

Online insurance introductory services can be exempt

Background

In what may perhaps be viewed as a surprising decision InsuranceWide and Trader Media (the taxpayers) have both successfully argued in the High Court that their services could qualify for exemption. Both taxpayers provided online introductory services between people seeking insurance and a panel of insurers. The preceding Tribunal cases had given contradictory answers (InsuranceWide lost its Tribunal appeal while Trader Media won its appeal) so the High Court was asked to rule first on the question whether a taxpayer who merely introduced parties to each other (sometimes not the insurer and the person seeking insurance) could be regarded as an insurance agent/broker. Secondly the court was asked to consider whether the services provided by the taxpayers comprised the exempt services of an insurance broker or agent acting as an insurance intermediary, as set out in UK law. The judge answered both questions in the affirmative. This was a case argued primarily on UK law; specifically the definition of services of an insurance intermediary in Note 1 to Schedule 9 Group 2 and the tests HMRC apply (which however seem to have their origin in EU cases). There must be an assumption that a Member State both needs to and wants to implement its Treaty of Rome obligations to apply EU law but equally the authorities are bound by domestic law where there is no doubt about the clear words of the legislation.

The issue

This case concerned the scope of the insurance intermediary exemption. Customers were attracted to the websites because of the taxpayers' reputation in the market as facilitators for the obtaining of insurance. HMRC argued that a mere introducer did not meet the terms of the insurance intermediary exemption because it did not play any part in the negotiation of the contracts being sought. Also HMRC submitted the fact that the taxpayers lacked any power to bind the insurers and the fact they did not recommend or endorse any insurer were strong indications they were not insurance agents. HMRC were also concerned that the taxpayers were not regulated under the Financial Services and Markets Act and they submitted that the taxpayers did not have the necessary relationship with both customer and insurer to secure the exemption (relying on the ECJ decision in Taksatorringen). Furthermore InsuranceWide declared on the site that it was not a broker, intermediary or agent. HMRC therefore argued that the services provided by the taxpayers were taxable advertising of insurance companies' wares. The taxpayers on the other hand argued that their services related to insurance transactions and could be exempt.

The judge rejected all these submissions by HMRC. He distinguished advertising from introduction because introduction involves a relationship between the introducer and individuals and a relationship did exist here. This was a key point made in the Andersens case. Exemption

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was not limited to supplies by regulated suppliers (CPP had shown this). However CPP was about supplies of insurance. This exemption was about supplies by insurance brokers/agents. The Sixth and VAT Directives do not define insurance brokers/agents and the Commission has criticised the importation of non VAT law (the Insurance Mediation Directive which does give an approximate definition) which is passed by qualified majority, into VAT decisions.

The judge concluded that the exemptions should be interpreted strictly but not in a restricted way. He considered the relationship the taxpayers had with insurer and insured was sufficient to secure the exemption. There was no need for the introducer to have a direct relationship with both customer and insurer as long as he was part of a chain of introduction communicating between customer and insurer. This was a key point in the Beheer case. The judge concluded that the terms broker and intermediary were interchangeable and agent should be given its broad commercial meaning. The services came within a fair interpretation of the wording of the exemption, albeit under HMRC's more restricted interpretation of the words, exemption did not apply.

Why is this important?

This decision is important because the judge has rejected so many of the conditions HMRC sought to apply as necessary if the insurance intermediary exemption was to be secured. Accordingly the decision appears to widen the scope of the insurance intermediary exemption to encompass the services of those who use on line portals to channel people through to insurance companies, even where they declare that they are not agents/brokers, where they have no involvement in agreeing contract terms, make no recommendations or endorsements, have no power to bind, and where they are not even the introducer who is closest in the chain to the insurer. Certainly this decision seems to cast doubt on at least two of HMRC's three conditions for the distinguishing of exempt introductory services from taxable advertising services, namely that the intermediary must target its own customer base and endorse the product or insurer. The third condition is payment per successful take up of a policy. The taxpayers met that one.

What now?

HMRC are unlikely to be happy with this decision and we would expect them to appeal the judgment to challenge any widening of the intermediary exemption and the more restrictive definition of advertising set out in the decision. However in the interim suppliers who have accounted for VAT on services similar to those at issue in this case may wish to lodge a back claim, plus interest. The recent VIC GLO decision would seem to suggest that this would be the sort of claim where compound interest could be claimed as restitution, if HMRC have erred under Community law in collecting VAT on supplies that should be exempt.

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