staysure's Finance Director. He noted that the Christmas and New Year holidays were imminent, and that "it has been nearly 15 months since you met with Richard [Savelli] and 10 months since your last correspondence. It will take me some time to digest and analyse all of the points you have raised". He suggested a new deadline of 29 February 2016. Ms Forsyth said that she would allow further time, but only to 29 January 2016.

266. Mr Kearney replied on 12 February 2016 saying he had been surprised by Ms Forsyth's preliminary views as to the VAT position and that, prior to being able to respond to her questions, he was making a "subject access request" ("SAR") under the Data Protection Act to be provided with internal HMRC correspondence to see how HMRC had come to their erroneous view. On 17 February 2016, Ms Forsyth refused the SAR because Staysure was not an individual, and also refused to exercise her discretion to release the internal HMRC correspondence, but she extended the deadline for a substantive response to 7 March 2016.

267. On 25 February 2016, Mr Kearney made a formal complaint about the length of time taken by HMRC, and about Ms Forsyth's refusal to release the internal correspondence. On 2 March 2016, Ms Forsyth replied, apologising for "the regrettable length of time between my visit and my letter dated 30 November 2015" and offering to meet with Mr Kearney so both sides could set out their position. On 11 March 2016, Mr Kearney provided a detailed response to Ms Forsyth's earlier letter, including informing her that Staysure had consulted Ms Sloane, who had confirmed that HMRC's position was inconsistent with the principles in *InsuranceWide*; he also agreed to a further meeting.

268. On 11 May 2016, an HMRC complaints officer rejected Staysure's complaint on the basis that the time taken was not "exceptionally unusual where arrangements are complex" and that Ms Forsyth's refusal to release the documents on a discretionary basis was "reasonable".

269. On 2 June 2016 Ms Forsyth and another HMRC Officer, Mr Sibley, met with Mr Kearney and Mr White. Mr Sibley was the "VAT Lead" for Scotland and the North-East of England, and the meeting ended with Ms Forsyth asking for further information. On 29 June 2016, Ms Forsyth submitted another internal technical advice request, countersigned by Mr Sibley. Under the heading "Countersigning officer's comments" he said that Staysure had indicated they would appeal an adverse decision to the Tribunal, and added that "case law suggests to me that the decision could go either way". On the same day, Ms Forsyth notified Staysure that she had made a further internal referral.

270. On 11 August 2016, on the basis of that referral, HMRC's Enforcement and Compliance Disputes Resolution Board decided that Staysure's position should be rejected and a liability decision issued. However, on 17 August 2016 a tax avoidance team within HMRC contacted Ms Forsyth and said they wanted to have another look at the arrangements. On 24 August 2016, Ms Forsyth sent a holding letter to Mr Kearney.

271. Finally, on 28 October 2016, Ms Forsyth issued her decision letter. Under the heading "Next steps" she set out the value of Intervest's services supplied to Staysure for each year from 2009 to 2015, and calculated the related VAT. She had taken all but the last of those figures from Staysure's annual accounts as filed at Companies House. As the 2015 accounts had not yet been filed, Ms Forsyth based the figure for that year on those for 2014 s. She did not ask Staysure for a copy of the 2015 accounts, but agreed under cross-examination that she could have done so.

272. Under the heading "belated notification penalty", Ms Forsyth said that HMRC would charge Staysure a penalty under VATA s 67 of 15% of the VAT for the period from 1 April 2009 to 31 March 2015, unless Staysure had a reasonable excuse, and that the 15% was charged "based on the fact that you will be more than 18 months late in notifying your liability to be registered". This was a reference to s 67(4)(c) set out above.

273. On 22 November 2016, Staysure appealed to HMRC. In relation to the penalty, the appeal letter said that Staysure had "co-operated fully with any enquiries and taken appropriate advice to support its position".

274. On 6 February 2017, HMRC issued Staysure with a penalty of £1,187,291, being 15% of £7,915,276, the VAT charged by the Assessment, with no mitigation. Ms Forsyth said under cross-examination that she had been unaware of HMRC's guidance on mitigation (see further below). In relation to reasonable excuse, she said that it was up to Staysure to put forward such an excuse on receipt of the decision letter, and it had not done so. When asked whether, in her opinion, the Penalty was "fair and proportionate" she gave an honest and straightforward reply, saying that in the light of the guidance to which she had been taken by Ms Sloane, it was "probably excessive".

HMRC'S REDUCTION OF THE PENALTY

275. HMRC's guidance on penalties is contained in their VAT Civil Penalties Manual ("VCP"). At VCP10440 the text says:

> "If a formal enquiry is conducted by HMRC into the liability of supplies in complex circumstances, you should mitigate the penalty by not imposing the penalty for the period of the enquiry."

276. The VCP also included the following guidance:

(1) "It is important to consider mitigation in every case" (VCP11741).

(2) "Evidence of mitigating factors can arise both before and after a liability to a penalty arises" (VCP11742).

(3) "It is essential to establish a fair and appropriate penalty to fit the circumstances of each individual case…All the facts of the case, such as the size and maturity of the business and whether or not a professional advisor is used, should be considered. Although the law allows us to reduce a penalty to nil, cases where 100% mitigation is appropriate are rare" (VCP11743).

(4) Mitigation of between 10-50% may be appropriate where there is "complexity of liability in relation to the size of the business and frequency of transaction"(VCP11746).

(5) Mitigation of up 25% where there had been "full quantification of arrears within X number of days of identification of the belated notification of a liability to be registered" (VCP11747).

277. Ms Forsyth gave her oral evidence on Thursday 18 November 2021. The hearing resumed on Wednesday 24 November 2021, and on the Tuesday afternoon HMRC informed the Tribunal and the Appellant that they had reconsidered the penalty in the light of Ms Forsyth's evidence, and invited the Tribunal to mitigate it.

278. The first of HMRC's suggested reductions was to remove the part of the penalty which related to the period of the enquiry, in line with the guidance at VCP10440. HMRC considered that this period ran from the date of Staysure's first meeting with HMRC on 10 April 2014 to 31 March 2015 (the day before Staysure registered for VAT following the restructuring). The result of this mitigation would be that the Penalty reduced from £1,187,290 to £865,125.

279. A second consequence of mitigating the Penalty in this way would be that the parties' dispute about the period for which the Penalty was due under s 67(3)(a), namely when, during this long enquiry, HMRC had "received notification of, or otherwise became fully aware of, [Staysure's] liability to be registered", would fall away, because no part of the remaining Penalty would relate to the period after commencement of the enquiry.

280. HMRC also proposed two further reductions:

(1) mitigation of 50% for "factors including complexity" by reference to VCP11746; and

(2) mitigation of 25% for assistance in quantifying arrears by reference to VCP11747.

281. As a result of taking those mitigating factors into account, the Penalty would further reduce to £216,821.

282. However, VATA s 67(8) provides that if the person has a reasonable excuse, and no penalty arises. Mitigation is therefore only relevant if there is no reasonable excuse. I therefore next consider reasonable excuse, and I return to mitigation at §303.

REASONABLE EXCUSE

283. Both parties accepted that in deciding whether Staysure had a reasonable excuse, the Tribunal should follow the approach in *Perrin v HMRC* [2018] UKUT 0156 (TCC), where the UT (Judges Herrington and Poole) gave the following guidance:

> "70. …the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer…
>
> 71. In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*).

> 72. Where the facts upon which the taxpayer relies include assertions as to some individual's state of mind (e.g. 'I thought I had filed the required return', or 'I did not believe it was necessary to file a return in these circumstances'), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it, and one of those tools is the inherent probability (or otherwise) that the belief which is being asserted was in fact held…
>
> 73. Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.
>
> 74. Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. "I did not think it was necessary to file a return", or "I genuinely and honestly believed that I had submitted a return". In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse.
>
> 75. It follows from the above that we consider the FTT was correct to say (at [88] of the 2014 Decision) that 'to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account'."

Mr Howsam's belief and whether it provides a reasonable excuse

The evidence

284. The evidential position was as follows:

(1) Tribunal was not provided with any correspondence between Staysure and any firm of advisers.

(2) Mr Howsam's witness statement did not refer to having taken advice.

(3) The Contract (dated 1 June 2013) and the earlier draft (created at some point in 2012) said that both Staysure and Intervest "consider the supplies under this Agreement to be VAT exempt", see §62.

(4) In evidence-in-chief Mr Howsam confirmed he had "a genuine belief that the supplies made by Intervest were exempt".

(5) As to the basis of that belief, Mr Howsam said that "like anything else we do…we take professional advice before doing something", adding "we are a regulated entity, we work with different regulatory bodies, we have to take things seriously and look into things properly, this was no different".

(6) Staysure had an unblemished record in relation to prior dealings with HMRC and that the same was true of its relationship with its other regulators.

Ms Sloane's submissions

285. Ms Sloane submitted that Mr Howsam was an honest witness, as Mr Mantle had accepted. It must therefore follow that the Tribunal should accept his evidence that Staysure had taken professional advice before deciding that the supplies from Intervest were exempt.

286. She added that there was clearly a sound legal basis for Staysure to have been advised that the supplies were exempt: she had confirmed this when consulted in 2015, and it was accepted even within HMRC: Mr Sibley had said that if the case went to the Tribunal "the decision could go either way". It was therefore objectively reasonable for an adviser to have concluded that the supplies were exempt.

287. In Ms Sloane's submission, Staysure was not required to disclose its advice in these proceedings. At the time the issue of reasonable excuse was raised, it was clear to both parties that the case would be proceeding to the Tribunal. Ms Sloane said that "it can't be right that Staysure should have to disclose its legal advice…to its adversary" when it was on the brink of litigating the issue, and she noted that HMRC had redacted their own internal legal advice when providing documents to Staysure.

288. She also relied on *HMRC v Greenisland* [2018] UKUT 440 (TCC). In that case, the FTT had found that the taxpayer's Development Officer, Mr Munn, had sought professional guidance on the VAT position. HMRC appealed on the basis that the FTT had acted irrationally in coming to that conclusion.

289. Horner J accepted at [67] that it was "legitimate for HMRC to draw attention to the fact that there was no corroborating evidence from the accountants, for example, who provided the advice…which confirmed the opinion that Mr Munn had already reached", but upheld the FTT's judgment, saying:

> "It is important to appreciate that FTT did give reasons for the conclusion they reached. They believed Mr Munn. He was in their view a 'totally credible witness'. There is no point in asking this Tribunal to reach a different conclusion and reject Mr Munn's evidence unless there are grounds that would enable this Tribunal to do so. The FTT saw Mr Munn give evidence, they heard him give evidence and they watched him being cross-examined. They accepted his testimony as being truthful."

290. In Ms Sloane's submission, the position was the same in this case. Mr Howsam was an entirely credible witness and the Tribunal should accept that evidence; it should then go on to find that his belief was objectively reasonable.

Mr Mantle's submissions

291. Mr Mantle said that while Mr Howsam was an honest witness, he had provided no evidence, whether in his witness statement or in evidence-in-chief as to:

(1) what advice had been requested;

(2) when it was provided;

(3) by whom it was provided, in particular whether the adviser was a law firm, a firm of accountants or an individual;

(4) whether that adviser had expertise in advising on the area of VAT which was in issue;

(5) whether the advice was caveated or equivocal or qualified in any way; or

(6) what information was provided to the adviser so as to form the basis for the advice being given.

292. In relation to the final point, Mr Mantle pointed out that there was no written agreement between Staysure and Intervest until the Contract was drawn up at some point in 2012, and it was difficult therefore to know what had been provided in order for professional advice to be given in early 2009 or before.

293. There was in his submission no good reason why Staysure had not provided the advice, even with redactions. He rejected Ms Sloane's parallel with HMRC's position, pointing out that, unlike Staysure, HMRC did not have to prove the basis for a reasonable excuse defence.

294. In summary, Mr Mantle accepted that Mr Howsam genuinely believed the supplies were exempt, but did not accept that Staysure had proved the belief to be objectively reasonable, because almost no information had been provided as to its nature or extent, the burden being on Staysure.

The Tribunal's view

295. It was common ground that, having taken advice, Mr Howsam genuinely believed that the supplies were exempt, and I agree. On the basis of Mr Howsam's honest evidence I find as a fact that he (and thus Staysure) had that genuine belief.

296. However, as Mr Mantle said, that is not enough to provide a reasonable excuse: the belief must also be objectively reasonable. I agree with Mr Mantle that there are significant gaps in the information provided to the Tribunal: Staysure has not given any evidence as to who provided the advice, what their qualifications were; when it was provided; what instructions and documents were given to the adviser to enable the advice to be given (noting that the Contract which describes the supplies was first drawn up three years after their commencement).

297. It is true, as Ms Sloane says, that her own advice in 2016 was that HMRC's position was inconsistent with the principles in *InsuranceWide*; that Mr Sibley had subsequently said that "case law suggests…that the decision could go either way", and thus that an adviser, properly informed as to the facts and the case law could have come to an objectively reasonable view that the supplies were exempt. But that is insufficient where, as here, there is no information as to the facts given to the adviser, or as to the law on which that adviser was relying.

298. Although Ms Sloane said Staysure should not have to disclose its legal advice, there was no evidence before the Tribunal that the advice had been given by a law firm. That is relevant because only advice given by lawyers (and not, for example, accountants) is covered by legal advice privilege, see *R (oao Prudential Plc) v HMRC* [2013] UKSC 1. Advice given by accountants can be covered by litigation privilege, but the dominant legal purpose of the communication must then relate to litigation which is pending, reasonably contemplated or existing at the date the advice was given, see *Serious Fraud Office v ENRC* [2018] EWCA Civ 2006. Staysure received the advice before 2009, so it could not have been covered by litigation privilege.

299. Of course, even if the advice was not privileged, Staysure could decide not to provide the advice, even in redacted form. However, as Mr Mantle said, the burden is on Staysure to show that its reliance was objectively reasonable. In my judgment, the lack of any relevant supporting detail or information, even by way of oral evidence from Mr Howsam, means that Staysure has not satisfied its burden.

300. In coming to that conclusion I did not overlook *Greenisland*. However, reasonable excuse cases requires consideration of a specific matrix of facts, which are never exactly replicated in another case. I note too, that Mr Munn gave evidence that he had consulted HMRC's guidance and checked the position with the company's accountant and its consultant. Although those advisers did not give evidence, there is no suggestion that their identities were not disclosed.

301. I therefore agree with Mr Mantle, and find that Staysure does not have a reasonable excuse. Of course, this finding does not change the outcome of the appeal, as Issue Two has already been decided in Staysure's favour.

302. In her skeleton argument Ms Sloane said that, if there was no reasonable excuse, the penalty should in any event have been reduced for disclosure. It is true that FA 2008, Sch 41 provides for penalties to be reduced depending on the extent to which the person has given assistance to HMRC by "telling, helping and giving", but those provisions do not apply to the Penalty. Sch 41 came into effect for VAT from 1 April 2010, and the Penalty was levied under VATA s 70 for failing to notify liability in 2009. VAT s 70 was repealed when Sch 41 came into effect.

MITIGATION

303. As there is no reasonable excuse, I return to mitigation. I agree with HMRC's proposed mitigation of the Penalty for the reasons they gave, so begin from the reduced amount of £216,821. As noted above, one consequence of this mitigation is that the parties' submissions on the date HMRC "received notification of, or otherwise became fully aware of, [Staysure's] liability to be registered" were no longer in issue. It is not necessary to summarise those arguments in this Decision.

The parties' submissions

304. Ms Sloane submitted that HMRC should have further mitigated the penalty to reflect Staysure's degree of co-operation with the enquiry. She relied on VCP11748, which is headed "Why And When We Should Mitigate A Penalty: Degree Of Co-Operation In Identifying and Quantifying Errors and Other Factors (Misdeclarations)", which states that HMRC should mitigate a penalty by up to 50% where there is "full co-operation and quantification" of the error, and that there should be mitigation of up to 40% where "published guidance is unclear or not up to date".

305. Mr Mantle's position was that HMRC had taken all relevant factors into account and the Penalty (as reduced) was proportionate.

The Tribunal's view

306. I first observe that VCP11748, on which Ms Sloane placed reliance, relates to cases where the taxpayer had *misdeclared* the VAT payable. This was not Staysure's position. In contrast, the passages relied on by HMRC relate to Staysure's particular circumstance:

VCP10440 deals with formal enquiries in complex circumstances; VCP11746 considers the reasons for the failure and VCP11747 relate to belated notification. No guidance in the VCP supports further mitigation in a case of late registration, other than the general advice that "it is essential to establish a fair and appropriate penalty to fit the circumstances of each individual case" and that all the facts of the case should be considered.

307. However, VATA s 70 gives the Tribunal the power to "reduce the penalty to such amount (including nil) as they think proper", so I am not bound to follow HMRC's published guidance as to the appropriate mitigation. I note in particular that the mitigation given so far only encompasses the reasons why the failure occurred, and Staysure's assistance in quantifying the Penalty.

308. Although there is no specific guidance to this effect, I agree with Ms Sloane that some mitigation should be given for the extent of Staysure's co-operation during the very long enquiry period, as described at §258ff. I have decided that the penalty should be further reduced by 10% (£576,500 x10%). Thus, were I to be wrong on Issue Two, Staysure would be liable for a penalty of £159,171 (216,821-57,650).

309. I add for completeness that if the Assessment was invalid not because of the nature of the supplies (Issue Two) but because of the failure to meet the relevant time limits (Issue Three), the Penalty (as mitigated) would remain in place. That is because penalties charged under VATA s 70 are not linked to the issuance of an assessment, but to the existence of a liability, see *Whitney v IRC* [1926] AC 37 at 52, and the conclusion of the Court of Appeal in *Ali (t/a Vakas Balti) v HMRC* [2006] EWCA Civ 1572 that HMRC could issue a penalty even though they had by "incompetent error" failed to raise a valid assessment. Although that case concerned evasion, the underlying analysis is equally applicable where there has been a failure to notify.

OVERALL CONCLUSION AND APPEAL RIGHTS

310. For the reasons set out above, this appeal is decided as follows:

(1) the Tribunal has the jurisdiction to decide the appeal against the Assessment (Issue One);

(2) Intervest made single supplies of services to Staysure which come within the exemption for insurance intermediary services, with the result that Staysure was not required to register for VAT and the Assessment was not valid for that reason (Issue Two);

(3) if I were to be wrong on Issue Two, so that the services were standard rated:

(a) the Assessment would in any event have been invalid as out of time, other than in relation to the final three month period (Issue Three); but irrespective of that conclusion

(b) Staysure would be liable to a penalty because it did not have a reasonable excuse, although that penalty would be mitigated to £159,171 (Issue Four).

311. My thanks to both Counsel, whose comprehensive and careful submissions were of great assistance in clarifying the Issues I had to decide, and my thanks also to those instructing them.

312. 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 Rules. 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.

ANNE REDSTON
TRIBUNAL JUDGE

Release date: 21 APRIL 2022