Neutral Citation: [2025] UKFTT 00275 (TC)

Case Number: TC09444

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2023/09155

VAT – Input tax – Whether "customer" is company established in Gibraltar or person located in UK insured by Gibraltar company – Whether Article 169(c) of Principal VAT Directive has direct effect – If so, whether this has, or is of a kind that has, been recognised by the CJEU or any court or tribunal in the UK in a case decided before 31 December 2020 – Appeal allowed

Heard on: 31 January and 3 February 2025
Judgment date: 03 March 2025

Before

TRIBUNAL JUDGE BROOKS

Between

HASTINGS INSURANCE SERVICES LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Andrew Hitchmough KC, instructed by Ashurst LLP

For the Respondents: Raymond Hill of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal, as explained more fully in the parties' 'Statement of Agreed Facts and Issues' (see below), concerns a claim for the deduction of input tax, in particular, whether an insurance intermediary established in the United Kingdom ("**UK**") can deduct input tax in relation to supplies of services it makes to an insurer established in Gibraltar, in circumstances where the intermediary arranges for the Gibraltar company to insure persons in the UK and where that input tax would be irrecoverable if that same intermediary arranged for a UK insurer to insure the same persons in the UK (as are insured by the Gibraltar company).

2. It is common ground that such input tax was recoverable under the Value Added Tax (Input Tax) (Specified Supplies) Order 1999 (SI 1999/3121) (the "**SSO**"). However, the SSO was amended by the Value Added Tax (Input Tax) (Specified Supplies) (Amendment) Order 2018 (SI 2018/1328) (the "**Offshore Looping Regulations**") following the decision of the Tribunal in *Hastings Insurance Services Ltd v HMRC* [2018] UKFTT 27 (TC).

3. The Appellant, Hastings Insurance Services Limited ("**Hastings**") contends that the amendment to the SSO is incompatible with Article 169(c) of the EU Principal VAT Directive (Directive 2006/112/EC) (the "**PVD**") and therefore ineffective. The Respondents, HM Revenue and Customs ("**HMRC**"), do not agree.

4. Hastings was represented by Andrew Hitchmough KC. Raymond Hill appeared for HMRC.

5. In his oral reply, on 3 February 2025, Mr Hitchmough referred to Article 395 PVD. As this had not been included in the Authorities Bundle, I agreed that Mr Hill could respond in writing (to which Mr Hitchmough could reply) to the extent that there were further authorities which might assist in relation to Article 395 PVD.

6. On 10 February 2025, I received, by email, two relevant authorities, *European Commission v. United Kingdom* Case C-276/19 EU:C:2020:368 and the Opinion of Advocate General Saugmandsgaard Øe in *G. sp. z o. o v Dyrektor Izby Administracji Skarbowej w Bydgoszczy* Case C-855/19 ECLI:EU:C:2021:222 ("***G. sp. z o. o***"), together with written submissions from Mr Hill. I also received written submissions in reply from Mr Hitchmough later on 10 February 2025.

7. Although I was very much assisted by the submissions of Mr Hitchmough and Mr Hill, both written and oral, I have not found it necessary to make specific reference in this decision to all of these or all of the materials or authorities to which I was referred, but I have taken all of them into account.

STATEMENT OF AGREED FACTS AND ISSUES

8. The parties produced the following 'Statement of Agreed Facts and Issues':

> **AGREED FACTS**
>
> **A. Preliminary**
>
> (1) The following statement sets out the agreed facts and issues between the parties.
>
> (2) Nothing in this document should be taken as an acceptance by either party of the relevance of any particular fact or facts or that any fact omitted from this statement is not relevant.
>
> **B. Relevant Legislation**
>
> **European Union legislation**

(3) The relevant Articles of the PVD are as follows:

(a) Article 59(e) PVD provides that:

> The place of supply of the following services to a non-taxable person who is established or has his permanent address or usually resides outside the Community, shall be the place where that person is established, has his permanent address or usually resides:
>
> …
>
> (e) banking, financial and insurance transactions including reinsurance, with the exception of the hire of safes;

(b) Article 135(1)(a) PVD provides that:

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

(c) Article 169(c) PVD provides that:

> In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein so far as the goods and services are used for the purposes of the following:
>
> …
>
> (c) transactions which are exempt pursuant to points (a) to (f) of Article 135(1), where the customer is established outside of the Community or where those transactions relate directly to goods to be exported outside of the Community.

UK legislation

(4) Article 3A of the SSO provides that:

> Any services that are included within Article 3 above by virtue of the fact that the supply is exempt, or would have been exempt if made in the United Kingdom, by virtue of item 4 of Group 2 of Schedule 9 to the Value Added Tax Act 1994 must be related to an insurance transaction or a reinsurance transaction where the party to be insured under the contract of insurance or reinsurance (whether or not a contract of insurance or reinsurance is finally concluded) is a person who belongs outside the United Kingdom.

(5) Section 31(1) of the Value Added Tax Act 1994 ("**VATA 1994**") provides 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.

(6) Schedule 9, Group 2, Item 4 VATA 1994 provides that:

> 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.

(7) Prior to its repeal on 1 January 2024, Section 4 of the European Union (Withdrawal) Act 2018 ("**EUWA 2018**") provided that:

> (1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before [IP completion day] —

(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

(b) are enforced, allowed and followed accordingly,

continue on and after [IP completion day] to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).

(2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they—

(a) form part of domestic law by virtue of section 3, [...][

(aa) are, or are to be, recognised and available in domestic law (and enforced, allowed and followed accordingly) by virtue of section 7A or 7B, or]

(b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before [IP completion day] (whether or not as an essential part of the decision in the case).

(3) This section is subject to section 5 and Schedule 1 (exceptions to savings and incorporation) [and section 5A (savings and incorporation: supplementary)].

(8) Section 2 of the Retained EU Law (Revocation and Reform) Act 2023 ("**REULA 2023**") provides that:

(1) Section 4 of the European Union (Withdrawal) Act 2018 (saving for rights, powers, liabilities etc under section 2(1) of the European Communities Act 1972) is repealed at the end of 2023.

(2) Accordingly, anything which, immediately before the end of 2023, is retained EU law by virtue of that section is not recognised or available in domestic law at or after that time (and, accordingly, is not to be enforced, allowed or followed).

C. Background to the Appeal

(9) On 28 April 2023, the Appellant, Hastings submitted a claim to HMRC for the recovery of input tax attributable to supplies made by Hastings to Advantage Insurance Company Limited ("**Advantage**"). The claim relates to the following periods:

(a) 1 January 2019 to 31 December 2020 (the "**First Disputed Period**"); and

(b) 1 January 2021 to 31 December 2022 (the "**Second Disputed Period**", together with the First Disputed Period, the "**Disputed Periods**"),

and is in the sum of £16,060,572.31, excluding any applicable repayment interest.

(10) The respective businesses of Hastings and Advantage, together with the services supplied by Hastings to Advantage throughout the Disputed Periods, are described in Sections D and E below.

(11) By a decision of 30 June 2023 (the "**Decision**"), HMRC refused the claim on the grounds that Article 3A of the SSO, as inserted from 1 March 2019 by the Offshore Looping Regulations correctly implemented Article [59(e)][1] and Article 169(c) PVD.

[1] The decision letter refers to Article 56(1)(e) of the PVD which does not exist. This appears to be an incorrect reference to Article 59(e) which is referred to in HMRC's Statement of Case.

(12) Hastings appealed against the Decision to the First-tier Tax Tribunal on 26 July 2023. Hastings' Grounds of Appeal are that:

(a) the amendments made by the Offshore Looping Regulations to the SSO (in particular the insertion of Article 3A to the SSO) are incompatible with Article 169(c) PVD;

(b) Article 169(c) PVD requires the UK to allow the deduction of input VAT used by insurance brokers or insurance agents to make supplies of services related to insurance and reinsurance transactions where the customer is established outside the Community. Hastings submits that the word "customer" means "the person who buys the goods or services", and that the customer of the Services (as defined below) supplied by Hastings is Advantage;

(c) Hastings is therefore permitted to make a claim for overpaid input VAT in respect of the First Disputed Period because Article 169(c) PVD has direct effect in the UK; and

(d) Hastings is permitted to make a claim for overpaid input VAT in respect of the Second Disputed Period because, in accordance with section 4(2) of the EUWA 2018, the direct effect of Article 169(c) PVD was recognised by the Court of Justice of the European Union and/or the UK First-tier Tribunal before 31 December 2020.

(13) HMRC served their Statement of Case on 8 December 2023, and resist Hastings' appeal on the grounds that:

(a) the amendments made by the Offshore Looping Regulations to the SSO are compatible with Article 169(c) PVD because, in the context of insurance and reinsurance transactions and related services performed by insurance brokers and insurance agents, the "customer" of the Services (as defined below) supplied by Hastings is the person located in the UK insured by Advantage, rather than Advantage;

(b) it is not admitted that Article 169(c) had direct effect in the period to 31 December 2020; and

(c) under the EUWA 2018, a Directive such as the PVD is not in itself "retained EU law" and the direct effect of Article 169(c) PVD has not been recognised by the Court of Justice of the European Union or by any court or tribunal in the UK in a case decided before 31 December 2020. Therefore, Hastings is not entitled to make a claim for overpaid input VAT in respect of either the First or Second Disputed Period.

D. Business of Hastings

(14) Hastings is a private company limited by shares incorporated in England and Wales on 20 October 1995 with company number 03116518.

(15) Hastings is an insurance services company operating in the UK. The principal activity of Hastings, trading as 'Hastings Direct', at all relevant times was the provision of insurance broking services to the UK private car, van, motorbike and home markets.

(16) Throughout the Disputed Periods, Hastings made supplies of insurance broking, underwriting support and claims handling services (the "**Services**") to Advantage under various intragroup services agreements (see Section F).

(17) Throughout the Disputed Periods, Hastings was authorised in the UK by the Financial Conduct Authority to arrange deals in, assist in the administration and

performance of, deal as agent in, and make arrangements for, insurance contracts with commercial and retail customers.

E. Business of Advantage

(18) Advantage is a private limited company limited by shares incorporated in Gibraltar on 28 August 2002 with incorporation number 85900.

(19) Advantage underwrites UK private motor car, commercial van, motorcycle and home insurance.

(20) Throughout the Disputed Periods, Advantage made supplies of insurance services to UK persons, with Hastings acting as its broker or intermediary.

(21) Throughout the Disputed Periods, Advantage was licensed by the Financial Services Commission in Gibraltar to carry out, and effect, certain contracts of insurance in the UK. This permitted Advantage to provide those insurance services from Gibraltar.

(22) Advantage has at no point supplied insurance in the UK through a branch in the UK. Advantage is established in Gibraltar and does not have a fixed establishment in the UK for VAT purposes and has at all times operated from its business premises in Gibraltar.

F. Services Agreements between Hastings and Advantage

(23) From 17 April 2012, Hastings and Advantage were indirect, wholly-owned subsidiaries of Hastings Insurance Group Limited. On 11 April 2018, Hastings Insurance Group Limited changed its name to Hastings Group Limited.

(24) During the Disputed Periods, the contractual relationship between Hastings and Advantage was addressed by services agreements setting out the terms on which Hastings provided the Services to Advantage:

(a) a services agreement between Hastings and Advantage dated 9 February 2017;

(b) a variation to the above 2017 services agreement dated 20 August 2021; and

(c) a services agreement between Hastings and Advantage dated 20 August 2021.

(25) During the Disputed Periods:

(a) the Services were provided to the business establishment of Advantage in Gibraltar;

(b) Advantage was established outside the UK and outside the EU; and

(c) the Services were transactions which are exempt pursuant to sub-article (a) of Article 135(1) PVD, as implemented into UK law by section 31(1) and Schedule 9, Group 2, Item 4 of the VATA 1994.

AGREED ISSUES

G. Issue 1

(26) Whether the "customer" of the Services supplied by Hastings to Advantage for the purposes of Article 169(c) PVD is Advantage or the person located in the UK insured by Advantage.

H. Issue 2

(27) Whether Article 169(c) PVD meets the requirements for that provision to have direct effect.

I. Issue 3

(28) If Issue 2 is decided in the affirmative, whether the direct effect of Article 169(c) PVD has been recognised by the Court of Justice of the European Union or by any court or tribunal in the UK in a case decided before 31 December 2020 (whether or not as an essential part of the decision in the case) such that, in accordance with section 4 of the EUWA 2018 and section 2 of the REULA 2023, Hastings can continue to rely upon the direct effect of Article 169(c) PVD throughout the Second Disputed Period.

9. In addition to the Agreed Issues, a further matter was raised by HMRC in relation to Issue 1, namely whether, for the purpose of preventing avoidance, the word "customer" in Article 169(c) PVD is to be given a restrictive construction. In the absence of any objection by Hastings, and as I heard argument on it, I have also taken this issue into account.

10. For the purposes of this decision I have adopted the abbreviations used in the 'Statement of Agreed Facts and Issues'.

LEGISLATIVE CONTEXT

11. As the Disputed Periods coincide with the implementation period of the UK's withdrawal from the EU, it is convenient to first set out the legislative context for the period in which this dispute has arisen. This was helpfully discussed by Lord Sales and Lady Rose in *Lipton v BA Cityflyer Ltd* [2024] UKSC at [10] – [20], under the heading "The Implementation of Brexit in the United Kingdom" as follows:

> "**(a) Brexit and the implementation period**
>
> 10. The moment that the United Kingdom ceased to be a member of the European Union is identified with great precision as 11 pm GMT on 31 January 2020. However, the process of withdrawal, in particular as regards its legal consequences, has been a complex and gradual one. Many of those consequences were dealt with by the provisions of the European Union (Withdrawal) Act 2018 ("the Withdrawal Act 2018") which received Royal Assent on 26 June 2018 having completed its passage through both Houses of Parliament a few days earlier.
>
> 11. The date set for the United Kingdom to cease to be a member by the Withdrawal Act 2018, as it originally entered into force, was 29 March 2019. The term "exit day" used in that Act was defined in section 20(1) as 29 March 2019 at 11 pm (that being midnight Central European Time). Section 1 of the Withdrawal Act 2018 provided simply that "The European Communities Act 1972 is repealed on exit day". The European Communities Act 1972 ("the ECA 1972") had been enacted to implement the United Kingdom's accession to the European Economic Community (as it then was) on 1 January 1973.
>
> 12. Section 2(1) of the ECA 1972 as originally enacted is regarded by many as a peerless example of the Parliamentary drafters' skill. It encapsulated the effect of this country's accession in a single sentence. It appears to have been unproblematic in achieving whatever needed to be achieved between 1 January 1973 and Brexit despite the seismic changes in EU law over that period. …
>
> 13. That provision therefore was one of the provisions repealed by section 1 of the Withdrawal Act 2018.
>
> 14. At the point when the Withdrawal Act 2018 gained Royal Assent, the arrangements for an orderly transition in terms both of future relations between the UK and the EU and in terms of the corpus of law applicable in the UK had not yet been settled. The United Kingdom and the EU concluded a treaty, called the Agreement on the Withdrawal of the United Kingdom of

Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, on 24 January 2020 ("the Withdrawal Agreement"). This was signed the day after the text of the draft treaty was approved by the UK Parliament. The Withdrawal Agreement set out the agreement between the EU and the UK that the UK's exit would be followed by a time limited transition period which would last until 11 pm on 31 December 2020. Article 127(3) of the Withdrawal Agreement provided that during that transition period, EU law "shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union." This meant that during that 11 month period, the EU Treaties and other EU law would continue to apply in the UK by way of transitional provision.

15. The Withdrawal Agreement between the EU and the UK was implemented in the United Kingdom by the European Union (Withdrawal Agreement) Act 2020 which gained Royal Asset on 23 January 2020 ("the Withdrawal Agreement Act 2020"). That Act made extensive amendments to the Withdrawal Act 2018. Further, the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No 3) Regulations 2019 (SI 2019/1423) amended the definition of exit day in section 20 of the Withdrawal Act 2018 so that it read 31 January 2020. This meant that 11 pm on 31 January 2020 was therefore the date and time of Brexit and the date and time when the United Kingdom became a non-Member State.

16. However, to reflect what had been agreed with the EU in the Withdrawal Agreement, the Withdrawal Agreement Act 2020 introduced the concept of the implementation period after Brexit, and of "IP completion day" which would mark the end of that period. In effect, therefore, much of the legal landscape would stay the same during the 11 months between Brexit actually occurring on 31 January 2020 and the completion of the implementation period on 31 December 2020. As the Explanatory Notes to the Withdrawal Agreement Act 2020 put it, the effect of the ECA 1972, as modified to give effect to the Withdrawal Agreement, was saved for the time limited implementation period: para 21. Further:

> "22. The [Withdrawal Agreement Act 2020] also modifies the saved ECA [1972] provisions to reflect the fact that the UK has left the EU, and that the UK's relationship with EU law during this period is determined by the UK's obligations under the Withdrawal Agreement, rather than as a Member State. The Act will also make sure that existing legislation continues to operate properly during the implementation period, despite the fact that the UK is no longer a Member State. As such, the Act will provide glosses to make clear how EU terms on the UK statute book should be read during the implementation period. …
>
> 23. EU rules and regulations will continue to apply in the UK during the implementation period. The Act, therefore, amends the EU (Withdrawal) Act 2018 so that the conversion of EU law into 'retained EU law' and the domestication of historic Court of Justice of the European Union (CJEU) case law can take place at the end of the implementation period rather than on 'exit day'. The Act defines this point in time as 'IP completion day' at section 39 [that is 31 December 2020]."

17. Section 1 of the Withdrawal Agreement Act 2020 therefore inserted a new section 1A into the Withdrawal Act 2018. This saved and amended the ECA 1972 for the purpose of giving effect to the Withdrawal Agreement. As the Explanatory Notes put it (para 76):

> "Until 'exit day', the ECA's purpose is to implement EU law as required by the UK's membership of the EU; during the implementation period, by contrast, the modified and repurposed 1972 Act will implement EU law as set out in the Withdrawal Agreement."

18. If the law which formed part of domestic law because of the UK's membership of the EU had simply ceased to have effect on IP completion day, that would have left large gaps in our legal system dealing with many important aspects of our lives. Sections 2, 3 and 4 of the Withdrawal Act 2018, as amended by the Withdrawal Agreement Act 2020, dealt with carrying forward EU enactments and rights into domestic law after IP completion day. … For the moment it is enough to summarise them as follows:

> a. Section 2 provided that subject to various exceptions, domestic legislation derived from EU law continues to have effect after IP completion day;
>
> b. Section 3 provided that, again subject to various exceptions, "direct EU legislation" such as EU regulations or decisions forms part of domestic law after IP completion day; and
>
> c. Section 4 provided that any rights, powers, liabilities, obligations etc which were enforceable by virtue of section 2(1) of the ECA 1972 continue after IP completion day to be so recognised and available.

19. Those provisions were an interim solution until the suitability of each EU enactment could be assessed in a domestic context and it could either be amended, revoked or continued in force in the form of domestic primary or secondary legislation. Whilst that detailed assessment was carried out in slower time, the EU enactments as they applied pre-Brexit needed not only to be carried forward but to be amended in the interim if they did not make sense after Brexit. For example, the term "Member State" frequently used in directly applicable EU instruments no longer included the United Kingdom. To deal with this, section 8 of the Withdrawal Act 2018 provided that a Minister of the Crown could make regulations as appropriate "to prevent, remedy or mitigate" any failure of retained EU law to operate effectively, or any other deficiency in retained EU law arising from the withdrawal of the UK from the EU. Section 8(7) restricted the power to make regulations by prohibiting regulations which made retrospective provision, or created certain criminal offences or established a public authority.

20. Many regulations, including those at issue in the current appeals, were expressed to take effect on exit day because they had been introduced in the period before the Withdrawal Act 2018 was amended to make IP completion day the critical date. But para 1 of Schedule 5 to the Withdrawal Agreement Act 2020 provided that, where any subordinate legislation made before exit day under a power in the Withdrawal Act 2018 provided that it would come into force on exit day, that provision was to be read instead as providing for it to come into force on IP completion day. Henceforth in this judgment the references to the Withdrawal Act 2018 are to that Act as revised after the amendment to change "exit day" to IP completion day."

12. For completeness, I should also mention that s 4 EUWA 2018 was repealed by s 2 REULA 2023 with effect from 1 January 2024. However, as s 22(5) REULA 2023 provides that s 2 REULA 2023 does not "apply in relation to anything occurring before the end of 2023", the repeal of s 4 EUWA 2018 has no bearing on this appeal as the Disputed Periods, from 1 January 2019 to 31 December 2022, occurred before the end of 2023.

DISCUSSION

Issue 1: Meaning of "customer" in Article 169(c) PVD

13. Mr Hitchmough contends that the word "customer" should have its ordinary natural meaning, ie "a person who buys goods or services", which in this case he says is Advantage and not the person it insures.

14. He points out that the word "customer", which appears throughout the PVD, eg in Articles 36, 36a, 56(1) 198, 220, 224 and 226, is used in its general sense unless it is intended to mean "final consumer" rather than the recipient of a supply, in which case this is expressly stated in unambiguous terms. For example, Recital (19) to the PVD, which refers to supplies of gas and electricity that are to be treated as supplies of goods, provides:

> "… the place of supply of gas … or of electricity before the goods reach the final stage of consumption should … be the place where the customer has established his business. The supply of electricity and gas at the final stage, that is to say, from traders and distributors to the final consumer, should be taxed at the place where the customer actually uses and consumes the goods".

15. Recital (19) is given effect by Articles 38 and 39 PVD which also refer to "the place where the customer effectively uses and consumes the goods". As there is no equivalent qualification of the capacity in which the word "customer" is used in Article 169(c) PVD, Mr Hitchmough submits that the terms "customer" and "final consumer" are distinct and should not therefore be treated as synonymous. This is clear he says from other Articles of the PVD such as Articles 106, 107 and 110 which specifically refer to "final consumer".

16. Mr Hill accepts, as he must, that the word "customer" is not defined in the PVD. However, he says that as a result it does not require the meaning of "customer" to mean the direct recipient of the relevant supply as Mr Hitchmough contends. While Article 169(c) PVD can refer to the person that the intermediary (Hastings) supplies (Advantage), it can also, Mr Hill submits, refer to the person (the insured) who receives the underlying financial service.

17. He contends that as neither the words used nor the context of the word "customer" in Article 169(c) PVD provide a clear answer it is necessary to consider the objective and/or purpose of the provision to determine its scope.

18. This was considered by Advocate General Jääskinen in the infraction proceedings in *European Commission v United Kingdom of Great Britain and Northern Ireland* Case C-582/08 EU:C:2010:429 ("***EC v UK***") who observed (omitting footnotes) that:

> "32. The reasons for the adoption of Article 169(c) of the VAT Directive or Article 17(3) of the Sixth VAT Directive have not been clearly stated in any document. However, some commentators have suggested that the possibility to deduct or refund was granted in order to ensure the competitive neutrality of EU financial and insurance service providers on international financial markets by introducing a possibility to alleviate tax cascading, that is, a non-recoverable hidden input VAT on purchases of goods and services burdening their cost-structure.
>
> 33. In the EU, financial and insurance services are exempt from VAT, implying that there should be no right to deduct input tax since exempt services are not subject to output tax. Without a possibility to deduct or of a

> corresponding refund, taxable persons established in the EU and carrying out financial and insurance transactions will be forced to absorb non-deductible input tax in their dealings with non-EU customers. Since they will pass on the inability to deduct input VAT to their customers through higher costs, those EU taxable persons will be at a competitive disadvantage compared to taxable persons from other jurisdictions whose cost structure does not include hidden VAT …
>
> 34. Thus, a possibility to deduct or refund appears desirable in order to maintain the international competitiveness of the EU financial sector".

19. Despite Hastings being at such a competitive disadvantage when compared with a non-EU insurance intermediary if it supplied the same services to Advantage, Mr Hill contends that it would be contrary to the purpose of Article 169(c) and the principle of neutrality to allow a right of input tax deduction where insurance intermediary services were purchased by an insurer outside the EU, but those intermediary services connected the insurer with insured persons within the EU, thereby enabling the insurer to supply insurance to those insured persons within the EU.

20. This, he says, is because an EU-based insurance intermediary would be able to reclaim VAT in respect of intermediary services supplied to a non-EU insurer but could not do so in respect of intermediary services supplied to an EU-based insurer and, as such, would result in a provision intended to prevent EU-based financial service providers being put at a competitive advantage to non-EU based financial service providers having the opposite effect and disadvantaging EU-based insurers.

21. Mr Hill submits that if Member States were not permitted to define the "customer" of the intermediary service as meaning the person receiving the underlying services from the financial service provider it would amount to the facilitation of tax avoidance, something that the Offshore Looping Regulations were enacted to prevent as is clear from the following extract of the 'Explanatory Memorandum' to those Regulations:

> "**1. Introduction**
>
> This explanatory memorandum has been prepared by Her Majesty's Revenue and Customs ('HMRC') on behalf of Her Majesty's Treasury and is laid before the House of Commons by Command of Her Majesty.
>
> **2. Purpose of the instrument**
>
> 2.1 This Order amends articles 2 and 3 of the Value Added Tax (Input Tax) (Specified Supplies) Order 1999 ('SSO') to restrict its application in certain circumstances in order to prevent avoidance. In accordance with the European vires, the SSO allows businesses who export certain financial services to customers in countries outside the European Union ('EU') to reclaim the VAT they incur while providing those services. However, it does not allow companies to reclaim this VAT when these services are supplied within the EU.
>
> 2.2 The SSO is currently being exploited by some insurance companies who have entered into 'looping' arrangements whereby insurance intermediaries based in the United Kingdom ('UK') supply their services to insurance companies based outside the EU who then use those services to make supplies of insurance services back to customers in the UK. This allows these UK based companies to reclaim the VAT incurred on making supplies of insurance even though the ultimate customers (the insured parties) are based in the UK and thereby gain a competitive advantage over other UK based companies. This Order seeks to prevent this form of 'looping' by ensuring that there is no recovery of input tax

where the final customer of the insurance services is based in the UK, as was intended.

…

7. Policy background

What is being done and why?

7.1 This Order amends the SSO to close down a VAT avoidance scheme which relies on VAT rules which allow recovery of input tax incurred on exempt financial services supplied to recipients outside the EU.

7.2 …

7.3 This measure addresses a particular version of off-shore looping which is currently found almost exclusively in the insurance sector and involves looping insurance supplies via an overseas territory. The 'offshore looping' structure that this Order is intended to prevent was the subject of a First Tier Tribunal decision in a case concerning Hastings Insurance Services which ruled in favour of the taxpayer. Following this HMRC loss, other insurers have made it clear that, if this distortion is not addressed, they will have to adopt similar structures to compete. MPs have also criticised this avoidance and called for Government action.

7.4 As a consequence, this Order amends UK legislation to ensure that there is no VAT recovery where the final customers of the insurance services belong inside the UK, as intended."

22. The objective of preventing avoidance, Mr Hill contends, is consistent with the purpose of the PVD and has been recognised as such by the Court of Justice of the European Union (the "**CJEU**")[2]. In *Gemeente Leusden and Holin Groep v Staatssecretaris van Financiën* Cases C-487-01 and C-7/02 EU:C:2004:263 the CJEU stated, at [76]:

> "… that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive."

23. In a similar vein, in *Imofloresmira - Investimentos Imobiliários SA v Autoridade Tributária e Aduaneira* Case C-672/16 EU:C:2018:134 at [51], the CJEU observed that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the PVD. Also, provided that they are within the objectives of the PVD, a Member State may impose restrictions "to prevent abusive practices and behaviour or to combat tax evasion or tax avoidance … even in the absence of express powers granted by the EU legislature" (see *Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham* Cases C-108/14 and Case C-109/14 EU:C:2015:496 at [41] and [42]).

24. Mr Hill also refers to Articles 131 and 273 PVD as examples of Articles expressly permitting Member States to lay down conditions "for preventing any possible evasion, avoidance or abuse" (Article 131 PVD) and to "prevent evasion" (Article 273 PVD). He contends that to interpret the word "customer" in Article 169(c) PVD as only being capable of referring to the direct recipient of a supply of intermediary services would be "irreconcilable with the correct and straightforward application of the exemptions laid down in Article 131" (see *L.Č.' IK v Valsts ienemumu dienests* Case C-288/16 EU:C:2017:502 at [21]). It would, he says, also be irreconcilable with the correct collection of VAT as laid down in Article 273 PVD.

[2] Although throughout the decision I have referred to the CJEU, this should be read where appropriate as a reference to the Court of Justice of the European Communities ("ECJ").

25. He therefore submits that when the wording, context and objectives of the scope of the word "customer" in Article 169(c) are, as required, taken into account (see eg *Le Crédit Lyonnais Ministre du budget, des comptes publics et de la réforme de l'État* Case C-388/11 EU:C:2013:120 ("***LCL***") at [23]; and *European Commission v Kingdom of Sweden* Case C-480/10 EU:C:2013:541 at [33]) it should be interpreted as being restricted to the person receiving the underlying services from the financial services provider, in this case the person insured by Advantage, rather than the immediate recipient of the supply of intermediary services, Advantage. Mr Hill says that this is possible under Article 169(c) PVD, without derogation from it, relying on the Opinion of Advocate General Saugmandsgaard Øe in *G. sp. z o. o* who said at [81]:

> "… Article 273 of that directive [the PVD] is necessarily concerned with the adoption of measures that do not derogate from that directive. …"

26. Accordingly, Mr Hill submits, that for the purposes of Article 169(c) PVD, the word "customer" in the present case should mean the person located in the UK insured by Advantage.

27. However, neither Article 131 PVD nor Article 273 PVD are applicable in the present case. Article 131 PVD is concerned solely with the avoidance of an exemption from VAT and Article 273 PVD, which rather than restrict rights, allows a Member State to impose additional "obligations" to ensure the correct administration and collection of tax, does not refer to "avoidance". As Advocate General Saugmandsgaard Øe observed in his Opinion in *G. sp. z o. o* [78]:

> "… the Court has repeatedly held that Article 273 of the VAT Directive does indeed afford discretion to the Member States as regards the means of achieving the objectives of recovering VAT in full and **combatting fraud**." (emphasis added)

28. In addition, as is clear from the Opinion Advocate General Jääskinen in *EC v UK*, at [26] and [28], albeit that case was in relation to infringement proceedings, the interpretation of a provision "should not be too far removed from the actual wording used" and the literal interpretation might only be rejected where the express wording of a provision "is ambiguous or contradictory". Given that it is agreed that Article 169(c) PVD is "unconditional and precise" in its terms (see below), it follows that a literal construction is to be preferred and the word "customer" be given its ordinary and natural meaning as Mr Hitchmough contends.

29. Even if that were not the case and Mr Hill is right that Article 169(c) PVD should be given a restrictive construction, it is clear from *LCL*, at [46] and [48], that taxable persons such as Hastings are "generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens" and to choose to structure their "business in such a way as to limit his tax liability".

30. Moreover, as noted above (at paragraphs 18 and 19), the arrangements in the present case are consistent with the objective of Article 169(c) PVD as explained by Advocate General Jääskinen in *EC v UK*. Hastings is (or was) a taxable person in the EU which would have been forced to absorb non-deductible input tax in its dealings with its non-EU customer Advantage and, but for Article 169(c) PVD, would have been at a competitive disadvantage compared to non-EU persons providing similar services.

31. As such, I agree with Mr Hitchmough that the arrangements concerned did not amount to avoidance and, even if Article 169(c) PVD were capable of the restricted construction advanced by Mr Hill, it would not, in the absence of avoidance, be applicable in this case.

32. It therefore follows that the "customer" of the Services supplied by Hastings to Advantage for the purposes of Article 169(c) is Advantage and not the person it insures.

Issue 2: Whether Article 169(c) PVD meets the requirements to have Direct Effect

33. In *Autorità Garante della Concorrenza e del Mercato v Comune di Ginosa* Case C-348/22 ECLI:EU:C:2023:301 ("***Ginosa***") the CJEU, at [62], observed that:

> "It follows from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against a Member State …"

34. It is common ground that Article 169(c) PVD is "unconditional" and "sufficiently precise" to meet the requirements to have direct effect. As such, it is not necessary to consider this issue further.

Issue 3: Recognition of Direct Effect by a Court or Tribunal

35. Lord Sales and Lady Rose in *Lipton v BA Cityflyer Ltd*, at [49], observed that direct effect:

> "… means that the regulation takes effect in the domestic law of the Member States of the EU without the need for any domestic law measure of implementation or transposition. Provisions have direct effect if they confer rights directly on individuals which those individuals can enforce in the domestic courts, again without the need for domestic implementing measures."

36. It is therefore necessary to consider whether, if it has direct effect, Article 169(c) PVD has been recognised by the CJEU or any UK Court or Tribunal as having direct effect, or is "of a kind" that has, in a case decided before 23:00 on 31 December 2020.

37. Although not concerned with Article 169(c) PVD, an issue before Johnson J in *Harris v The Environment Agency* [2022] EWHC 2264 (Admin) ("***Harris***") concerned whether article 6(2) of the Habitats Directive imposed an obligation of a kind recognised by the CJEU or any court or tribunal in the United Kingdom in a case decided before 2021. Having noted, at [90] that the CJEU in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C-127/02) [2005] 2 CMLR 31 ("***Waddenzee***") had held that Article 6(3) of that Directive had direct effect, Johnson J continued:

> "91. The court did not rule on the question of whether article 6(2) has direct effect. Section 4(3) does not, however, require that the particular provision in issue (here article 6(2)) has been held to have direct effect. It only requires that it is "of a kind" that has been held to have direct effect. There is a close relationship between article 6(2) and 6(3). They both require the national authorities to take steps to achieve the aims of the Habitats Directive and, in particular, to avoid deterioration of habitats and significant disturbance of species in the special areas of conservation. Article 6(3) applies prospectively. Article 6(2) enables a retrospective check that the article 6(3) steps remain adequate. Article 6(2) is thus "of a kind" that was recognised in *Waddenzee* as having direct effect.
>
> 92. Further, the question of whether article 6(2) has legal effect in domestic proceedings was addressed by the decision of the Upper Tribunal in *Warren*. Upper Tribunal Judge Markus QC held (in a judgment given on 2 October 2019), at [88], that the duties on member states under article 6(2) are binding on all public authorities of a member state, including the courts:

> "The tribunal was bound to act consistently with the precautionary principle because the duties on member states under article 6(2) are binding on all authorities of a member state including the courts…"
>
> 93. Judge Markus cited *Waddenzee* at [65]–[66]. Mr Dale-Harris argues that Judge Markus was saying only that article 6(2) was binding, without expressly stating in terms that it had direct effect in domestic law. That is correct so far as it goes, but the effect of Judge Markus' judgment was to recognise and enforce the precautionary principle that is inherent in article 6(2). This is sufficient to satisfy the test in section 4(3) of the 2018 Act. Mr Dale-Harris further argues that Warren was decided per incuriam because the judge had not appreciated that *Waddenzee* only decided that article 6(3) had direct effect and had made no such finding in respect of article 6(2). I disagree. There is no indication in Warren that Judge Markus had misunderstood the ambit of the court's finding in *Waddenzee*. Her citation of *Waddenzee* at [65]–[66] was entirely apt. Although those passages only concern article 6(3), their rationale reads across to article 6(2). They therefore provide support for Judge Markus' conclusion. In addition, even if *Warren* was decided per incuriam, that is not relevant to the section 4(2) test. That test is satisfied once a case is identified that recognises article 6(2) as being enforceable in domestic proceedings. The statute expressly provides that it is not necessary for that to be an essential part of the court's decision. It is not relevant to the section 4(2) test to enquire as to whether the case was correctly decided or was decided per incuriam. The position might be different if the decision had been overturned on appeal, or later overruled, but that is not the case here.
>
> 94. Accordingly, by reason of section 4 of the 2018 Act, article 6(2) continues to be recognised and available in domestic law and is to be enforced accordingly."

38. In the present case, although HMRC accept that Article 169(c) PVD is unconditional and sufficiently precise, Mr Hill contends that, because this has not been recognised by the CJEU or any UK court or tribunal prior to IP completion day or is of a kind that has, it does not have direct effect. He finds support for this in the absence of any express statement by the CJEU that Article 169(c) PVD has direct effect as, generally, where it considers a provision has direct effect it will expressly say so as it did in eg *Ginosa* (see at [69] and [74]) and *RS* Case C-430/21 ECLI:EU:C:2022:99 at [58].

39. However, Mr Hitchmough contends that Article 169(c) PVD does have direct effect as is apparent from the decisions of the CJEU in *BP Supergas Anonimos Etairia Genki Emporika-Viomichaniki kai Antiprossopeion v Greece* Case C-62/93 [1995] STC 805 ("***BP Supergas***") and *Kopalnia Odkry Polski Trawertyn P Granatowicz, M Wąsiewicz, spółka jawna v Dyrektor Izby Skarbowej w Poznaniu* [2012] STC 1085 ("***Polski Trawertyn***").

40. In *BP Supergas*, the CJEU considered the general right to deduct input tax (now found in Article 168 PVD) concluding, at [32] – [36], that such rights can be invoked before a national court in order to challenge national rules which are incompatible with those provisions (see at [35]).

41. In *Polski Trawertyn* the CJEU was concerned with the right to deduct input tax on expenditure incurred by two intending partners before the creation and VAT registration of their partnership. The Court considered Articles 168 and 169 concluding, at [38]:

> "In the light of those considerations, the answer to the first question is that arts 9, 168 and 169 of Directive 2006/112 must be interpreted as precluding national legislation which permits neither partners nor their partnership to

> exercise the right to deduct input VAT on the investment costs incurred by those partners, before the creation and registration of the partnership, for the purposes of and with the view to its economic activity."

42. Mr Hill contends that although the CJEU in *Polski Trawertyn* found the Polish legislation to be incompatible with the PVD it did not, as is necessary for there to be direct effect, go any further and state that Article 169 could be relied upon directly in the national courts and tribunals. However, reading the judgment of the CJEU as a whole, given that the referring court in *Polski Trawertyn* took the view that the "solution to the case" depended on whether, in view of certain Articles of the PVD including Article 169, the prospective partners had the right to deduct VAT on purchases before the partnership came into being as a legal entity (see *Polski Trawertyn* at [24]), I consider that it is apparent from the CJEU's answer at [38] (which I have set out above) that it had concluded that the partnership was entitled to rely on Article 169 in a national context and, as such, it has direct effect.

43. This was recognised by the Tribunal (Judge Sinfield and Mrs Wilkins) in *American Express Services Europe Ltd v HMRC* [2019] UKFTT 548 (TC), at [5], in which (although the issue of direct effect did not arise) it was recorded that it was common ground that if American Express Services Europe Limited ("**AESEL**"):

> "… supplied the payment services to a customer established outside the EU then AESEL was entitled, under Article 169(c) PVD, to credit for the input tax incurred on goods and services that were attributable to those supplies."

44. However, if I am wrong, and Article 169(c) PVD was not recognised by the CJEU or a UK tribunal as having direct effect before 1 January 2021, it is necessary to consider whether Article 169(c) PVD is "of a kind" or, as Johnson J put it in *Harris*, has a "close relationship" with Article 168 PVD which, as is clear from *BP Supergas* at [35], does have direct effect.

45. Mr Hill contrasts the present case with *Harris* in which he says Johnson J was making the point that Articles 6(2) and 6(3) of the Habitats Directive "worked inseparably and in tandem with each other" with Article 6(3) applying prospectively to licence applications and Article 6(2) allowing ongoing checks on the same licence applications and whether the requirements of the Directive were still satisfied, whereas Article 169, which grants an entitlement to deduction of input tax insofar as transactions which are exempt under Articles 135(1)(a) to (f) PVD, is an exception to the general rule in Article 168 that input tax deduction is only allowed insofar as goods or services are used for the purposes of the taxable person's taxable transactions.

46. He also makes the point that the Articles apply in different factual situations with Article 168 PVD applying only to allow deduction of input tax where goods and services are used for the purposes of the taxed transactions of a taxable person within a single Member State and Article 169(c) PVD applying "where the customer is established outside the Community or where those transactions relate directly to goods to be exported out of the Community."

47. However, I agree with Mr Hitchmough that there is a close relationship between Articles 168 and 169 PVD given that Article 169 PVD provides that:

> **In addition to** the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following … (emphasis added).

48. It is also clear from the way in which the CJEU understood and answered the first question before it in *Polski Trawertyn* (see at [27] and [38]) that this is the case. Moreover, both Articles 168 and 169 PVD appear under the same heading and title of the PVD and both are concerned with the right to deduct input tax. As the Upper Tribunal (Bacon J and Judge

Cannan) observed in *HMRC v Tower Resources Plc* [2021] UKUT 123 (TCC) ("***Tower***") at [8]:

> "Article 169(a) PVD extends that right of deduction to goods and services that are used for transactions relating to the activities described in the second subparagraph of Article 9(1), but carried out outside the Member State in which the input VAT is sought to be deducted."

49. Although *Tower* concerned Article 169(a) PVD there is, in my judgment, no reason why the rationale in that case cannot be equally applied to Article 169(c) PVD which, like Article 169(a) PVD, provides an extension to that right of deduction for the transactions described in it and accordingly, even contrary to my conclusion that Article 169(c) PVD has been recognised by the CJEU before 31 January 2020, it is of a kind that has been recognised as such and therefore Hastings can continue to rely upon the direct effect of Article 169(c) PVD throughout the Second Disputed Period.

CONCLUSION

50. Therefore, for the reasons above, the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

51. 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.

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