Neutral Citation: [2022] UKFTT 148 (TC)

Case Number: TC08479

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/01055

VAT – whether fees paid to the scheme administrator of SIPP pension consideration for an exempt supply of insurance – no – appeal dismiss

Heard on: 23 – 25 February 2022
Judgment date: 05 May 2022

Before

TRIBUNAL JUDGE AMANDA BROWN QC
SUSAN STOTT

Between

INTELLIGENT MONEY LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Scott Redpath of Counsel instructed by the Appellant

For the Respondents: Mr Andrew McNab ofCounsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was a video hearing using the Tribunal video platform/etc. A face-to-face hearing was not held because it was expedient that the matter be heard remotely.

2. 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. As such, the hearing was held in public.

3. This appeal concerns the liability to VAT of supplies of services made by Intelligent Money Limited (**Appellant**) in connection with the provision of self invested pension schemes (**SIPP**) and, in particular whether those supplies are exempt from VAT as the provision of "insurance or reinsurance".

4. Since 2006 the Appellant has been the provider, operator and administrators of a SIPP known as the Intelligent Money SIPP (**IM SIPP**). Until 2014 the Appellant understood that the services it provided to members of the SIPP were subject to VAT. However, following a review of the company's VAT position the Appellant formed the view that it had incorrectly accounted for VAT on those supplies. On 30 March 2016 the Appellant submitted three claims to HM Revenue & Customs (**HMRC**) to recover the VAT it considered had been overpaid.

5. On 23 October 2019 HMRC rejected that claim. The decision was reviewed and upheld on 11 February 2020. Whilst there was considerable correspondence between the parties as to whether HMRC had taken account of the relevant features of the SIPP when concluding that the supplies were subject to VAT it is not relevant to the issue to be determined by the Tribunal and any narration of it is unnecessary.

6. HMRC accept that if the supplies are exempt the Appellant is entitled to repayment of VAT which has been otherwise declared on the fees. HMRC have not verified the calculations underpinning the claims made. The parties were agreed that the Tribunal need only determine the liability of the supplies. If the supplies are exempt HMRC will verify the quantum of the claims.

THE INTELLIGENT MONEY SIPP

7. The contractual documentation which must be considered to determine the nature and liability of the supplies made by the Appellant consists of:

(1) An application form completed by a prospective member of the scheme

(2) A fee schedule

(3) The terms and conditions of the scheme

(4) The key features document (required to be provided under the regulatory provisions governing the provision of pensions)

(5) The trust deed and rules of the SIPP

8. A copy of the composite document comprising the first 4 contractual documents is annexed to this judgment.

9. The parties took the Tribunal to the provisions of these documents at considerable length. The Tribunal has carefully considered all the terms referenced by each of the parties. However, for the purposes of this judgment the Tribunal does not propose to quote from the documents at length.

10. At the outset it is to be noted that the defining characteristic of a SIPP, including that offered by the Appellant, is that the contractual holder/their financial advisor (and not the Appellant) is responsible for the management of the funds held in the member's SIPP.

11. It is also significant that the SIPP is established so as to meet the detailed and specific requirements of the Finance Act 2004 (**FA 04**), pursuant to which members may, subject to those requirements, save for their retirement in a tax efficient manner. Further detailed rules are imposed on the operation of the SIPP pursuant to the Pensions Act 2008 (**PA 08**). The rules place particular limits on when and how payments can be made from the SIPP to either the member or other beneficiaries. There are also certain restrictions on the level of contributions which can be made to the SIPP in respect of which tax relief can be claimed. The detail of these requirements is not relevant to the issue to be determined in this appeal. The Appellant's commitment to the investing members that the SIPP will be managed so as to preserve the tax effective status of the regime is, however, highly relevant.

Application form

12. An individual who wants to apply to become a member of the IM SIPP will complete the application form and provide their personal details together with what is referred to as an expression of wish as to "those people that [they] would like to receive any remaining benefits payable under the Intelligent SIPP on [their] death". It is noted that "This agreement does not bind the trustees of the scheme but is a means to help the trustees pay out [the] benefits in line with [the member's] wishes". The applicant warrants that they understand the non-binding nature of the expression of wishes in the declaration section.

13. Much of the detail requested to be provided ensures that the applicant is eligible for tax relief on contributions proposed to be made to the SIPP and ensure that the pension provided meets the requirements of FA 04.

14. The application form includes a number of declarations (again many driven by the requirements of either the PA 08 or FA 04) including a declaration which has the contractual effect of incorporating the terms and conditions, fee schedule and deed and scheme rules such that the applicant (who becomes a member of the IM SIPP) is bound by their terms.

15. The applicant also declares that they are solely responsible for all decisions relating to the purchase, retention and sale of all investments within the SIPP and that the value of the SIPP may only be applied to provide benefits in accordance with the scheme rules.

Fee schedule

16. The fee schedule provides for specific fees to be payable. Every member is required to pay an annual fee of £150. Further fees are payable for instance where the member wishes to make an in-specie contribution/transfer, transfers out, on the commencement of payment of benefits, interim valuations, non-platform investment transactions, banking fees and in respect of property transactions. The majority of these latter fees are charged per hour.

17. Annual fees are stated to be for the "provision, establishment and ongoing operation of [the member's] pension plan". Annual fees are payable in advance and may be met from the member's cash account or from the liquidation of funds within the SIPP.

Terms and conditions

18. The key provisions of the terms and conditions are:

(1) Clause 1 provides the definitions.

(2) Clause 2 sets out that the agreement is between the Appellant and the member and that the SIPP has been established and will be operated so as to comply with the provisions of FA 04 and that it is governed by a declaration of trust and rules pursuant

to which the trustee is the legal owner of all investments which are held on behalf of the member and/or other beneficiaries of the member.

(3) Clause 3 sets out the provisions regarding contributions.

(4) Clause 5 outlines the operation of the member's cash account. Initially all contributions (and any associated tax relief) are paid into a cash account held on behalf of the member from which the member may then instruct how investments are made.

(5) Clause 7 concerns investments. The member is notified that there are a wide range of investments to which funds may be applied. The range of funds is stated to be restricted so as to ensure they remain compliant for the purposes of remaining within the FA 04 tax efficient regime. The member or his financial advisor must select appropriate investments from the list provided.

(6) Investment procedures are set out in clause 8 – the member/their financial advisor selects appropriate investments which are then acquired by the trustee. The member is again reminded that the Appellant is not liable for any loss arising from the member's choice of investment. The Appellant preserves the right to sell investments for the purposes of paying benefits fees and charges under the plan.

(7) Pursuant to clause 10 the member has no right to vary the terms of the agreement.

(8) The member has a right to cancel under clause 11; they are, however notified that any refund in respect of investments made during the statutory cancellation period of 30 days will be subject to investment fluctuation and the sums refunded will be net of charges incurred.

(9) Clause 12 regarding termination provides that fees paid prior to termination are not refundable.

(10)Clause 17 concerns charges referencing the fee schedule.

(11)Clause 18 provides that the following services are provided:

> "Establishment of your Plan;
> - Ongoing operation of your plan;
> - Receipt of contributions/transfer payments into/out of the Plan;
> - Recovery of basic rate tax on Member contributions where applicable;
> - Annual statements detailing assets, contributions and transfer payments received and amounts of tax recovered from the Revenue;
> - Creation of banking facilities;
> - Settlement and payment of benefits; and
> - Such other services as may from time to time be necessary to efficiently operate your Plan and to comply with Revenue requirements."

(12)Under clause 20, Treating Customers Fairly, it is again reiterated that the Appellant does not provide financial advice to the member.

Key features

19. The key features document explains that the SIPP is a personal pension plan established under trust and approved by HMRC.

20. As with all other documents it repeatedly explains that the member is responsible for the suitability of investments requested to be made on their behalf by the trustee.

21. The aims of the SIPP are set out and essentially seek to provide the member with a tax efficient means of saving for a pension over which they have control of the investments made.

22. The member is reminded:

> "A pension is a long-term investment for your retirement and benefits cannot normally be taken until you have reached your 55th birthday except in limited circumstances e.g. when you retire due to ill health, … There are also restrictions on the type and amount of benefits you can take from your Intelligent SIPP."

23. In connection with risk the member is provided with considerable detail as to the risks that they will bear if selecting to invest under the SIPP and reminded that they bear the risk of investment performance and as to decisions taken regarding the nature and timing of benefits taken.

24. Consistently with the terms and conditions the member is notified that all cash payments and transfers are paid into the cash account held on their behalf by the trustee from which investment instructions will be executed.

25. A full list of the tax compliant choices available to the applicant in respect of when and how to take benefits from the SIPP including by way of lump sum, taking a regular income or purchasing an annuity is set out.

26. Under a heading "what happens when I die?" the member is informed:

> "When you join the Intelligent SIPP, you will complete an expression of wish form which allows the trustees … to pay benefits to your Nominees when you die.
>
> The trustees will use an 'expression of wish' form to guide them in their decision as to how to pay this benefit, but this form is not binding upon them. This 'discretionary trust' structure means the payment can be made free from inheritance tax (IHT).
>
> …

27. In respect of death before or after 75 the member is informed that death prior to 75 and prior to the taking of any benefits means that "the full value of your fund can be used to provide for your beneficiaries". Where benefits had been taken those benefits can be transferred to the successor or nominee.

Trust deed and rules

28. There were two sets of deed and rules in the bundle. The parties had prepared their cases by reference to different sets but agreed that there was no relevant difference between them. All references below are to the 2013 deed and rules as they were the relevant ones in the period covered by the claims to sums said to have been overpaid.

29. The SIPP is established under irrevocable master trust with the Appellant as the trustee. It is a registered pension scheme for the purposes of FA 04 into which the individual or their employer may make contributions (see clause 3 of the deed). All contributions and/or transfers are held in identifiable member fund (clause 4). The sums so contributed are held within the trust and individually identifiable qua the member.

30. Clause 12 provides that the trustee may purchase an annuity on behalf of the member or other beneficiary and/or establish a policy of life assurance, they may also purchase units in unit trusts and insurer managed funds, purchase property and undertake any transaction permitted under FA 04.

31. Pursuant to clause 13 the scheme may not make any payment representing an unauthorised payment under FA 04 (in essence a payment in breach of the tax regime).

32. All investment transactions undertaken are required to be exercised "only in accordance with any directions given by the member" subject to ensuring compliance with FA 04.

33. Clause 20 provides that "all costs, fees, expenses … in connection with the administration, management and investment of the Scheme may, subject to the agreement of the Scheme Administrator and the Scheme Trustee, … be paid directly to the Scheme Administrator or Scheme Trustee by the Member or may be paid on any other basis which the Scheme Administrator and Scheme Trustee agree. Otherwise, such amounts shall be paid by the Scheme Administrator out of the Member Fund or other asset of the Scheme in respect of which the amounts have been incurred …"

34. Rule 4 concerns contributions and provides that all contributions and their proceeds must be used to provide benefits in accordance with the rules. There is also provision for contributions to be used to purchase a life assurance contract (as one of the assets held) the proceeds of which may then be distributed as a benefit.

35. The commencement date for the payment of benefits is provided for in rule 5 and, consistently with the limitations provided for in order to be a registered pension scheme for tax purposes, benefits are payable from age 75 subject to an election to take them any time after the age of 55 though from an earlier date in the event of incapacity through ill health prior to attaining the age of 55.

36. The benefits arising under the scheme are particularised in clauses 6 – 8 which provide for member benefits: payment of a lump sum (as provided for/limited by section 164 Finance Act 2004), an annuity (provided by an independent insurance company) and income from the assets; dependent pensions (which again may take the form of an annuity provided by an independent insurer); and death benefits in the form of a series of defined lump sum payments equal to the value of the fund at the time of the member's death as the trustee thinks fit having taken into consideration the member's expression of wish.

THE LAW

37. Article 135 Principal VAT Directive (**PVD**) provides for the exemption of "insurance and reinsurance transactions".

38. That exemption is implemented in the UK via section 31 and Group 2 Schedule 9 Value Added Taxes Act 1994 (**VATA**) which, post 1 January 2005 provide for the exemption of "insurance and reinsurance transactions".

39. In the context of an understanding of the principal case relied upon by the Appellant (*Winterthur*) it is also relevant to note that the terms of Group 2 (and its predecessor) prior to 1 January 2005 provided for the exemption of "the provisions of insurance or reinsurance in the course of insurance business by" a number of identified categories of business provider. In this period it was not simply the nature of the services provided but also the identity of the provider which determined whether the supply was exempt from VAT.

40. Directive 2009/138 known as the Solvency II directive provides a definition under Article 1 of life insurance as "assurance on survival to a stipulated age only, assurance on death only, assurance on survival to a stipulated age or on earlier death, life assurance with return of premiums, marriage assurance, birth assurance."

41. Although not directly relevant, reference was made to The Financial Service and Markets Act 2000 (Regulated Activities) Order 2001 (**Order**) which specifies the activities which are regulated under Financial Services and Markets Act 2000. The Order provides various definitions of insurance including, in particular, contracts of insurance on human life and contracts to pay annuities on human life where the benefits are wholly or partly to be determined by reference to the value of, or the income from, property of any description. It was noted that pension fund management carried on by persons who do not carry on a banking business is also included within the definition of insurance for the purposes of the Order. The

Order independently identifies and brings into regulation the activity of operating a pension scheme which is defined to mean a scheme or arrangement which is not an occupational pension scheme or a stakeholder pension scheme and which comprised one or more instruments or agreements, having or capable of having effect so as to provide benefits in respect of people on retirement, reaching a particular age or on termination of employment) as subject to regulation under the Act.

42. The Tribunal was also taken to provisions of the PA 08 concerning the regulation of pensions generally and FA 04 which lay out detailed provisions concerning the regulation of pension provision in order to preserve the favourable tax regime applicable to pension savings. As stated at paragraph [11] above a detailed review of these provisions is not necessary in this appeal as there was no dispute that the IM SIPP was a pension scheme operating within the terms of both PA 08 and FA 04

Case law on insurance generally

Prudential

43. The case of *Prudential Insurance Co v IRC* [1904] 2 KB 658 concerned a dispute as to the nature of a contract for stamp duty purposes as insurance contracts were stamped differently to covenants. The contract headed "old age endowment with life insurance", provided that a weekly premium be paid on terms that a certain sum be paid on attaining the age of 65 and a different (and lesser sum) be paid in the event of death prior to that date. The critical dispute between the parties was as to whether a contract of insurance required to indemnify loss.

44. Channell J identified the key features of an insurance contract as:

> (1) a contract whereby, for some consideration, the insured secures some benefit, usually but not necessarily, the payment of money, upon the happening of some event;
>
> (2) the event must involve some amount of uncertainty, either that the event will ever happen or at the time at which it will happen;
>
> (3) the event must be adverse to the interest of the insured such that the payment meets some loss or other detriment on the happening of the event i.e. there must be an insurable interest in the subject matter (otherwise the contract is one of wager);
>
> (4) in the case of life insurance the interest is not the measure of loss.

Intervening modification of the Prudential test

45. Case law subsequent to Prudential provides some further insight into the Prudential test.

46. In *Gould v Curtis* [1913] I3.KB 84 CA clarified that there are two types of insurance: indemnity insurance which provides indemnity against loss where the payment under the policy will be referable (or capped to) the loss; and contingency insurance which provides no indemnity but makes payment against a contingent event. In light of the nature of contingency insurance the Court of Appeal considered, in respect of the fourth element identified in *Prudential* that whilst adversity is commonly present in the context of insurance an insurable interest may be established without the requirement of adversity.

47. *Medical Defence Union v Department of Trade* [1980] Ch 82 considered, in particular, the nature of the benefit which accrued on the happing of the insured event. Megarry VC was required to determine whether a right of a doctor/dentist, in return for their annual subscription, to require the union to "properly consider any request for assistance" in connection with legal proceedings for malpractice and indemnity in respect of damages payable represented insurance. It was clear, factually, that the union would act in good faith when considering a request from a member and that in substantially all cases the union did act. The obligation to consider a request for assistance was not dependant on the number of prior requests or actions

(subject to remaining a registered practitioner) nor did the number of requests affect the membership subscription payable.

48. Megarry VC noted that the terms "'insure' and 'assure', like 'ensure' seem to … confer a sense of making something certain, and not merely of giving hope or expectation no matter how well founded." He continued:

> "When a person insures, … he is contracting for the certainty of payment in specified events, and not merely for the certainty of proper consideration being given to his claim that a discretion to make a payment in those events should be exercised in his favour."

49. Whilst the right to have the request considered unquestionably represented a benefit to the medical professional and the assistance almost invariably provided ensured that litigation against them was managed and funded and an indemnity against any damages awarded provided, the lack of enforceable certainty precluded the conclusion that the union were providing insurance.

Fuji

50. The case of *Fuji Finance Inc v Aetna Life Ins Co Ltd* [1997] Ch 173 concerned a capital investment bond the terms of which provided for payment of a sum on the death of a Mr Tait or on the surrender of the bond. The sum payable on the occurrence of one of those events was calculated by reference to the price of units allocated at the time of payment. Fuji paid a single £50,000 premium to the Tyndall/Aetna who invested it at the direction of Fuji. As a consequence of how Tyndall/Aetna reported the performance of the investments and the timing of investment reallocation Fuji (through the auspices of Mr Tait) was able to manage the investment switches such that, in the period from 1987 – 1991 the value of the investments increased from the initial £50,000 to in excess of £1m. This prompted Tyndall/Aetna to change the procedures for reporting performance and acceptance of instruction to switch investments. Fuji claimed that this change in procedures constituted repudiation of the policy which it accepted and surrendered the policy, but they went on to claim damages against Tyndall/Aetna amounting to the loss of an equivalent investment growth compounded annually for the rest of Mr Tait's life.

51. Two preliminary issues came before the Court of Appeal:

> (1) whether the contract was a contract of insurance under sections 1 and 3 Life Assurance Act 1774, which precluded the writing of an insurance policy on life where the policy holder had no insurable interest in the life insured and/or the value of the insurance exceeded the insurable interest); and
>
> (2) on the basis that Fuji accepted that it had no insurable interest beyond the value paid on surrender, whether the contract was void by virtue of section 16(1) Insurance Companies Act 1982 which provided that an insurance company was prohibited from carrying on any business other than an insurance business.

52. The High Court had determined, by reference to the Prudential definition of insurance (see [44] above) that the capital investment bond was not a contract of life assurance. As Fuji had been entitled to the same sum on the surrender of the policy as on Mr Tait's death the judge considered that there was no contingency on Mr Tait's death and the contract was not one of life insurance.

53. By reference to the judgment of the Court of Appeal in New Zealand in *Marac Life Assurance Ltd v Commission of Inland Revenue* [1986] 1 N.Z.L.R. 694 and the judgment of the Federal Court of Australia in *NM Superannuation Pty. Ltd v Young* 113 A.L.R 39 the Court of Appeal noted:

> (1) A short-term investment contract which depends on the contingencies of life and pursuant to which a sum greater than the premium becomes payable is not excluded from the definition of a life insurance contract because of its short-term nature. However, when assessing whether such a contract is an investment contract or a life insurance contract with an investment element the insurance content must be sufficiently substantial and must "necessarily embrace a risk by the insurer dependent on the length of human life".
>
> (2) A contract which accumulated contributions made by an employer with interest accrued on those contributions and which paid prescribed but different benefits on the happening of specified events including: death, retirement on or after a defined retirement date, death in employment or leaving employment, was a contract of life insurance. This was so because the necessary requirement of "uncertainty" was present in the sense that each of the potential circumstances in which a benefit was payable was uncertain as against the other potential outcomes. The uncertainty identified relating to death was its timing.

54. Morritt LJ concluded that the bond written by Tyndall/Aetna was a contract of life insurance on the basis that the two circumstances in which payment would be made (namely death or surrender) were contingent on one another in the sense that surrender depended on the continuation of life to the point of surrender and the timing of death was itself uncertain. He considered that the payment of benefits needed to be "sufficiently life or death related" so as to cross the line from pure investment to life insurance but on the terms of the arrangements before him that criterion was met, particularly as the value of the investments fluctuated over time such that the sum payable at surrender would not be the same as the sum payable at death.

55. Hobhouse LJ considered that under the terms of the contract which Fuji entered its rights "at any moment in time under the contract [were] dependent upon the contingency whether Mr Tait had died".

Case law concerning the insurance exemption

Winterthur

56. *Winterhur Life UK Ltd* [1996] Lexis Citation 959 concerned supplies made in relation to two pension schemes which provided for the scheme member to control the management and investment of the funds accumulated from the individual's contributions (both their own and those made on their behalf by their employer). The critical issue in the appeal was who made the supplies under consideration: Winterthur (an appropriately registered insurance company) or the subsidiary acting as scheme administrator (not a registered insurance company).

57. As noted above, at the time the terms of item 1 to Group 2 provided for exemption of the "provision of insurance" by a company permitted to carry on insurance business within section 2 Insurance Companies Act 1982.

58. Both pension schemes were designed to take advantage of the income tax provisions relating to personal pension scheme under Taxes Act 1988 (subsequently replaced by FA 04 but substantively with a similar purpose to encourage saving for retirement). The scheme documentation provided that it was established on an irrevocable trust for the benefit of members subject to the Taxes Act restrictions as to how the benefits were to be provided. The terms of the scheme provided that the member had the power to make investment decisions and for the scheme and the administrator of the scheme to have no responsibility to the member in respect of the performance of the investments. The rules also authorised for administrative expenses to be paid from the investment fund. The accumulated value of contributions was to be used to provided benefits in accordance with the scheme rules.

59. The schemes were administered by a scheme administrator on behalf of the scheme provider. The scheme administrator was responsible for: the establishment of the scheme so as to be compliant with the tax rules; the collection of contributions; the facilitation and payment of retirement and death benefits; execution of investment instructions etc. Fees were payable by members to the scheme administrator annually and in other identified situations.

60. In light of the issue to be determined the Tribunal declined to determine the nature and effect of the trust on which the scheme was established being content to conclude that the purpose of the trust was to secure the provision of the annuity and lump sum benefits contemplated by the Taxes Act and the scheme documents.

61. The Tribunal considered, by reference *Fuji,* that the scheme under consideration provided for payment of annuities or a lump sum by reference to life or death related events and the fact that the scheme had an investment element which involved no risk to the insurance company (since the benefits were secured on the trust funds) was not inconsistent with a conclusion that they were insurance.

62. Substantively the case for HM Customs & Excise (as HMRC then were) was that the members paid the fees (as distinct from the contributions) to the scheme administrator, for trust administration services which were liable to VAT at the standard rate. They argued that there was no contract of insurance between the insurance company and the member as the only contractual provisions existed between the scheme administrator and the member. In addition they contended that as the pension benefits were secured by reference to the investment performance of the investments made from the individual's contributions and which were held on trust for the individual the arrangements were not by way of insurance and the fees payable did not represent consideration for the provision of the benefits.

63. Winterthur contended that the fees were part and parcel of the provision of the exempt provision of insurance. In the alternative, it was claimed that as the primary purpose of the scheme was the provisions of an annuity (which had to be provided by an insurance company in order to be tax compliant) the services associated with the administration of the scheme were exempt under alternative provisions in the insurance exemption which provided for exemption of "the making arrangements for the provisions of … insurance". A supply of making arrangements did not need to be provided by an authorised insurance company.

64. The Tribunal determined that the arrangements provided for the scheme administrator, acting on behalf of the insurance company, to contractually bind the insurance company to ensure that the relevant retirement/death benefits were provided to the members and their dependants. It considered that the nature of arrangements met the description of life insurance as set out in the case law referred to at paragraphs [43– 55] above. That conclusion was unaffected by the feature of the arrangement pursuant to which the members' contributions were protected for the purposes of providing the benefits. The Tribunal considered that the (low) level of charges reflected that Winterthur (as insurer) bore no risk as to the performance of the investments and therefore the benefits payable on the occurrence of the insured contingent events. The Tribunal therefore concluded that the administration fees were "part and parcel" of the provision of insurance by a permitted insurer and therefore exempt.

65. That conclusion disposed of the appeal; however, the Tribunal expressed the view that had it concluded otherwise it would have rejected the alternative argument based on "making arrangements" as, if the only element of the arrangements amounting to the provision of insurance were the annuity provisions, the administration of the trust and the associated fees could not reasonably be said to represent the making of arrangements for the provision of an annuity.

66. There was a further argument run by Winterthur referred to as “the alternative insurance argument” in respect of which HM Customs & Excise conceded that as pension fund management was classified as insurance business for the purposes of the Insurance Companies Act 1982 if it were it to be established that the supplies under consideration were made by, or on behalf of, the insurance company they would be exempt supplies under item 1.

Card Protection Plan

67. *Card Protection Plan Ltd v Customs & Excise Commissioners* C-349/96 was the first case in which the Court of Justice of the European Union (**CJEU**) considered the insurance exemption. As noted in paragraph [39] above the provisions of the UK domestic insurance exemption was to limit exemption to the provision of insurance to insurance provided only by insurance companies. The taxpayer in this case was not regulated as an insurance company but provided a service to its customers pursuant to which, in return for payment, customers were indemnified against certain costs and expenses incurred in the event of the loss or theft of their credit cards or other possessions such as keys. They claimed that the provision of these services represented a service of insurance which should be exempt from VAT.

68. In the absence of a definition of insurance under what was then the Sixth VAT Directive, the Advocate General considered it appropriate to interpret the exemption by reference to what was then the relevant EU directives regulating insurance business; however, noting that those directives too did not define the nature of insurance. He considered that the essentials of an insurance transaction were “that one party, the insurer, undertakes to indemnify another, the insured, against the risk of loss … in consideration for the payment of a sum of money called a premium: it is the giving of the indemnity which constitutes the insurance and, thus the supply of the service”.

69. When giving judgment the CJEU endorsed the interpretation adopted by the Advocate General though indicating that indemnity insurance was not limited to the payment of a sum of money and that the service of insurance for VAT purposes may also be established by reference to the provision of a benefit in kind.

70. The CJEU reinforced the need, under the VAT regime, to ensure, in accordance with the principle of fiscal neutrality, that similar transactions are taxed in the same way and determined that the fact that the taxpayer was not a regulated insurer did not affect the nature of the supply made and as such, under the terms of the VAT Directive, the services provided were required to be exempted from VAT.

71. Following this case, but not until 2004, the UK amended the provisions of group 2 to remove the requirement that in order to be exempt services of insurance were required to be provided by a regulated insurer.

Mapfre

72. *Directeur general des finsnaces publiques v Mapfre asistencia compania internacional de seguros y reaseguros SA* C-584/13 concerned contracts for repair warranty provided by Mapfre to customers of second-hand motor dealers.

73. Rejecting a claim that the provisions of such warranties fell outside the scope of exempt insurance the CJEU reiterated, at [42], that the essence of an insurance transaction “lies in the fact that the insured person is exempted from the risk of bearing financial loss, which is uncertain, but potentially significant, by the premium, payment of which for that person is certain but limited”.

Aspiro

74. *Minister Finansow v Aspiro SA* C-40/15 concerned the provisions of insurance claim settlement services. The CJEU adopted its previous articulation:

> 22. … the essentials of [insurance transactions] are, as generally understood, that the insurer undertakes, in return for prior payment of a premium, to provide the insured party, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded. …
>
> 23 … the expression 'insurance transactions' covers not only transactions carried out by the insurers themselves and, is, in principle, sufficiently broad to include the provision of insurance cover by a taxable person who is not himself an insurer but, in the context of a block policy, procures such cover for his customers by making use of the services provided by an insurer who assumes the risk insured. However, such transactions necessarily imply the existence of a contractual relationship between the provider of the insurance service and the person whose risks are to be covered by the insurance, that is to say, the insured party. ..."

75. The CJEU rejected the contention that claims settlement services qualified for exemption on the basis that such services, whilst an essential element of an insurance arrangement, did not involve the assumption of any risk by the supplier on behalf of the customer. The CJEU considered the language of the insurance exemption to be insufficiently broadly drafted to incorporate services relating to or concerning the provision of insurance more broadly.

United Biscuits

76. The *United Biscuits (Pension Trustees) Ltd v HMRC* C-235/19 concerned whether investment management services provided to pension funds constituted insurance or reinsurance transactions within the meaning of Article 135(1)(a) PVD.

77. United Biscuits contended that the meaning of insurance transactions had a ubiquitous EU meaning such that the inclusion of the management of group pensions including investment management within the scope of initially the First Life Assurance Directive (79/267/EEC as amended by Council Directive 2002/12/EC), subsequently under Directive 2002/83 and finally under the Solvency II Directive (2009/138/EC) necessitated a conclusion that the service of providing management of investments within a group pension represented a insurance transaction. Their case was predicated on an argument that the status of the provider of such services did not determine their nature (this was despite the insurance directives themselves requiring regulation of investment management only where provided by an approved insurer).

78. The CJEU, confirming previous judgments given, articulated that:

> "[30] … the essentials of [insurance] transactions are, … that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded".

79. The CJEU notes, at paragraph [31] that the insurance exemption is justified as an exception to taxability, "by the difficulty of determining the correct amount of VAT for insurance premiums relating to the coverage of risk". This difficulty is explained by reference to footnote 54 in the Advocate General's opinion setting out the Commission's observations. The Commission explains that a premium is made up of two components: 1) the remuneration of the services provided by the insurer and 2) a contribution to the pool of capital which is then invested and used to cover risks as and when they occur. As the capital element of the premium does not represent consideration for any service it cannot be subject to VAT and attribution of the premium between the two components is unlikely to be easily achieved except ex post facto.

80. In connection with United Biscuit's reliance on the provisions of the insurance directives the CJEU determined that there was no substantive read across to the concept of an insurance

transaction under the PVD from the CJEU's prior consideration of and reference to the insurance directives. The CJEU considered that reference to the insurance directives had not demurred from the VAT test (as set out at paragraph [78] above).

81. The CJEU was also of the view that, in any event, the terms of the insurance directive did not assist the case advanced by United Biscuits on the basis that investment management services are ancillary to insurance rather than insurance per se. In so finding there is at least an implicit recognition of the analysis provided by the Advocate General on the divergent objectives of the respective directives and as to the sense in which the CJEU had previously considered the provisions of the insurance directives relevant when considering referrals concerning the insurance exemption.

82. The CJEU did not expressly address United Biscuits contention that the position in the UK in which supplies of the investment management of pension funds had been exempt when provided by an insurance company but taxable at the standard rate when provided by non-insurers led to a breach of fiscal neutrality. However, and in light of the CJEU's conclusion that investment management is not an insurance transaction, there is, again, implicit acceptance of the Advocate General's analysis that the UK had simply been impermissibly allowing exemption where investment management was provided by an insurance company. A position corrected by a change of HMRC policy with effect from 1 April 2019.

Other domestic cases

83. Included within the authorities bundle and referenced by one or other of the parties were cases concerned with item 4 of Group 2 regarding the provision of services by an insurance agent or broker of services related to insurance. Neither party contended, rightly in the Tribunal's view, that the provision of the IM SIPP, if not insurance, was a service related to insurance. In that context the Tribunal did not consider these additional authorities to be of any assistance.

PARTIES SUBMISSIONS

84. The Tribunal had the benefit of three days of detailed oral argument from counsel, in addition to their helpful skeleton arguments. Counsel referred us to a substantial quantity of case law, which was collected into a main bundle of authorities and further authorities provided during the course of the hearing. The Tribunal was also provided with a bundle of documents running to 845 pages, although reference to the content of the bundle of documents was focused on the contractual material. In reaching the decision on this appeal the Tribunal has taken into account everything referenced by the parties, in both the written and oral submissions. It is however inevitable, given the detail of the arguments and given the quantity of material that not everything in the appeal can be given specific mention in this judgment.

Appellant's submissions

85. The Appellant's case was essentially predicated on a submission that the provision of a pension is an activity constituting the provision of long-term insurance when viewed through the lens of the EU insurance directives, the Financial Services and Markets Act 2000 and historic domestic case law on what constitutes insurance. Careful and thorough reference was made to the EU statutory provisions and a long history of domestic case law together with a reference to one of the leading texts, Houseman's Law of Life Assurance, which provides that life insurance activities include assurance on survival to a stipulated age, death and annuities. It was contended that by their nature the benefits payable by a pension scheme (including in particular the death benefits) represent assurance of this type.

86. On behalf of the Appellant the contractual documents were analysed to support that contention.

87. By reference to the case law identified above the Appellant contended that there was a valid contract between themselves and the member which intended to impose a legal obligation on the Appellant to ensure that the relevant benefits were provided to the member and his dependents or successors in consideration of the member contributing to the scheme and the various charges payable under the Fee Schedule.

88. It was argued that the funds held on trust are solely for the application and payment of the benefits to the identified beneficiaries which are all contingent on the happening of an uncertain event (living to a certain age, death, incapacity etc).

89. The Appellant is contractually obliged to the member to ensure that the relevant benefits are provided in accordance with and preserving the tax benefits contemplated under Finance Act 2004, including the provision of benefits after death in exercise of their discretion, by reference to the expression of wish and in return for the fees payable. Pension benefits are, as contended by the Appellant, the right to future enjoyment of benefits but with a contingency as to the rights so enjoyed.

90. It was contended that once properly analysed there could be no serious contention that the provision of a pension scheme was not insurance in this general sense.

91. It was essentially submitted that once it was established that the pension scheme represented a life assurance contract in respect of which consideration was payable by the member to the Appellant ergo, the case for exemption, was made.

92. When interpreting the accepted CJEU test for what constitutes a supply of insurance (i.e. "in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with a service agreed when the contract was concluded") it was contended that it was relevant to have in mind the difference between indemnity and life insurance. Under an indemnity insurance the insurer will agree to indemnify the insured by reference to loss suffered in consequence of an uncertain event. By contrast under a life insurance contract the insurer the agrees to make payment of a sum by reference to only the uncertainty as to timing/order of events, such sum being determined at the time of payment and potentially subject to fluctuation. The Appellant noted that the CJEU case law had concerned predominantly indemnity insurance with the consequence that the test was formulated through that lens.

93. It was contended that under the agreements pursuant to which the IM SIPP is established the Appellant agrees, in return for the payment of at least that part of the contribution which is charged with payment of the fees, to ensure that all contributions will be applied and, on materialisation of the identified risks (reaching a certain age or death) that the benefits will be paid out in accordance with the plan which will be operated in compliance with the tax rules in FA 04.

94. Although not articulated in this way the Tribunal understands the Appellant to contend that the element of contributions not used to meet the fees were akin to the capital element of a premium from which the benefits are then paid.

95. Particular reliance was placed on the analysis of the Tribunal in *Winterthur*. As set out above this case concerned a money purchase/defined contribution pension scheme managed under trust in respect of which (as was reasonable novel at that time) the member was given the ability to make investment decisions in respect of their contributions. The Appellant contended that the IM SIPP was materially similar to the Winterthur arrangements in which the Tribunal had concluded that the contributions made represented consideration for a contract of life assurance by virtue of the fact that the contributions were "charged with the payment of the administrative expenses of the scheme". The Appellant did not consider that the case law

of the CJEU nor the provisions of FA 04/A Day changes, which all post dated the tribunal in Winterthur, should affect the conclusions reached in that case which remained good law.

96. The Appellant contended that the trust structure under which the scheme was provided did not lead to a conclusion that the funds simply remained the property of the member. There was a restriction on how the funds could be used and the form and time in which the benefits could be taken so as to remain compliant with the FA 04 tax regime. In this regard the Appellant assumed the risk in ensuring that the payment of benefits was compliantly managed, and no unauthorised payments were made.

97. It was submitted that the *United Biscuits* case added no particular insight in respect of this appeal. It was contended that the Court in *United Biscuits* simply restated the definition of insurance and reinsurance transactions, on which the Appellant relies, but that the context of the reference, albeit concerning the pension industry, was focused on the status of pension fund management and not on the operation and management of a pension scheme. A pension fund manager will, like in *Asprio,* provide its services to the insurer/scheme provider and not to the individuals insured under the scheme. The Appellant contends that all questions of pension fund management are outside the scope of this appeal as the members are, contractually and practically, responsible for all investment decisions taken in respect of their pension fund and that the management of any underlying funds is a matter for the fund manager.

98. The Appellant considered that HMRC were seeking to put an unwarranted gloss on the CJEU test by requiring that the Appellant demonstrate that it had assumed financial risk in respect of the payment of benefits or that assets needed to be pooled in order for the provision of the services to constitute an insurance transaction.

99. Taking each feature of the CJEU's definition of an exempt insurance transaction the Appellant contended:

(1) "insurer" – that in accordance with the CJEU's determination in *CPP* status as an "insurer" is determined not by how the taxpayer is regulated but by reference to the nature of the services provided and hence, if it is established that the IM SIPP is insurance, the Appellant is an insurer;

(2) "in return for prior payment" – the Appellant's customers are required to pay the annual fee and other fees in advance.

(3) "of a premium" – there is no special meaning to be ascribed to the use of the term premium which simply references the prior payment of fees, here there was prior payment of a sum which included sums allocated to capital and to administration; as was the case in *Winterthur* the low administration fee reflected the low level of risk bore by the Appellant vis a vis the provision of the benefits available.

(4) "in the event of materialisation of the risk covered" – consistent with domestic case law, and the approach adopted by HMRC in its publicly available guidance, the appropriate reference point for determination of whether a contract covers the materialisation of risk is the Prudential test as articulated in the context of life insurance in *Fiji*. As such it is clear that any contract which provides for life-or-death benefits which carry an inherent uncertainty as to each of the potential circumstances in which a benefit was payable as against the other potential outcomes and/or in the case of death as to its timing represents the materialisation of a risk covered. All that is required is that there is a contingent event and here there demonstrably is a contingency.

(5) "the service agreed when the contract was concluded" – the service was substantially ensuring the payment of the tax compliant benefits in accordance with the

terms of the SIPP all of which was agreed at the point at which the customer joined the SIPP.

100. Finally, the Appellant contended that fiscal neutrality required that provision of a SIPP by a pension scheme trustee to be exempt on the basis that the provision of a SIPP by an insurance company was exempt. Particular emphasis was placed on the inclusion of insurance companies providing SIPPs under the Order and thereby, on HMRC's case, within the scope of the insurance exemption as a breach of fiscal neutrality.

HMRC's submissions

101. HMRC contended that the Appellant's appeal had been definitively determined against it in *United Biscuits* on the basis that the essential ingredients of an insurance transaction as identified by the CJEU in all the relevant cases referred to and summarised in *United Biscuits* were not evident in respect of the IM SIPP.

102. HMRC were particularly focused on the absence of the any risk borne by the Appellant. As a pension plan was a tax efficient form of saving there was no risk to the individual which required indemnification.

103. It was noted that the Appellant's registration with the Financial Conduct Authority was not as an insurance company but as a provider of establishing and operating a pension scheme and as such the Appellant was not subject to the Solvency II Directive.

104. Particular emphasis was put on the defining characteristic of a SIPP that it was the member or their independently appointed financial advisor who is responsible for the management of the fund and who therefore bore all the investment risk.

105. HMRC also considered it material that the contributions paid by the member or on their behalf were held under trust in an identified or ring-fenced member fund. Whilst the funds may be accumulated with other funds for the purposes of investment, the precise value of each member's fund was identifiable and held in trust for that member in respect of which the benefits under the terms of the scheme would be payable. HMRC contend that the trust structure justifies that the Appellant is not regulated as an insurance provider under the Solvency II regime as the underlying fund does not need the capital protection required in the case of insurance. The trust precludes the necessary assumption of risk for an insurance transaction.

106. It was contended that the services provided by the Appellant were precisely as describe in clause 18 of the member terms and conditions (as set out in paragraph [18(11)] above) inter alia, the establishment and operation of the scheme (in accordance with the requirements of FA 04 so as to remain a registered pension scheme offering tax efficient retirement savings) pursuant to which contributions were received and invested (on instruction) and benefits were paid. The charges (including the annual charge) represented consideration for the provision of those services and not the payment of a premium for the bearing of risk by the Appellant.

107. By reference to how the CJEU had framed and answered the question put to it in *United Biscuits* HMRC contended that the insurance exemption for VAT is limited to supplies in the nature of the provision of an indemnity only, in particular reference was made to paragraphs [28], [32] and [33] in which the CJEU identified that the critical feature of the services under consideration in that case (investment management services) was that there was no indemnity provided.

108. Particular reliance was also placed on the analysis of the Advocate General (paragraphs [46] – [50] and [64] – [70]) (which were the context for the conclusion of the Court as identified above in particular by reference to paragraph [32] of the judgment) who analysed, by reference to the underlying purpose of the insurance exemption (associated with the difficulties arising

in identifying the consideration for bearing risk and the potential for double taxation), that it was the assumption of risk by the insurance company in return for payment for bearing that risk which constituted an insurance transaction. Associated or otherwise critical activities inherent in the provision of insurance services were not insurance transactions and were thereby excluded from exemption.

109. HMRC also relied on *United Biscuits* (judgment paragraph [36] referring back to paragraphs [71] – [75] of the Advocate General's opinion) to support the contention that the treatment of pension administration as an insurance activity, when carried on by an insurance company regulated under the Insurance Directives, was an irrelevance.

110. In response to the Appellant's contention that there would be a breach of fiscal neutrality if insurance companies were permitted to exempt the provision of the operation of a SIPP HMRC contended that two wrongs did not make a right. In reliance on paragraphs [76] – [82] of the Advocate General's opinion and the overall conclusion of the CJEU in *United Biscuits* HMRC contended that fiscal neutrality could not result in exemption inconsistent with the PVD provisions.

111. HMRC too forensically analysed the various contractual terms between the member and the Appellant to illustrate that the service provided by the Appellant in return for the fees was not an insurance transaction because no service was provided on the materialisation of a risk which was the subject of any indemnity. Whilst it was, strictly, unnecessary to identify the nature of the service provided (because there was no alternative contention that the supply was exempt if it was not an insurance transaction) HMRC contended that the Appellant supplies services of administration of the member's own assets (held under trust) with a view to retaining the favourable tax treatment available for such assets including the payment of benefits in compliant form. HMRC asserted that pension benefits were not "benefits" in the sense required by reference to the provision of insurance but were the means by which the assets were returned in a tax compliant way.

112. HMRC's position on *Winterthur* was that it failed to survive the developments in CJEU case law.

DISCUSSION

Is the IM SIPP a contract of life assurance as a question of UK law?

113. A question arises as to where to start the analysis in this matter. The Appellant urged the starting point to be whether, as a question of UK law, the IM SIPP was life insurance. That starting point was also consistent with HMRC's publicly available guidance to officers GIM1040 – Legal Basis of Insurance: Contract of Insurance which provides:

> The 'Prudential' definition of insurance remains the starting point for a discussion of the legal basis of insurance. …Case law relating to insurance has also established a general principal that the substance of the contract prevails over its form. This follows from the decisions in Fuji … In the Fuji case the Court also held that the regulatory consequences of treating a contract as insurance are not relevant to the classification of the contract."

114. It is to be noted that this section of the manual concerns insurance generally and is not identified as relevant in the context of determining whether a supply is insurance for VAT purposes. VATINS2110 does not reference GIM1040 directly but, after referencing *Card Protection Plan* and the Collins dictionary definition on the meaning of insurance VATINS2110 states "This clearly accords with our daily understanding of what insurance is, and it is likely that any form of insurance would fall within this definition."

115. On the other hand HMRC contended that it mattered little whether the arrangements constituted insurance applying the *Prudential* and *Fuji* tests because, unless the, now established, CJEU articulation of what constitutes an insurance transaction is met the exemption cannot apply.

116. The Tribunal has determined to apply the domestic analysis first. If by reference to *Prudential*, *Fuji* and related cases the IM SIPP is not a contract of insurance, on the Appellant's case, the analysis would appear to end. However, if the IM SIPP is a contract of insurance this Tribunal must then consider, in the light of the most recent guidance given by the CJEU in *United Biscuits*, whether there is any basis for it to be excluded from the exemption provisions.

117. By reference to the summary of the domestic insurance cases set out above it is apparent that, certainly for the purposes of the historic domestic regulation of insurance companies, life insurance is a relatively broad concept, and it is clear, following *Fuji,* that an investment contract which provides for the payment of benefit on death is a contract for life insurance. That was so despite the fact that the substantive benefit payable by the insurance company is determined solely by reference to the investment performance of the premium in circumstances where that performance was solely attributable to the investment decisions of the insured. The division between an investment contract and an insurance contract being articulated in *Fuji*, by reference to the fact that the benefits were payable in the event of death or in the event of living and making the choice to surrender.

118. It appears to the Tribunal that a SIPP and thus the IM SIPP does meet the Prudential test of insurance, certainly by reference to the interpretation applied in *Fiji*. There seems to be little that can materially differentiate the IM SIPP from the contract bond in *Fuji*. In each case there is a financial contribution which is then invested, and it is the investment performance of that contribution which determines the benefits due under the contract. As the investments decisions are made exclusively at the direction of the policy holder/member the value of the fund from which benefits are payable are at the risk of the insured. Entitlement to receive benefits under a SIPP is driven by the same type of life and death events. Unlike the Fuji contract there are a greater number of contingencies or uncertainties which underpin what form the benefits may take and when they are paid as they may become payable in the event of incapacity prior to 55, at any point between 55 and 75 or on death. That latter point would appear to be more consistent with a conclusion that the contract is a contract of life insurance than was even the case in *Fuji*.

119. As far as they engaged with the question of whether the IM SIPP was insurance under the general law, HMRC contended that the critical and distinguishing feature of the IM SIPP which precluded it from being insurance was that the funds were held under trust and hence were substantively the member's own funds. It is right to say that under a standard insurance contract the premium is paid to the insurer which becomes beneficially and legally entitled to the full value of the payment. Indeed it is for that reason that the insurance directives were established to protect policy holders by setting capital adequacy requirements ensuring that the insurance company has sufficient capital to meet claims as they arise. It is also correct to observe that the Prudential test was set at a time prior to the imposition of capital adequacy but it was by reference to legislation which provided for regulation of precisely who could and could not write insurance business. The Appellant's response was that the terms of the trust under which the funds are held do not give the member (or any other beneficiary) an unfettered right to draw on or use the funds. On the contrary there are very significant fetters imposed which limit both when and how the funds are used so as to comply with the tax regime. The only right of the member is to require that the fund be administered in accordance with the scheme deed and rules and that is not equated to a direct right in respect of the fund itself. Although not put to the Tribunal in this way the submission was to the effect that the capital

adequacy requirements of the insurance directives and the master trust arrangements are substantively similar both in objective and effect as to be insufficient to preclude a conclusion that the IM SIPP is an insurance contract. The Tribunal agrees with a submission put in that way. The Prudential test, as applied in *Fuji* is one as to substance and not apparently as to form.

120. There was also some debate between the parties as to the contractual entitlement to benefits arising on death due to the discretion given to the trustees. The member completes a non-binding expression of wish (thereby permissibly excluding the benefit from a charge to inheritance tax) which "help[s] the trustee to pay out your benefits in line with your wishes". Despite the non-binding nature of the expression of wish there can be no doubt that on death the accumulated value of the member's individual fund is not to be retained by the trustees and will be paid out. Ultimately, and absent an identified beneficiary, the rules provide that the fund passes to the Crown bona vacantia. As such there can be no question benefits are payable on death (the timing of which is uncertain) such that, as was the case in *Fuji*, the contingency relevant in respect of the in-life benefits is that they happen prior to death.

121. The role of this Tribunal is to determine the VAT liability of the supplies made by the Appellant in connection with the IM SIPP and not to establish under insurance law that the IM SIPP is insurance. It is, therefore, with some caution, given the different purpose for which the Prudential test was developed, that the Tribunal concludes, for the reasons set out above, that the terms of the IM SIPP do, on balance, appear to meet the Prudential test of insurance.

Is the IM SIPP an insurance transaction for VAT purposes?

122. The Appellant contends that by reference to HMRC guidance determining that the IM SIPP is a contract for life assurance by reference to the Prudential test is enough. The Tribunal has some significant sympathy with that position. As noted above, though not explicit, the terms of VATINS2110 and GIM1040 when taken together would certainly imply that the provision of any life insurance contract meeting the *Fuji* test would constitute an insurance transaction for VAT purposes.

123. However, HMRC guidance is not the law and enforcing its application is not within the jurisdiction of this Tribunal (that is a matter for a judicial review challenge in the Administrative Court).

124. This Tribunal must determine whether the IM SIPP is an "insurance transaction" applying an EU wide interpretation of that term as provided by the CJEU. As set out above the CJEU has, since *Card Protection Plan,* been broadly consistent in its articulation of the essential features of an insurance transaction as "that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with a service agreed when the contract was concluded".

125. The definition of life assurance as articulated in Houseman (as derived from the Prudential test) is: "one whereby one party (the insurer) undertakes for a consideration (the premium) to pay money (the sum assured) to or for the benefit of the other party (the assured) upon the happening of a specific event, where the object of the assured is to provide a sum for himself or others at some future date, or for others in the event of his death or survival."

126. As the Appellant pointed out there is a remarkable similarity between the two. The most significant difference, certainly in terms of language, is between "upon the happening of a specific event" and "in the event of materialisation of the risk covered". The Appellant contends the two phrases have the same meaning. In particular, the Appellant contends that there is no requirement for the insurer to be at risk, the relevant risk or uncertainty for insurance purposes is the risk faced by the insured in this case the life and death uncertainties which

determine when and how the benefits are paid. HMRC contend that in order to be exempt there must be consideration paid for the assumption of risk by the insurance company.

127. Given the similarity in the Houseman articulation of the Prudential test and the EU case law on the essential characteristics of an insurance transaction the Tribunal considers that it is appropriate to start with the purpose underpinning each articulation.

128. In this regard it is firstly to be recognised that the Prudential test was developed in the context of wholly different legislation with a different purpose and addressing a different mischief. As is apparent from *Fuji* the question of the nature of the contractual relationship needed to be analysed in order to determine whether the contract was void with the attendant consequences in terms of the relationship between and entitlements of the parties. More generally the test was established and developed for a regulatory purpose.

129. The purpose of group 2 schedule 9 VATA is patently fulfilment of the pre-Brexit obligations on the UK under the EC Treaty to implement the provisions of the VAT Directives. This could not be more plainly the case post 1 January 2005 when item 1 was amended to take account of the implementation failure highlighted by the CJEU in *Card Protection Plan.*

130. The justification for the exemption at an EU level (as an exception to the general principle of taxation) has been expressly articulated by the CJEU in *United Biscuits* as addressing the difficulty arising from the fact that an insurance premium composes two parts: the fee for administration/provision of the policy under which the insured risk is borne and the capital element (from which claims are ultimately paid).

131. By reference to that justification and by reference to the articulations provided in *Card Protection Plan, Aspiro, Mapfre* and *United Biscuits* a supply is exempt for VAT purposes as a supply of insurance where in return for a fixed and known amount the insurer agrees to provide benefits on the materialisation of an identified risk where the scope of the benefits is specified at the outset.

132. Under the IM SIPP the member makes contributions into a fund held under a master trust but in respect of which the member's fund is individually identifiable. The individual directs the investments to be made and bears all the investment risk. Benefits are paid only by reference to value in the fund at the point at which the benefits are taken and subject to compliance with the tax rules. As such the Appellant bears no risk in connection with the payment of benefits. The Appellant contends by reference to the domestic non-VAT case law that the fact that it bears no risk is irrelevant. By reference to that case law the Appellant is correct however, there is no VAT authority which confirms that position.

133. However, as the case law in the CJEU has developed, the assumption of risk by the insurance company does appear to be significant.

134. The Advocate General in *Aspiro* analysed the essential features of an insurance transaction by reference to the assumption of risk by the insurer (at paragraph [22]). At paragraph [26] and by reference to the CJEU judgments in *Försäkringsaktiebolaget Skandia (publ),* C-240/99 and *Assurandør-Societetet, acting on behalf of Taksatorringen v Skatteministeriet* C-8/01 the Advocate General draws a distinction between insurance transactions in a "strict sense" and component elements of insurance business confirming that it is the assumption of risk by the insurer which is critical for an insurance transaction in a VAT sense.

135. In paragraph [42] of *Mapfre* the CJEU specifically articulates the essential features of an insurance transaction by reference to the insured person being exempted from the risk of bearing financial loss, which is uncertain, but potentially significant.

136. The "insurance in the strict sense" distinction is picked up by the Advocate General in *United Biscuits* at paragraph [68] in which it is noted that the PVD exempts insurance business "in the strict sense of the term, in that such an activity involves solely the assumption of risks in a contractual framework". The precise distinction is not articulated by the CJEU however, at paragraph [28] it references the requirement for indemnity and, where, at paragraph [40] the CJEU references the "normal meaning" of insurance the CJEU does so explicitly approving paragraph [58] of the Advocate General's opinion in which substantively the same distinction is drawn between "insurance" in the strict sense and "operations" which are closely related or ancillary to the provision of insurance.

137. It appears to the Tribunal that what is required under the Prudential test is somewhat different to that which is relevant for the purposes of the VAT exemption. In order for a supply to be exempt as an insurance transaction, the insured must pay the insurer to assume a financial risk. Such a conclusion includes within the scope of the exemption both indemnity and contingency insurance as, under a conventional (non-investment) life assurance policy the insured pays a fixed, up-front, annual or monthly premium over the term of the policy and the insurer bears the risk on a fixed sum payment on the happening of the insured event (death/critical illness etc). However, excluded from exemption is any policy/scheme which meets the Prudential life/death uncertainty without the assumption of financial risk.

138. That conclusion is consistent to the justification for the exemption. Each premium in a case where financial risk is assumed by the insurance company will consist of a payment to the insurer for bearing the risk and a contribution to "capital" from which, when taken with the risk across all policies, the benefits are paid.

139. Following the CJEU judgment in *United Biscuits* it is clear that reliance on the scope of the insurance directives to justify exemption is also misplaced. As the Advocate General noted the insurance directives are "intended to coordinate the laws of the Member States relating to life assurance business and to establish a classification by class of business in order to determine those that are subject to compulsory approval and the detailed rules applicable to such approval. In that regard the insurance directives cover insurance business in the strict sense and ancillary business…". This analysis receiving approval from the CJEU at paragraph [36]).

140. In addition, the insurance directives permit a level of discretion on the margins as to what ancillary insurance business is to be regulated. The scope of the insurance exemption is deliberately narrower than the scope of the insurance directives because they serve a different purpose. The exemption is to be narrowly construed and (unlike some of the social exemptions) does not extend to related or ancillary services.

141. The annual fees payable by a member of the IM SIPP are paid as consideration for the provision of the services listed in clause 18 of the terms and conditions. They do not include any element of risk premium and the Appellant does not need to accumulate capital from which to pay the benefits. The members contributions which are held under trust for the member, their dependents and other beneficiaries, represent the capital from which the benefits are paid. The Appellant does not provide insurance in the "strict sense" of assumption of financial risk rather, it has established and operates a trust scheme pursuant to which contributions made by the members are held and administered so as to comply with the provisions of FA 04.

142. However apparently similar the Prudential-rooted Houseman definition of life assurance and the high-level summary of the essential features of an exempt insurance transaction, there is a critical difference which, in the present case, precludes the Appellant from exemption even on the basis though the Prudential test would appear to be met.

143. This conclusion would appear to run contrary to the conclusion of the VAT & Duties Tribunal in *Winterthur*. Whilst *Winterthur* is a decision of the VAT & Duties Tribunal to which the principle of comity would apply it is a decision which predates even *Card Protection Plan* and hence all the relevant CJEU jurisprudence. It is also significant that, on the critical issues which arise in the present case, the Tribunal made no formal finding. As set out above *Winterthur* concerned the liability of similar fees as in the present case but, in that case, the heart of HM Custom and Excise's objection to exemption was that the charges were not payable to an insurance company. They had accepted that if the payments were made as consideration for a service provided by the trustee (as an insurance company) then they were exempt. The question in *Winterthur* did not, in substance, therefore, concern the nature of the activity but rather who the supplier was. The case evaluates the relationship between trustee, scheme administrator and member so as to conclude that the essential contractual relationship for the provision of the pension was between the trustee and the member through the auspices of the scheme administrator and that the charges made were pursuant to the scheme.

144. In view of the conclusion that the Appellant's supplies are not insurance transactions there is no basis for a fiscal neutrality argument. The Tribunal was not provided with the contractual documentation relevant for a SIPP provided by an insurance company. It cannot therefore be determined whether there is a substantive contractual basis for concluding that an insurance backed SIPP is or is not insurance in a strict sense and therefore properly subject to the exemption. However, if it were so that would represent a relevant difference justifying different treatment for VAT purposes, for fiscal neutrality to apply the supplies must be comparable (see *HMRC v Rank Group Plc* C-259/10 at paragraph [58]). However, even if there were no justifiable difference with the consequence that the supply of insurance backed SIPPs were incorrectly treated as exempt the principle of fiscal neutrality does not assist (see *Rank* at paragraph [68]) it simply confirms that the insurance backed SIPPs have been incorrectly exempted.

DISPOSITION

145. For the reasons stated the fees payable by members of the IM SIPP are not consideration for an exempt insurance transaction; as a consequence, there has been no overpayment of VAT and the sums claimed on the error correction notices are not due to the Appellant.

146. However, and by way of postscript, the Tribunal notes that by reference to HMRC's guidance in this area the Appellants case had clear merit. By reference to the case prosecuted by HMRC their guidance is outdated and misleading and should be amended without delay.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

AMANDA BROWN QC
TRIBUNAL JUDGE

Release date: 05 MAY 2022

ANNEX
Terms and Conditions