[2019] UKFTT 0276 (TC)

TC07115

Appeal number: TC/2014/00084

VALUE ADDED TAX – insurance for self-storage customers - whether supplies of insurance or of insurance intermediary services within Items 1 or 4 Group 2 Schedule 9 Value Added Tax Act 1994 – CJEU decision in Card Protection Plan considered – whether assessment dated 30 October 2015 was out of time – whether within the scope of Article 3(a) and/or (c) VAT (Input Tax)(Specified Supplies) Order 1999/3121- whether supplies made to the person who belongs outside the member states — appeal dismissed in principle -

FIRST-TIER TRIBUNAL
TAX CHAMBER

SAFESTORE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at Taylor House, London on 20 – 22 November 2018

Roderick Cordara QC and Robert Purves, instructed by Roly Pipe and Partners for the Appellant

Hui Ling McCarthy QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent

DECISION

Introduction

1. This is a consolidated appeal by Safestore Limited ("**Safestore**") against two VAT decisions of the respondents ("HMRC"):

(1) The first disputed decision (the "**First Decision**") is HMRC's refusal of 9 December 2013 of Safestore's claim for repayment of £793,830 of under-claimed input tax.

(2) The second disputed decision (the "**Assessment**") is HMRC's assessment of 30 October 2015 to recover £72,615.35 of over-declared input tax.

2. At the hearing Safestore accepted that a further supplementary claim which it made on 13 August 2015 relating to VAT periods 01/13 to 04/14 was not in fact before the Tribunal.

3. The appeal concerns four main issues:

(1) whether Safestore was supplying insurance to its UK-based customers[1] ("**Item 1 supplies**"[2]); or

(2) insurance intermediary services ("**Item 4 supplies**"[3]) to Assay Insurance Services Limited ("**Assay**"), a Guernsey-resident insurance captive which is a wholly owned subsidiary of Safestore Holdings Plc ("**Safestore Holdings**"), the common ultimate parent company of Assay and Safestore; and

(3) the place of those supplies. If Safestore is supplying insurance intermediary services to Assay, is the place of those supplies Guernsey (i.e. to Assay's business establishment) or the UK (i.e. to a fixed establishment of Assay in the UK); and

(4) was the Assessment made out of time for the purposes of section 73 (6)(b) Value Added Tax Act 1994 ("VATA") (the "**time-bar issue**")?

4. Issues (1) and (2) above are alternatives. If Safestore was making Item 1 supplies, then it would not also be making Item 4 supplies and issue (3) above would not arise. In that event, issue (4) above would become relevant. Conversely, if Safestore was not making Item 1 supplies but was making Item 4 supplies and issue (3), but not issue (4) above (see the next paragraph), would have to be decided.

5. During the hearing, Miss McCarthy QC, appearing for HMRC, informed me that the Assessment related entirely to VAT that would have been due if Safestore was making Item 1 supplies.

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[1] At the hearing the parties used the term "customer" to refer to the individual domestic (i.e. non-business) customer who stores his/her goods with Safestore and takes out insurance thereon and I shall do the same in this decision.

[2] A reference to Item 1 Group 2 Schedule 9 VATA.

[3] A reference to Item 4 Group 2 Schedule 9 VATA.

6. It was common ground that in order for Safestore's appeal on the First Decision to succeed, it needs to establish that Safestore was making supplies of insurance intermediary services to Assay (and not supplies of insurance to its customers) and that Assay had no fixed establishment(s) in the UK at which Safestore's supplies were being received.

7. HMRC's position is that Safestore was either making supplies of insurance to its customers (Item 1 supplies) or it was making supplies of insurance intermediary services (Item 4 supplies) to a fixed establishment(s) of Assay in the UK. Accordingly, Safestore would be unable to deduct input tax attributable to these supplies. HMRC further maintains in relation to the Assessment that it is not time-barred.

8. The relevant period for the purposes of this appeal is from 30 April 2009 to 30 September 2012 ("**the Relevant Period**").

9. The parties have asked me for a decision in principle on the above issues, with any adjustment to the figures consequent upon my decision being made subsequently.

The evidence

10. I was provided with four lever arch files of documents. In addition, Mr Stuart Beavers, Safestore's Head of Retail Services, produced to witness statements and gave oral evidence on which he was cross-examined.

11. In addition, Mr David Kendall, of Cooley (UK) LLP, a solicitor specialising in insurance law, supplied a witness statement on behalf HMRC in relation to insurance regulatory issues. Mr Kendall was not called to give oral evidence nor was he required for cross-examination.

12. I should say that, in relation to Mr Kendall's witness statement, Mr Kendall was presented as an expert witness on behalf of HMRC. Most of his witness statement, however, comprised of an analysis of the legal relationship between the parties and statements in relation to the law concerning insurance regulation. I have treated these parts of his statement as submissions because they were clearly not admissible evidence. There were some parts of his evidence which concerned market practice and insurance terminology which I did, however, regard as admissible evidence.

13. Safestore did not put forward an expert witness in relation to insurance regulatory matters. Mr Purves, appearing with Mr Cordara QC for Safestore, instead made full legal submissions both in Safestore's skeleton argument and at the hearing.

14. In addition, Safestore put forward a witness statement from Mr David Riley, who worked for Marsh Management Services Guernsey Limited ("**Marsh**") in Guernsey and was a director of Assay during the Relevant Period. Mr Riley declined to attend the hearing and was, therefore, not available for cross-examination. It was not clear why Mr Riley declined to attend. After hearing submissions from Mr Cordara and Ms McCarthy, I decided to exclude Mr Riley's witness statement. I considered that it would be unfair to admit this evidence, parts which were in dispute, without HMRC having an opportunity to test it in cross-examination.

15. I did, however, decide to admit a second witness statement from Mr Beavers which dealt with insurance regulatory matters on the basis that I considered it fair and just to allow Mr Beavers to respond to some of the suggestions put forward in Mr Kendall's witness statement about possible insurance regulatory breaches.

Insurance regulation

16. Mr Kendall's witness statement, as I have explained, contained a number of comments about the law relating to insurance regulation. In addition, Mr Purves' appendix to Safestore's skeleton argument and his oral submissions contain detailed submissions on the insurance regulatory position.

17. In my view, the insurance regulatory position cannot affect the correct VAT analysis of Safestore's transactions. I express no view as to whether Safestore's and Assay's insurance arrangements complied with UK insurance regulatory requirements. Nonetheless, I have taken account of Mr Kendall's and Mr Purves' comments and submissions. As will be apparent later in this decision, their different analyses of the underlying insurance arrangements (rather than the regulatory implications) were helpful.

The facts

Safestore

18. Safestore provides self-storage facilities to both business and domestic customers at a number of locations (approximately 80 locations during the Relevant Period) in the United Kingdom and Paris, although only its United Kingdom facilities are relevant for the purposes of this appeal.

19. Safestore is a wholly owned subsidiary of a commercial group, the ultimate parent company of which is Safestore Holdings Plc. Assay is another wholly owned indirect subsidiary of Safestore Holdings Plc. Neither has ownership or control of the other, being both owned by other members of the corporate group.

20. Safestore was incorporated in England and Wales on 19 July 2005 and its registered address is in Borehamwood in Hertfordshire. Safestore registered for VAT on 10 October 2005.

21. It was common ground that prior to 1 October 2012, Safestore's supplies of storage facilities fell within a VAT exemption for the supply of an interest in or right over land. However, Item 1(k) was introduced into Group 1 of Schedule 9 VATA on 1 October 2012 and this rendered the supplies of storage taxable.

Assay

22. Assay was incorporated in Guernsey by Mentmore Limited ("Mentmore") in 2002 with its registered office in Guernsey,

23. Assay is an insurance company licensed under the Insurance Business (Bailiwick of Guernsey) Law 2002 regulated by the Guernsey Financial Services Commission

(the "GFSC"). Assay became part of the Safestore group when the group acquired Mentmore in 2004 and Assay has, since then, been the Safestore group's captive insurance company. There is not and has never been a formal written contract between Safestore and Assay setting out the services which one supplies to the other. Indeed much of the relationship between Safestore and Assay appears to have been informal and not reduced to writing and it is hard to avoid the conclusion that the documentary evidence presents only part of the picture, although some of the "blanks" were filled in by Mr Beavers' evidence.

24. I was informed that the decisions regarding the operation of Assay's business and board meetings are conducted in Guernsey. There has at all material times been at least one UK-based Safestore (or possibly Safestore Holdings Plc) director on Assay's board, together with two or three other directors based in Guernsey. Throughout the Relevant Period Safestore and Assay did not share any employees (save for the fact that one of Safestore's directors was also a director of Assay).

25. Assay had no employees in the UK. In fact, apart from its directors, Assay had no employees at all[4].

26. In the Relevant Period the directors of Assay were Mr David Riley (who worked for Marsh and was based in Guernsey), Mr David Moore (an independent director based in Guernsey) and Mr Richard Hodsden[5], the UK-based finance director of Safestore.

27. Assay was based in Marsh's offices in Guernsey. Assay delegated the day-to-day management of its insurance business to Marsh.

28. In the Relevant Period, Assay's board meetings were held only in Guernsey and at which decisions relating to Assay's business were taken.

29. The directors of Assay were responsible for compliance with the GFSC rules, including compliance with capital requirements and were advised in this regard by Marsh.

30. Mr Beavers, who attended some board meetings of Assay, confirmed that the directors of Assay considered local insurance, Guernsey insurance solvency requirements before making dividend distributions.

Marsh

31. Assay relied on the advice of Marsh in relation to insurance matters. Marsh is part of a well-known, and very large global insurance broking business.

[4] The directors are, of course, strictly officeholders rather than employees, unless they also have contracts of employment.

[5] Mr Hodsden resigned as a director of Assay on 14 August 2013 and his replacement, Mr Ahmed, (the UK company secretary of Safestore, based in the UK) was appointed on 9 August 2013 ie after the Relevant Period.

32. Safestore and Assay worked with Marsh from 2004 until 2017. Marsh was, during the Relevant Period, the manager of Assay. Marsh advised on how to ensure that Assay was profitable and was compliant with solvency rules and with Guernsey law and regulation.

33. Marsh's UK affiliate ("Marsh UK") was Safestore's insurance broker and was responsible for advising Safestore on its insurance arrangements and evidently liaised with Safestore in relation to the Assay insurance arrangements.

The insurance of goods stored with Safestore

34. At all material times during the Relevant Period, Safestore was a member of the Self Storage Association (the "SSA"). One of the SSA's membership criteria was that its UK members must require that their customers insure their goods in storage with its members. Safestore, therefore, required its domestic customers to insure their goods that were in storage with Safestore. During the Relevant Period Safestore permitted its business customers to put their own insurance arrangements in place, but required its domestic customers to take out insurance exclusively with Assay.

35. As we shall see, Safestore's domestic customers were required, in connection with signing its Licence Agreement and moving their goods into one of its facilities, to have taken out insurance on the terms of the "Safestore Self Storage Policy".

The conclusion and operation of the insurance cover with Assay

36. During the Relevant Period, insurance cover was offered to Safestore's customers by Safestore's staff at its depots, as part of the process of entering into an agreement to use its storage facilities. Safestore then collected the premiums and reported the amounts collected and remitted those amounts due to Assay quarterly in arrears.

37. During the Relevant Period, the level of the premium payable by customers was set by Assay in conjunction with Marsh, with input from Marsh UK and Safestore. The level of insurance premiums charged by Safestore's competitors was a factor taken into account by Marsh. Indeed, on one occasion, Mr Beavers provided Marsh UK with details of insurance premiums charged by Safestore's competitors. It seemed to me that the final agreement on the level of premiums charged was something of a joint effort between Assay, Marsh, Marsh UK and Safestore.

38. The agreement between Safestore and Assay was that Safestore retained 30% of the net premium and the 70% balance, together with the Insurance Premium Tax ("**IPT**") thereon, was remitted to Assay quarterly in arrears, as I have mentioned. Assay was updated by Safestore as to premium income on a monthly basis. Although this agreement was not reduced to writing, there was no doubt that this course of dealing evidenced an agreement between Safestore and Assay. The names of Safestore's customers who were insured by Assay were kept by Safestore, with Assay having a right to obtain the information if it required.

39. Assay effected reinsurance with Royal & Sun Alliance ("RSA"), which was unconnected with Safestore and Assay. The details of the reinsurance agreements are set out below – see "*The reinsurance agreements"* below.

40. On occasion a customer might wish to store goods having a particularly high value which was in excess of the usual insurance limits. This required specific consent and/or calculation of the applicable premium. Mr Beavers confirmed that in such a case the store would send details to his office and the request would then be forwarded to Assay for authorisation or refusal. Assay would confirm the decision to Mr Beavers' department who would then confirm it to the store and thence to the customer.

41. During the Relevant Period, all claims arising were handled by RSA. In the event of a claim, the customer was given a claim form by one of Safestore's employees working in the relevant depot. The customer had to return the form to the Safestore depot, where it was scanned to Safestore's Head Office, which in turn passed it on to the claims handlers at RSA, along with a copy of the storage contract. The claims handlers at RSA would then contact and deal with the customer directly on behalf of Assay. Once RSA had agreed to pay a customer claim, they would make a payment to the customer themselves directly from funds provided by Assay.

42. Assay accounted for UK IPT and completed the necessary returns.

The documentation completed by customers

43. Safestore's staff at the relevant depot provided customers with various documents evidencing the insurance which they were required to take out. Safestore's customers entered into two contracts.

44. The first contract was the Safestore Licence Agreement (the **"Licence"**). I was provided with three versions. It was common ground that there was no material difference between the three versions and, for convenience (and because it was the more legible version), I shall refer to the version dated 02/06/2011. This was a contract with Safestore.

45. The second contract comprised three documents: the Insurance Application Form (the **"Application Form"**), a Key Facts document (the **"Key Facts"**) and the Confirmation of Insurance Cover (the **"Confirmation"**). These documents together formed the terms and conditions of a customer's agreement relating to the provision of insurance.

46. I shall summarise the relevant terms of each of these documents in turn.

(a) The Licence

47. The Licence sets out the terms on which the customer stored his or her goods with Safestore.

48. The Licence provides (in Conditions 19, 20 and 21 which are drawn to customers' attention as conditions of "*special importance*", amongst others):

> "Please note that all Domestic Customers (as defined in the Conditions) are required to take out and maintain during the period of this agreement, the Safestore Self Storage Insurance Policy available

> solely through us at the same time as entering into this Agreement. No other insurance policy will be acceptable for Domestic Customers."

49. Clause 19 of Part 2 of the Licence, so far as is relevant, provided:

> "19.1 Please note that we do not insure the Goods whilst they are on Site.
>
> …
>
> 19.3 **Domestic Customers**:
>
> 19.3.1 We [i.e. Safestore] require that all Domestic Customers entering into contracts of storage also take out and maintain during the period of the contract of storage, adequate insurance cover using the Safestore Self Storage policy available solely through us. No storage contract will be entered into by us unless this insurance policy is also taken out. Please note that no form of insurance policy other than the Safestore Self Storage Policy will be accepted by us."

50. From August 2011, the Licence was amended to add a "Part 4". Part 4 was headed "*Confirmation of Insurance Cover & Declaration*" and contained various details of the insurance cover. In various places the term "Underwriters" is used, but is an undefined term. Clause 15 of Part 4 concerns the "*Claims Procedure*". If goods are lost or damaged and a customer wishes to make a claim, the customer is required to obtain a claim form from a Safestore store manager. Clause 16 is headed "*Complaints Procedure - Insurance*". It provides as follows:

> "16 **Complaints Procedure – Insurance**
>
> We [i.e. Safestore] aim to provide you with a first class service. If we have not delivered the service that you expect or you are concerned with the service provided, we would like the opportunity to put it right.
>
> Initially contact us [i.e. Safestore], write to Customer Services Manager, Safestore Ltd…"

51. Assay is not named in the document (either in its pre-August 2011 or post-August 2011 format).

(b) The Application Form

52. The Application Form commenced with a Customer Declaration to the following effect:

- "I/We wish to insure my/our property whilst it is stored with you
- I/We understand that cover is accepted subject to payment of the insurance premium quoted to me/us below
- I/We will notify you if at any time during the period of storage the sum insured is to be increased and that I/we will pay the appropriate additional premium
- I/We confirm that my property does not include either any items prohibited for storage as detailed in the Licence

Agreement or property excluded under the insurance unless specified to you and agreed in writing by you and any appropriate special terms and conditions agreed and additional premium paid by me/us

- I/We understand that if at any time my premiums fall into arrears the insurance cover is cancelled with immediate effect as from the date the premiums become overdue for payment
- …
- I/We confirm that the sum insured in respect of … all the property of Domestic Customers represents the full replacement value of all my property stored and that I/we will maintain the insurance on this basis at all times"

53. The Application Form required customers to confirm that they had read and agreed to the terms and conditions and exclusions of the insurance as set out in the Key Facts and the Confirmation. The customer was also required to declare that, to the best of his/her knowledge and belief, the above statements were true and that they would form part of the contract between the customer and the insurer. The Application Form set out the sum insured, the premium, the frequency with which the premium was payable and the commencement date of the insurance.

54. The Application Form made no direct mention of Assay – the only indirect reference would be the cross-reference, mentioned in the preceding paragraph, to the Confirmation (which refers to "the Underwriters") and to the Key Facts which refers to customers being covered by an insurance policy arranged by Safestore with Assay (see below) and to "the Underwriters".

(c) Key Facts

55. The Key Facts document is branded as a Safestore document and summarised the main terms of the insurance cover. On its front cover it states: "Please refer to the Confirmation of Insurance Cover for full details of all terms, conditions and exclusions." The Key Facts document, so far as relevant, provided:

"**Insurer**

Our [i.e. Safestore's] customers are covered by an insurance policy arranged by Safestore Ltd with Assay Insurance Services Limited. All claims are handled on behalf of Safestore Ltd by Royal and Sun Alliance plc."

56. The Key Facts had the equivalent complaints procedure that described in [48] above.

57. The Key Facts document was used throughout the relevant period until August 2011. Thereafter, as already noted, the insurance terms and conditions were incorporated into the Licence and from that date the insurer was not referred to as Assay but rather as "the Underwriter".

(d) The Confirmation

58. The Confirmation provided a space at the top of the form which required the following details to be filled in: (1) the name of the insured customer, (2) the sum insured (£), (3) the period of cover (i.e. 7 days/4 weeks/monthly), (4) the date on which cover would commence and (5) the premium (including IPT) (in £). The Confirmation went on to provide in clause 8:

> "**Payment of premiums**
>
> Underwriters shall only be liable to settle a claim recoverable under this insurance provided [Safestore] confirm that we have received all insurance premiums due from you."

59. In summary, the Confirmation largely repeated (albeit in a different order) the substance of the terms contained in the Consumer Goods Policy. There were, however, some minor variations. For example, liability was further limited in respect of jewellery and certain other high-value items i.e. the cover was more restricted than provided for in the Consumer Goods Policy.

The Customer Goods Policy

60. There were four versions of the Customer Goods Policy in the papers before me. They were expressed to be signed by an insurance manager "in Guernsey" on behalf of Assay on, respectively, 14 December 2009, 31 August 2010, 31 August 2011 28 May 2012 and 15 July 2013. They were not signed by Safestore. Each Customer Goods Policy set out the terms on which a customer's goods were insured. It is not necessary to go into the detail of those terms, which varied (but only very slightly), between each document. More relevant, however, is the section at the front of each document entitled "Introduction" and some of the definitions contained in the section headed "Definitions". The provisions in these sections remained constant throughout the different versions.

61. Thus, the Customer Goods Policy provided as follows:

> "**CUSTOMER GOODS POLICY – NO: 1-01001-002010**
>
> **INTRODUCTION**
>
> Assay Insurance Services Ltd (hereinafter called the *Company*) and the *Insured* agree that
>
> This Policy and any Memoranda shall be considered one document and any word or expression to which a specific meaning has been attached shall bear such meaning wherever it appears.
>
> The *Company* will provide the insurance described in this Policy subject to the terms and conditions for the Period of Insurance and any subsequent period for which the *Insured* shall pay and the *Company* shall agree to accept the Premium.
>
> **DEFINITIONS**
>
> *Intermediary*: Safestore Holdings Plc and subsidiary companies
>
> *Insured*: Any customer of the Intermediary to whom a Confirmation of Insurance Cover has been issued.

Company: Assay Insurance Services Limited

Business Customer: A customer who is not a *Domestic Customer*

Domestic Customer: Any natural person who is acting for purposes which are outside his trade or profession

Premises: Any premises owned, occupied or utilised by the Intermediary including transit to and from by the Intermediary's employees

…

COVER PROVIDED

If any of the Property Insured suffers Damage at the Premises by any of the Insured Perils, the Company will, in accordance with the provisions of the insurance, pay to the Insured the amount of the loss or at its option reinstate or replace such property provided the Company's liability in any one period of the insurance shall not exceed in the whole, the total sum insured or any other stated limit of liability. For the purposes of this insurance, Damage shall mean loss, destruction or damage.

Insured Perils: fire, lightning, explosion, earthquake, storm, flood, burst pipes &/or leaking pipes, theft accompanied by forcible and violent entry or exit, riot, strike, civil commotion, malicious damage, impact by vehicles or aircraft and any other accident not otherwise excluded

Policy Period: [this was a one-year period running from the 30 April to the following 29 April]

Property Insured: All real[6] property owned by the ***Insured*** for which a Confirmation of Insurance Cover has been issued.

Limits of Liability: GBP 80,000,000 total sum insured but limited to GBP 2,500,000 in any one premises with the exception of Battersea and Clift House Road, Bristol where the limit is GBP 3,500,000 any one claim unless otherwise agreed by the *Company* in writing

Sub Limits: GBP 100,000 any one customer unit

GBP 10,000 Goods in Transit

GBP 100,000 *High Risk Goods* per *Insured*

GBP 25,000 *High Risk Goods* any one unit"

62. Mr Beavers described the Customer Goods Policy as an "open cover policy from Assay", which specified Safestore as an intermediary, Assay as the insurer and the customer as the insured. He drew attention to the fact that in the Key Facts document (see below) it was stated: "Our customers are covered by an Insurance policy arranged by Safestore with Assay Insurance Services Limited. All claims are handled on behalf of Safestore Ltd by Royal & Sun Alliance plc." Mr Kendall took issue with Mr Beavers' description of the Customer Goods Policy as an "open cover policy" because the contracts between Safestore and its customers were not consistent with

[6] This appeared to be a typographical error, but it appeared in all the versions of the Customer Goods Policy in the papers before me. The goods stored with Safestore by customers were chattels not, obviously, realty.

Safestore having authority from its customers to arrange insurance with Assay under an "open cover". Mr Kendall noted that an "open cover" policy is generally related to marine cargo but acknowledged that the expression "open cover" policy was not a term of art.

The reinsurance agreements

63. Assay entered into a Reinsurance Agreement with RSA in 2009, 2010, 2011, 2012 and 2013 ("**the Reinsurance Agreements**"). Each of these agreements was in the same form, save as noted. The following provisions are taken from the 2010 Reinsurance Agreement, the other Reinsurance Agreements being in the same form *mutatis mutandis*. The 2010 Reinsurance Agreement provided as follows:

> "**A: Schedule**
>
> **Reinsured**: [Assay]
>
> **Reinsurer:** [RSA]
>
> **Original Insureds:** 1. In respect of the SCG Policy, Customers of Safestore Holdings plc, or its subsidiary companies, to whom a confirmation of insurance cover has been issued under the SCG Policy.
>
> **Original Policies:** The undernoted policies[7] in the form approved by the Reinsurer and issued by the Reinsured during the Period
>
> 1. Storage Customer Goods Policy No. 1-01001-01 2010 (the **"SCG Policy"**)
>
> 2. Removals Policy No. 1-01001-01-2010 (the **"Removals Policy"**)[8]
>
> **Coverage:** 1. In respect of the SCG Policy, All Risks of accidental loss, destruction of, or damage to, customers' goods as more fully defined in the SCG Policy
>
> …
>
> …
>
> **Limit of Indemnity:** 1. In respect of the SCG Policy, GBP 2,000,000 (inclusive of the applicable Net Retention) in respect of each and every loss or series of losses arising from a single event at any one premises together with any Costs and Expenses (as defined in the General Conditions below) incurred by the Reinsurer in connection there with, other than Abbey Business Centre, Battersea and Clift House Road, Bristol where the Limit of Indemnity is GBP 3,500,000
>
> …
>
> **Net Retention:** 1. In respect of the SCG Policy, GBP 100,000 in respect of each and every loss or series of losses arising from a single event at any one premises together with any Costs and Expenses (as defined in the General Conditions below) incurred by the Reinsurer in connection there with

[7] The 2009 Reinsurance Agreement did not specify which policies had been approved by the Reinsurer.

[8] The Removals Policy does not appear to be relevant to the present proceedings.

…

Provided that the total amount retained in the Period shall not exceed GBP 750,000 in the aggregate

…

B: Preamble:

The Re-insured provides insurance cover to Original Insureds under the SCG Policy in the United Kingdom through its agent Safestore Holdings plc…. In consideration of the payment of the Premiums…, the parties have agreed that the Re-insured shall cede and the Reinsurer shall accept by way of reinsurance the Reinsurer's Written Share of the Original Policies….The parties have further agreed that the Reinsurer shall handle, investigate and settle claims in losses under Original Policies.

C: General Conditions:

1. Reinsuring Clause:

a) Subject to Clauses 1b) and 1d) below or as otherwise agreed…, the Reinsurer's liability under this Agreement shall follow that of the Reinsured for losses under all terms, conditions, and limits of the Original Policies….

b) subject to the total aggregate Net Retention for the Period…, The Reinsured shall bear the Net Retention in respect of each and every loss or series of losses: (i) arising from a single event at any one premises (in the case of the SCG Policy)….

c) Original Policies shall be in the form approved by the Reinsurer from time to time. The Reinsured shall not make any amendments to the form of any Original Policies without the Reinsurer's prior written approval.

…

2. Scope of Indemnity:

Subject to the terms of this Agreement, including (without limitation) the Net Retention and Limit of Indemnity set out above, the Reinsurer shall indemnify the Reinsured to the extent of the Reinsurer's Written Share in respect of any claims and losses paid by the Reinsured in respect of Original Policies and covered by this agreement in accordance with the terms of the Original Policy….

3. No Third Party Rights:

This Agreement is solely between the Reinsured and the Reinsurer and in no instance shall any Original Insured, claimant or other third party have any rights under the Contracts (Rights of Third Parties) Act 1999 or otherwise to enforce or enjoy the benefit of any terms of this agreement.

…

7. Claims Handling and Reimbursement by the Reinsured:

a) The Reinsured hereby authorises the Reinsurer to handle, investigate and settle claims and losses under the Original Policies and the Reinsurer shall, without any right on the part of the Reinsured to

> interfere, have full discretion in the adjustment, settlement, compromise or resistance of all claims and losses under the Original policies….
>
> …
>
> c) The Reinsurer shall make payment of all valid claims and losses under Original Policies directly from its own funds.
>
> …"

Evidence relating to Safestore's insurance arrangements

64. Safestore would write to its domestic customers informing them of any increase in insurance charges for goods stored with them. The example of a letter that was shown to me comprises a letter from the relevant store manager and referred to "our previous improvement in cover from indemnity to replacement 'new for old'".

65. Mr Beavers was asked about a document from the Self Storage Association ("SSA") containing a Code of Practice which stated:

> "This Code of Practice supplies from 6 April 2009 where SSA UK members extend to private individual (retail) customers rights under their 'open cover' insurance policy covering customers' property against loss and/or damage whilst the customer is storing his goods in their self-storage unit.
>
> …
>
> Prior to the signing of the rental agreement the Member agrees to inform the Customer that:
>
> – The Customer must insure the goods in storage.
>
> – Insurance can be provided under an extension of the Member's 'open cover' insurance policy…."

66. Mr Beavers was asked whether this was what Safestore's insurance arrangements were achieving. Mr Beavers replied that, based on advice that Safestore had received from Marsh, he believed that Safestore was compliant with these requirements. Mr Beavers agreed that the insurance product provided to Safestore's domestic customers would be expected to and did comply with these requirements. Mr Beavers' commercial understanding was that insurance cover was provided to Safestore's customers under an extension of Safestore's open cover insurance policy. In his oral evidence, Mr Beavers referred to the Customer Goods Policy as a policy that "Assay had with Safestore." In cross-examination Mr Beavers said that the terms of the insurance were not prepared by Safestore but were, instead, prepared by "the insurer", by which I understood him to mean either Assay or RSA.

67. Mr Beavers was asked whether Safestore procured insurance cover for its domestic customers. He considered that Safestore arranged insurance for its customers with Assay.

68. In his witness statement Mr Beavers said that:

> "all domestic customers take out adequate insurance arranged through us. From 1 May 2009, this insurance was provided under an open cover policy from Assay…."

69. Mr Beavers was asked what was meant by an "open cover policy" he said that it was a policy:

> "that we have taken out which gives us the opportunity… for us to let the customers have the benefit of that policy via Assay."

70. Mr Beavers confirmed that his understanding was that Safestore was the legal holder of the insurance policies effected with Assay (at the inception of the arrangements and on each subsequent annual renewal), but with the customers having rights. Safestore, he understood, was not itself insured under each of those policies.

71. Mr Beavers understood that, commercially, Safestore was making available to its domestic customers the rights under its single Assay master policy to enable domestic customers to claim directly from Assay.

72. Mr Beavers was also asked about a note of the meeting dated 20 April 2009 held in Safestore's head office. Mr Beavers represented Safestore together with a colleague. In addition, there were two representatives of Marsh UK, Mr Alan Griffiths and Mr Ben Ryan. Mr Granville De Cruz (Mr Riley's predecessor at Marsh in Guernsey) joined the meeting by telephone from Guernsey. The purpose of the meeting was to discuss the proposal for the Customer Goods Insurance on renewal in 2009. Mr Griffiths described the proposal as follows:

> "Assay to issue a policy direct to Safestore, correct [sic] premiums quarterly in arrears without the requirement for a deposit premium. Assay to arrange reinsurance via Marsh with RSA and pay the reinsurance premium from its own funds. RSA to continue to provide claims handling service to the captive…

73. Mr De Cruz is recorded as saying:

> "[Mr De Cruz] confirmed that the basis upon which cover was being provided was that a direct policy would be issued to Safestore rather than their customers taking out their own insurance, cover would be granted to them under Safestore's policy underwritten by the captive."

74. Mr Beavers confirmed that the "captive" being referred to was Assay.

75. Mr De Cruz also advised that RSA were to be named as claim handlers but that Assay was not required to be mentioned. It was then noted, however, obviously in a comment added subsequently: "it has now been confirmed that Assay should be mentioned to avoid any complications with the FSA or Financial Ombudsman as per RSA's instructions on 21 April 2009."

76. In cross-examination, Mr Beavers was taken to Mr Kendall's witness statement. At paragraph 56 of that statement, Mr Kendall stated:

> "In order to provide insurance to customers, it is necessary for an insurer to do the following:
>
> (a) Receive proposals for insurance from customers, whether orally or in writing and evaluate the information provided to assess the risks to be underwritten. In relation to insurance for self-stored property, this will involve obtaining information from the customer about the nature of the property to be stored,… who owns the property, whether it is private or commercial property, its value and length of time for which it is to be stored. This information will typically be obtained by the self-storage company's employee when dealing with the customer.
>
> (b) Offer terms of insurance to the customer, including the premium that will be charged for the insurance and the period of cover. This will typically be done by the self-storage company's employee when dealing with the customer in combination with the written contractual terms that are given to the customer.
>
> (c) If the offer of insurance is accepted by the customer, arrange for the customer to receive a record of that insurance (including the terms of the insurance) and arrange for the receipt of the premium from the customer. It will typically be for the self-storage company's employee to ensure that the customer has accepted the terms of the insurance cover by signing the relevant contractual document, and to provide a copy of the document to the customer."

77. Mr Beavers agreed that the above activities were carried out by Safestore's employees in the UK. Mr Beavers further accepted that the Licence was provided to the customer as a Safestore-branded document by Safestore's employees in the UK. Mr Beavers also agreed that Safestore's staff received and evaluated the information provided by the customer on the Licence. Finally, Mr Beavers agreed that the contracts of insurance between Assay and Safestore's customers were entered into by Safestore's staff and the customers on Safestore's premises in the UK, the customers having been handed the Licence and the Application Form in the depot. Mr Beavers understood that Safestore and its staff were acting as agents for Assay in concluding those contracts. The payments made by the customer went into Safestore's bank account. Mr Beavers also accepted that Safestore collected insurance premiums from its customers on its premises. Also, in the first instance, claims were notified to Safestore by way of a claim form (made available to customers by the store manager). The Safestore store manager would then refer the claim to RSA, the claims handler. Any complaints were first to be notified to Safestore.

78. As already noted, from August 2011onwards the insurance terms and conditions were incorporated into the Licence. The insurer was then referred to as the Underwriter. Mr Beavers said that after August 2011 he believed that it had been common practice that the customer was verbally informed of the identity of Assay as the underwriter. However, it transpired from Mr Beavers' oral evidence that he simply notified the store managers of the change in the wording to the Licence on a conference call. He did not, in fact, know whether the customer was verbally informed of the identity of Assay as the underwriter. I was not convinced that customers were, in fact, informed about the identity of Assay.

The Legal Framework

79. For the purposes of the present appeal, the relevant provisions of Council Directive 2006/112 (the "**PVD**" or "**the Principal VAT Directive**") and EU Council Implementing Regulation 282/2011 (the "**Implementing Regulation**") are Articles 44, 45, 135(1) and 169(c) of the PVD. Articles 44 and 45 have only applied since 1 January 2010, but prior to that date, Articles 43 and 56 of the PVD had equivalent effect for present purposes.

80. Article 135 provides that Member States shall exempt the following transactions:

> "(a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents…"

81. In UK domestic law services that are exempt if supplied in the United Kingdom are set out in the VATA. Section 31(1) VATA states as follows:

> "A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 …"

82. Group 2 Schedule 9 VATA, entitled "Insurance", provides that (inter alia) the following are exempt supplies:

> "Item No.
>
> 1. Insurance and reinsurance transactions
>
> 4. 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.
>
> Notes:
>
> (1) For the purposes of item 4 services are services of an insurance intermediary if they fall within any of the following paragraphs—
>
> (a) the bringing together, with a view to the insurance or reinsurance of risks, of— (i) persons who are or may be seeking insurance or reinsurance, and (ii) persons who provide insurance or reinsurance;
>
> (b) the carrying out of work preparatory to the conclusion of contracts of insurance or reinsurance;
>
> (c) the provision of assistance in the administration and performance of such contracts, including the handling of claims; (d) the collection of premiums.
>
> (2) For the purposes of item 4 an insurance broker or insurance agent is acting 'in an intermediary capacity' wherever he is acting as an intermediary, or one of the intermediaries, between—
>
> (a) a person who provides [insurance or reinsurance], and

(b) a person who is or may be seeking insurance or reinsurance or is an insured person.

(3) Where—

(a) a person ("the supplier") makes a supply of goods or services to another ("the customer"),

(b) the supply of the goods or services is a taxable supply and is not a zero-rated supply,

(c) a transaction under which insurance is to be or may be arranged for the customer is entered into in connection with the supply of the goods or services,

(d) a supply of services which are related (whether or not a contract of insurance is finally concluded) to the provision of insurance in pursuance of that transaction is made by—

(i) the person by whom the supply of the goods or services is made, or

(ii) a person who is connected with that person and, in connection with the provision of that insurance, deals directly with the customer,

and

(e) the related services do not consist in the handling of claims under the contract for that insurance,

those related services do not fall within item 4 unless the relevant requirements are fulfilled.

(4) For the purposes of Note (3) the relevant requirements are—

(a) that a document containing the statements specified in Note (5) is prepared;

(b) that the matters that must be stated in the document have been disclosed to the customer at or before the time when the transaction mentioned in Note (3)(c) is entered into; and

(c) that there is compliance with all such requirements (if any) as to—

(i) the preparation and form of the document,

(ii) the manner of disclosing to the customer the matters that must be stated in the document, and

(iii) the delivery of a copy of the document to the customer,

as may be set out in a notice that has been published by the Commissioners and has not been withdrawn.

(5) The statements referred to in Note (4) are—

(a) a statement setting out the amount of the premium under any contract of insurance that is to be or may be entered into in pursuance of the transaction in question; and

(b) a statement setting out every amount that the customer is, is to be or has been required to pay, otherwise than by way of such a premium, in connection with that transaction or anything that is to be, may be or has been done in pursuance of that transaction."

83. I should add that it was common ground that the requirements of Note (5) were satisfied in the present case.

84. Article 44 PVD deals with the place of supply, as follows:

> "The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides."

85. As regards Articles 10, 11, 21 and 22 of the Implementing Regulation, the Implementing Regulation only came into effect on 1 July 2011, but it is consistent with the CJEU case-law that preceded it. It was thus common ground between the parties that the Implementing Regulation is persuasive in relation to the interpretation of the PVD prior to 1 July 2011.

86. Article 10 of the Implementing Regulation provides:

> "10.1 For the purpose of Articles 44 and 45 of Directive 2006/112/EC, the place where the business of a taxable person is established shall be the place where the functions of the business's central administration are carried out.
>
> 10.2 In order to determine the place referred to in paragraph 1, account shall be taken of the place where the essential decisions concerning the general management of the business are taken, the place where the registered office of the business is located in the place where the management meets.
>
> Where these criteria do not allow the place of establishment of the business to be determined with certainty, the place where essential decisions concerning the general management of the business are taken shall take precedence.
>
> …"

87. Article 11 of the Implementing Regulation provides:

> 11.1 For the application of Article 44 of Directive 2006/112/EC, a "fixed establishment" shall be any establishment, other than the place of establishment of the business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs."

88. Article 21 of the Implementing Regulation provides:

> "Where a supply of services to a taxable person, or a non-taxable legal person, falls within the scope of Article 44 of Directive 2006/112/EC, and the taxable person is established in more than one country, that

supply shall be taxable in the country where that taxable person has established his business.

However, where the services provided to a fixed establishment of the taxable person located in a place other than that where the customer has established his business, that supply shall be taxable at the place of the fixed establishment receiving that service and using it for its own needs.

Where the taxable person does not have a place of establishment of a business or a fixed establishment, the supply shall be taxable at his permanent address or usual residence.

89. Finally, Article 22 of the Implementing Regulation materially provides:

"In order to identify the customer's fixed establishment to which the services provided, the supplier shall examine the nature and use of the service provided.

…"

90. Sections 7A and 9 VATA also provide guidance on determining the location of a supply:

"**7A Place of supply of services**

(1) This section applies for determining, for the purposes of this Act, the country in which services are supplied.

(2) A supply of services is to be treated as made—

(a) in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and

(b) otherwise, in the country in which the supplier belongs.

(3) The place of supply of a right to services is the same as that in which the supply of the services would be treated as made if made by the supplier of the right to the recipient of the right (whether or not the right is exercised); and for this purpose a right to services includes any right, option or priority with respect to the supply of services and an interest deriving from a right to services….

9 Place where supplier or recipient of services belongs

(1) This section has effect for determining for the purposes of section 7A (or Schedule 4A) or section 8, in relation to any supply of services, whether a person who is the supplier or recipient belongs in one country or another.

(2) A person who is a relevant business person is to be treated as belonging in the relevant country.

(3) In subsection (2) "the relevant country" means—

(a) if the person has a business establishment, or some other fixed establishment, in a country (and none in any other country), that country,

> (b) if the person has a business establishment, or some other fixed establishment or establishments, in more than one country, the country in which the relevant establishment is, and
>
> (c) otherwise, the country in which the person's usual place of residence [or permanent address] is.
>
> (4) In subsection (3)(b) "relevant establishment" means whichever of the person's business establishment, or other fixed establishments, is most directly concerned with the supply…"

91. Sections 7A and 9 VATA have been in force since 1 January 2010. Prior to that, the relevant provisions (namely, sections 7(10)-(11) and 9(2) and (4) VATA, together with paragraph 5 of Schedule VATA and Article 16 of the VAT (Place of Supply of Services) Order 1992) had equivalent effect for present purposes.

92. It is not in dispute that Safestore is a taxable person for the purposes of the VATA. As such, it is also a "relevant business person" for the purposes of section 7A thereof.

93. Section 25(2) VATA provides that a taxable person is "entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him."

94. In this respect, section 26 VATA states:

> "(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.
>
> (2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—
>
> (a) taxable supplies; (b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom; (c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection…"

95. The Value Added Tax Regulations 1995 set out the mechanics of proportional deduction of input tax in circumstances where a taxpayer makes both taxable and exempt supplies. Regulation 101 provides for the standard method of apportionment. However, if this would lead to a result which does not reflect the use made of the goods and services upon which tax is chargeable, regulation 102 provides for the adoption of an alternative method, subject to HMRC approval.

96. Articles 3 and 4 of the VAT (Input Tax)(Specified Supplies) Order 1999/3121 ("**the 1999 Order**") are specified for the purposes of section 26(2)(c) VATA, but only Article 3 is material for present purposes. It provides:

> "Services–
>
> (a) which are supplied to a person who belongs outside the member States; (b) … or (c) which consist of the provision of intermediary services within the meaning of item 4 of Group 2… of Schedule 9 to the Value Added Tax Act 1994 in relation to any transaction specified in paragraph (a) or (b) above, provided the supply is exempt, or would have been exempt if made in the United Kingdom, by virtue of any item of Group 2… to the Value Added Tax Act 1994."

97. The general principle is that exemptions from VAT should be construed strictly. This was explained by Etherton LJ in *HMRC v Insurancewide.Com Services Ltd* [2010] STC 1572 at [83]:

> "Before leaving the case law, it is important to comment on the proper application of the numerous statements in the European cases, some of which are cited above, that the exemption in Article 13B(a), like the other exemptions in Article 13, should be interpreted strictly since it constitutes an exception to the general principle that turnover tax is levied on all services supplied for a consideration to a taxable person. As Advocate General Fennelly said, in paragraph 24 of his opinion in *Card Protection*, this does not mean that a particularly narrow interpretation will be given to the terms of an exemption. As Chadwick LJ said in *Expert Witness Institute v Customs and Excise Commissioners* [2002] STC 42 at paragraph [17], the Court is not required to give the words in the exemption the most restricted, or most narrow, meaning that can be given to them. I agree with his observation, in paragraph [17] of his judgment, that:
>
> 'A 'strict' construction is not to be equated, in this context, with a restricted construction. The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question.'"

The Item 1 issue

Submissions for Safestore on the Item 1 issue

98. Mr Cordara maintained that Assay (and not Safestore) acted as the principal in providing insurance to Safestore's customers throughout the Relevant Period. He drew attention to the Customer Goods Policy which referred to Safestore as an "intermediary". A domestic customer had no right to be indemnified by Safestore in respect of an insured event.

99. It was, therefore, clear, Mr Cordara submitted, that Safestore was merely an intermediary introducing domestic customers to Assay. Safestore's customers concluded contracts of insurance directly with Assay, with Safestore merely supplying intermediary services to Assay (for which it was paid by Assay).

100. Mr Cordara distinguished C-349/96 *Card Protection Plan Ltd v Customs and Excise Commissioners* [1999] STC 270 ("***CPP***"), C-224/11 *BGŻ Leasing sp. zoo. v Dyrektor Izby Skarbowej w Warszawie* [2013] STC 2162 ("***BGZ***") and *Wheels Private Hire Limited* [2017] UKUT 0051 (TCC) (Judges Bishopp and Sinfield) ("***Wheels***") on the basis that in those cases the taxpayers were party to the insurance policy. The situation in those cases was, therefore, that the taxpayers had a "bit of the insurance cake" which they were able to share with third parties. Mr Cordara noted that the demarcation between an intermediary and a *CPP*-type situation was whether Safestore was a "cake sharer" i.e. was Safestore an insured? In the present case, Safestore was not an insured person and was not named on the policy.

101. Particularly as regards *Wheels*, Mr Cordara noted that it was important that the taxpayer was named as a beneficiary under the policy and that there was no contractual relationship between the third parties (the taxi drivers) and the insurance company. In the present case, there was a direct relationship between Safestore's customers and Assay.

102. Mr Cordara referred to Note (1) to Item 4 Group 7 Schedule 9 VATA which referred to the role of an intermediary as "bringing together with a view to insurance". That was what Safestore did in this case – it introduced its customers to Assay.

103. As regards *CPP*, Mr Cordara drew attention to the CJEU's judgment at [21]-[22] and place particular emphasis on the fact that CPP was the holder of a block insurance policy and that the Court said:

> "[21] In those circumstances, it must be noted that CPP is the holder of a block insurance policy under which its customers are the insured. It procures for those customers, for payment, in its own name and on its own account, to the extent of the services mentioned in the Continental policy, insurance cover by having recourse to an insurer. Consequently, for the purposes of VAT, there is a supply of services between Continental and CPP on the one hand, and between CPP and its customers on the other, and the fact that Continental under the terms of its contract with CPP provides insurance cover directly to CPP's customers is not material in this respect.
>
> [22] Such a supply of services by CPP constitutes an insurance transaction within the meaning of Article 13B(a). It is true that the exemptions provided for by Article 13 of the Sixth Directive are to be construed strictly (see *Stichting UitvoeringFinanciële Acties*, paragraph 13). However, the expression 'insurance transactions' is broad enough in principle 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 supplies of an insurer who assumes the risk insured."

104. The Court, said Mr Cordara, regarded the facts before it as a "linear" rather than a triangular relationship. In other words, the Court was considering a situation where CPP paid Continental to supply insurance to CPP's customers.

105. As regards *BGZ*, this case could be distinguished because, as Mr Cordara argued, the policy was concluded in the name of BGZ – BGZ was a party to the policy. Mr

Cordara referred to Mr Kendall's analysis to the effect that Safestore was not insured under the relevant policy.

106. In relation to *Wheels*, Mr Cordara noted that the Upper Tribunal attached no importance to the labels described to the insurance policy in question and considered the facts to be indistinguishable from those in *BGZ*. The Tribunal at [15] noted that in *BGZ*, BGZ was insured under the policy and simply re-invoiced the cost. Thus, Mr Cordara submitted that what was important was that the "middleman" (i.e. Safestore in the present case) was itself a party to the insurance policy, whereas it was unnecessary for the insured to be in a direct relationship with the insurance company. Again, this was a case involving a "linear" arrangement where the insurance company had a contract with the middleman and the middleman was able to "disseminate" the benefit of that contract to which it was a party to third parties.

107. Applying the *Wheels* decision to the present case, Safestore was not sharing part of the insurance "cake" which it owned but rather was arranging for the customer its own direct insurance relationship with Assay.

Submissions for HMRC on the Item 1 issue

108. Ms McCarthy QC noted that the real argument between the parties was whether there was an "Item 1" supply of insurance services by Safestore or an "Item 4" supply of intermediary services by Safestore.

109. In relation to Item 4 supplies, these occurred if the insurance arrangements set up by Safestore took effect as a series of individual contracts of insurance between Assay and each storage customer throughout the course of the year i.e. a new insurance contract arose as each self-storage customer was signed up in-store. In those circumstances, Safestore would be acting as an agent for Assay.

110. By contrast, however, an Item 1 supply of insurance services was what Ms McCarthy described as "the *CPP* argument." In these circumstances Assay effected a single group policy at the start of the year, of which Safestore was the legal holder, and then Safestore simply extended the benefit of that one policy to its customers by adding them as policyholders, thereby giving them rights against Assay. In the present case there was no negotiation on the terms of the insurance extended to customers – it was simply adherence to a pre-existing policy.

111. Ms McCarthy referred to Mr Purves' insurance regulatory written submissions in which he said, referring to the Customer Goods Policy, at paragraphs 24 and 25:

> "24. In summary, HMRC's expert [Mr Kendall] is wrong to suggest that the insurance arrangement set up by Safestore during the Relevant Period took effect as a series of individual contracts of insurance between Assay and a storage customer, each such contract having been effected in the UK by Safestore, acting as agent for Assay.
>
> 25. The correct analysis is that, at inception and on each annual renewal, Assay effected a single group or master policy.
>
> …

> 27. Safestore, as the legal holder of the contract of insurance, was the policyholder under each annual Assay group policy. Safestore's qualifying customers, as persons to whom a payment or benefit was contingently due, payable or to be provided, also became policyholders under the same Assay group policy.
>
> 28. Each qualifying customer was then issued with a Key Facts document and 'confirmation of insurance cover', which enabled the customer to evidence that he was an 'insured" 'or policyholder under the single Assay group policy (i.e. that he fell within the class of persons for whose benefit the policy had been effected), alongside and on the same terms as all other qualifying customers in that year. The adhesion of each customer to the single annual group policy did not represent new business on the part of Assay…, or require Assay to effect a new contract of insurance."[9]

112. Ms McCarthy also observed that Mr Purves, in his oral submissions, stated:

> "… there was certainly no negotiation in this case, because the insurance was presented as a *fait accompli* to [Safestore's] customers: take our insurance and take storage, or don't take storage."

113. Referring to *CPP*, Ms McCarthy noted that CPP was not itself insured, although it was the legal holder of the policy with insurer, Continental, and that CPP could not itself issue a policy of insurance (*per* Popplewell J in *Card Protection Plan Ltd v Customs and Excise Commissioners* [2001] STC at [11] and per Sir John Megaw at [15]).

114. Ms McCarthy referred to the two grounds on which Mr Cordara sought to distinguish *CPP*. Mr Cordara had referred to the *CPP* position as one in which a company in the position of Safestore had a "cake" which it then "shared" with the assureds i.e. the customers. Mr Cordara had argued that Safestore was not a "cake-sharer" because Safestore was not insured under the policy. The same was true, Ms McCarthy submitted of CPP – it was not an insured person under the policy in that case.

115. The second ground on which Mr Cordara sought to distinguish *CPP* was, said Miss McCarthy, that there was a direct contractual relationship between Safestore's customers and Assay. Ms McCarthy noted that Safestore's customers had direct rights against insurer but that was also the position in *CPP*, where cardholders could claim directly against Continental. Cardholders were added to the policy and CPP notified the broker of their names.

116. In relation to intermediation, Ms McCarthy noted that CPP was instrumental in bringing its customers into an insurance relationship with Continental. Nonetheless, CPP made an Item 1 supply of insurance services.

117. Thus, Miss McCarthy submitted that if Mr Purves was correct in his analysis that Safestore was the legal holder of the Consumer Goods Policy, the parallel with the facts in *CPP* was exact. Safestore was extending the benefits of pre-existing cover to

[9] It was for this reason, Mr Purves submitted, that Safestore did not require UK regulatory authorisation.

its customers in the same way that CPP extended the benefits of its policy to cardholders. Safestore was, therefore, supplying insurance within Item 1. An intermediary within Item 4, on the other hand, would bring together an insurer and a customer for the purposes of effecting a new contract of insurance.

118. Ms McCarthy noted that in the present case there was no services agreement between Safestore and Assay which could affect the position.

119. The CJEU's decision in *BGŻ* was of little assistance. In that case the issue was whether the extension of the benefit of insurance, without the lessee actually becoming an insured, was a supply of insurance purposes by the lessor – a question which the CJEU answered in the affirmative. *BGZ* was not an authority for the two propositions which Mr Cordara claimed to be distinguishing features of the facts in the present appeal from *CPP*.

120. Next, Miss McCarthy referred to the decision of the Upper Tribunal in *Wheels*. In that case, Wheels was the insured and cover notes were issued in respect of individual vehicles. The Upper Tribunal made it clear at [12] that the existence of a "block policy" was not a precondition to the application of CJEU's broad interpretation of an insurance transaction in *CPP*, referring to the decision of the CJEU in *BGZ*. It did not matter what type of policy was used or what it was called – what was important was that the taxable person used an insurance policy in order to procure the insurance for its customers (see also at [34]). Furthermore it did not matter that Wheels insured its own vehicles – that was not a relevant feature – what was important was that Wheels procured insurance for its drivers. That was so, even though Wheels had to enforce the cover.

Discussion of the Item 1 issue

The relevant case law

121. The decision of the CJEU in *CPP* is the leading relevant authority. In that case appellant company supplied various services and some small goods of low value under a plan to protect its customers from loss or inconvenience resulting from the loss or theft of their credit cards. The services included insurance which indemnified the customers against financial loss caused by the loss or theft of credit cards together with other non-insurance assistance services. In relation to the insurance element, CPP obtained block cover from an insurance company, Continental. The customers were the named "assured" under the policy. CPP was not itself insured under the policy. When a customer purchased CPP's services his or her name was added to the schedule of assured. CPP paid an annual premium to the insurer and adjustments to reflect cardholders joining or leaving the plan were made at the end of the policy year.[10] One of the questions referred to the CJEU by the House of Lords was whether

[10] The facts found by the VAT Tribunal (HH Judge Medd QC) LON/90/282Y,on this point were:

"When a member of the public, such as Dr Howell, is accepted as a member having filled in the application form and having sent it with the appropriate amount of money to the Appellant Company [CPP], the company pays the money into its own bank account. It also informs the brokers of his name so that it may be added to the Schedule lodged with and held by them and is referred to in the

supplies of services such as those provided by CPP to its customers constituted insurance transactions or related services of insurance agents within the exemption in what is now Article 135(1)(a) of the PVD.

122. The CJEU dealt with that issue at [20]-[23]:

> "20. However, CPP acknowledges that it merely promised its customers to do what was necessary for insurance to be provided to them by a third party, and that it did not itself undertake to provide insurance cover. In this respect, the Commission has pointed out that CPP is the holder of a group policy for its customers.
>
> 21. In those circumstances, it must be noted that CPP is the holder of a block insurance policy under which its customers are the insured. It procures for those customers, for payment, in its own name and on its own account, to the extent of the services mentioned in the Continental policy, insurance cover by having recourse to an insurer. Consequently, for the purposes of VAT, there is a supply of services between Continental and CPP on the one hand, and between CPP and its customers on the other, and the fact that Continental under the terms of its contract with CPP provides insurance cover directly to CPP's customers is not material in this respect.
>
> 22. Such a supply of services by CPP constitutes an insurance transaction within the meaning of Article 13B(a). It is true that the exemptions provided for by Article 13 of the Sixth Directive are to be construed strictly (see *Stichting Uitvoering Financiële Acties*, paragraph 13). However, the expression 'insurance transactions' is broad enough in principle 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 supplies of an insurer who assumes the risk insured.
>
> 23. That interpretation is supported by the purpose of the Sixth Directive, which exempts insurance transactions but gives member states, in Article 33, the possibility of maintaining or introducing a tax on insurance contracts. Consequently, if 'insurance transactions' refers solely to transactions performed by insurers themselves, the final consumer might have to pay not only that tax but also VAT, in the case of block policies. Such a result would be contrary to the purpose of the exemption provided for by Article 13B(a)."

123. As a result of its conclusion that CPP's supplies were an insurance transaction within the exemption, the CJEU stated that it did not need to consider whether CPP carried on the activity of an insurance agent. I think, however, it will be appreciated that the decision of the CJEU that the procurement of insurance from Continental by CPP for the benefit of its members inevitably involves an element of "bringing

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paragraph entitled "Assured" in the memorandum attached to the Schedule of the insurance policy. The amount of the insurance premium paid by the company to the Brokers at the start of the period covered by the policy is based on the number of members who have joined the Card Protection Plan. At the end of the year an adjustment to the premium is made to take account of the members who have joined or left the scheme during the year."

together" of an insurer with those seeking insurance.[11] There is, therefore, some degree of overlap between the CJEU's extension of insurance transactions to cover the procurement of insurance by persons who are not themselves insurers and the provision of services by insurance intermediaries. The question in this case, broadly speaking, is in which category do Safestore's activities fall?

124. The CJEU later considered the exemption for insurance transactions in *BGZ*. BGZ was a leasing company that leased goods to its customers in return for rent. The lessees were liable for any loss or damage to the leased goods, other than normal wear and tear. BGZ required the leased goods to be insured at the cost of the lessee. BGZ offered to provide the insurance but the lessee also had the option of insuring the leased goods with an insurance company of its choice. If the lessee accepted BGZ's offer of insurance then BGZ would take out insurance on the goods with an insurer and re-invoice the cost of that insurance to the lessee. BGZ took the view that the re-invoiced cost of the insurance was consideration for an exempt insurance transaction. The Polish tax authority disagreed and the matter was ultimately referred to the CJEU. The CJEU was asked two questions, one of which was whether a transaction under which the lessor insured a leased item with a third-party and re-invoiced the cost of that insurance to the lessee constituted an exempt insurance transaction.

125. As the Upper Tribunal noted in *Wheels* at [15] it appears from [63] of the CJEU's judgment in *BGZ* that BGZ was insured under the policy and simply reissued the cost of the insurance to its customers (the lessees) who apparently were not insured under the policy.

126. At [60] the CJEU considered whether 'insurance transactions' also covered the grant of insurance cover taken out by an insured party such as a lessor, who re-invoices, in the context of a leasing transaction, the cost of that insurance to the lessee. At [61] the CJEU answered that question in the affirmative. The CJEU referred at [65] to [68] to the principle of fiscal neutrality as follows:

> "[65] In any event, according to settled case-law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (Joined Cases C-259/10 and C-260/10 *The Rank Group* [2011] ECR I-0000, paragraph 32 and the case-law cited).
>
> [66] Therefore, the supplies of insurance for the leased item, in respect of which the owner remains the lessor, cannot, in circumstances such as those at issue in the main proceedings, be treated differently

[11] Referred to by the CJEU as the "essential aspects of the work of an insurance agent, such as the finding of prospects and their introduction to the insurer" in C-472/03 *Arthur Andersen* [2005] STC 508 at [36]. It appears (although the point was not argued before me and I express no view) that the question whether the concept of insurance agents and brokers is limited to professional insurance intermediaries is still open – see the opinion of Advocate General Fennelly in *CPP* at [32]. *Taksatorringen* [2003] EUECJ C-8/01 at [44] by limiting the concept of insurance brokers and agents to "professionals" indicates that Advocate General Fennelly's reservation may be correct, although the thrust of the Court's observations in that paragraph was that an intermediary must have a relationship with both the insurer and the insured.

> according to whether such services are supplied directly to the lessee by an insurance company or whether the latter obtains such insurance cover through the lessor which procures it from an insurer and re-invoices its cost to the lessee for the same amount."

127. Before reaching its conclusion at [69] that the re-invoicing of the cost of the insurance was the exempt provision of insurance, the CJEU imposed an important qualification at [68] to the effect that the amount re-invoiced had to be the same as the cost of the insurance:

> "68 Finally it must be stated that that reasoning is based on the assumption that the lessor invoices the lessee for the exact amount of the insurance and that that reasoning cannot apply if the amount invoiced to the lessee for insurance costs is more than that invoiced to the lessor by the insurer.
>
> 69 It follows that it must be held that, in the context of leasing, a transaction consisting in re-invoicing the exact cost of insurance for the leased item, like that at issue in the main proceedings, constitutes an insurance transaction within the meaning of Article 135(1)(a) of the VAT Directive."

128. In the next case, *Wheels*, the appellant company (Wheels) ran a taxi-hire business. Most of the Wheels' drivers owned their own vehicles. However, the appellant hired 70-80 vehicles to other drivers. In addition to rental for the vehicle and a further sum for radio support the drivers were able to elect to purchase insurance cover from the Wheels to satisfy the RTA's requirements. The insurance was provided at a competitive rate and Wheels did not derive any significant profit from providing it. The receipt of any additional sums for insurance cover was accounted for separately by the Wheels. Wheels was the insured in terms of the insurance policy. Cover notes were issued in respect of individual vehicles identified by registration number. The persons entitled to drive were required to be authorised by the appellant as policy holder. Wheels determined who may drive a particular vehicle. The insurers required details annually about the drivers, their licences and driving records. In the interim additional drivers could be added to the cover by Wheels provided that their driving records satisfied certain criteria prescribed by the insurers. Otherwise reference had to be made to the insurer.

129. The Upper Tribunal found that Wheels had supplied insurance to the drivers within the exemption in Article 135(1)(a) PVD. First, the Upper Tribunal dismissed HMRC's submission that the existence of a block policy was a precondition to the application of "the CJEU's broad interpretation of insurance transaction in *CPP*". The Tribunal said at [12]:

> "We do not consider that the use of the phrase "in the context of a block policy of which he is the holder" by the CJEU was intended to limit the expanded meaning of insurance transaction to situations where there is a block policy. There was a block policy in CPP and that was the context in which the question for determination arose. The CJEU's application of the exemption to supplies by taxable persons who are not insurers but procure cover for their customers from insurers was not predicated on the existence of a block policy as opposed to any other type of policy. In our view, whether a taxable

> person who is not an insurer procures insurance for a customer using a policy of a particular type, such as a block policy or a group policy (both terms were used in CPP) or a fleet policy (as referred to before the FTT in this case), is not a determinative factor in deciding whether the supply is an exempt insurance transaction. That the CJEU's broad interpretation of insurance transaction can apply to supplies by persons who procure insurance cover other than by means of a block policy is shown by the CJEU's decision in Case C-224/11 *BGŻ Leasing sp. zoo. v Dyrektor Izby Skarbowej w Warszawie* [2013] STC 2162 ('*BGZ*')."

130. Then the Upper Tribunal at [16] observed:

> "The CJEU [in *BGZ*] explained, in paragraph 67, that its interpretation avoided the possibility of a final consumer, such as the lessee, having to pay both VAT and insurance premium tax. Paragraph 68 shows that the CJEU's reasoning was, however, predicated on the assumption that the lessor invoices the lessee for the exact amount of the insurance. The CJEU stated that its reasoning in BGZ could not apply if the lessor invoiced the lessee for more than the amount invoiced to the lessor by the insurer."

131. The Upper Tribunal at [34] placed reliance on the finding by the First-tier Tribunal ("FTT") that Wheels could add new drivers to the insurance schedule during the policy year without notifying the insurer, provided that certain prescribed criteria were met. The insurer then covered such drivers for their legal liability to third parties. Accordingly, the Tribunal (again, at [34]) concluded that Wheels procured cover for the drivers by making use of the policy agreed with the insurer even if the drivers would have to rely on Wheels to enforce that cover. The position was, therefore, indistinguishable from *BGZ*. It was immaterial in determining the nature of the supply whether the requirement for insurance was imposed by the lessor, as in *BGZ*, or by law, as in *Wheels*.

132. Although Wheels did not derive any "significant profit" from providing the insurance there appears to have been some element of mark-up (*Wheels* at [39]). The Upper Tribunal, however, did not consider that this precluded the reasoning of the CJEU in *CPP* applying in this case because Wheels could add drivers to the policy and they were covered by it against the risk of liability while using the insured vehicles.

133. Accordingly, the Upper Tribunal held that Wheels had been making an exempt supply of insurance.

Application of the principles to the facts

134. The Item 1 issue raises the question whether Safestore is making an exempt supply of insurance, rather than a supply of intermediary services (within Item 4).

135. I have come to the conclusion that Safestore is making a supply of insurance services and is not acting as an insurance intermediary. I see no relevant distinction in principle between the position in the present case and that in *CPP*.

136. I reach this conclusion for the following reasons.

137. In this case, I find that Safestore and Assay have reached agreement on an insurance policy embodied in the Customer Goods Policy, representing the terms of insurance coverage to be extended to Safestore's customers. That they have reached such an agreement between themselves on this policy is evident from the fact that some of its terms seem relevant to Safestore rather than to Safestore's customers. For example, the "Limit of Liability" provisions contained in the Customer Goods Policy puts a maximum of £80 million on the total sum insured but which is limited to £2.5 million in respect of any one premises, with certain exceptions. These limitations, which are not repeated in the terms set out in the Confirmation, are clearly of more interest to Safestore than to their customers.

138. Moreover, it was clear from Mr Beavers' evidence at [66]-[71] and the evidence referred to at [71]-[74] above that there was an agreement between Safestore and Assay which was reflected in the Customer Goods Policy and that this was a policy of insurance of which Safestore was the policyholder. Thus, Mr Beavers' commercial understanding was that insurance cover was provided to Safestore's customers under an extension of Safestore's open cover or master insurance policy and that Safestore was the policyholder. This is also consistent with the record of the meeting of 20 April 2009, between Safestore, Marsh and Marsh UK which clearly envisaged an insurance policy being concluded between Safestore and Assay and cover being granted to customers under that policy.

139. Furthermore, the Reinsurance Agreements re-insured the Customer Goods Policies of each year, specifying the identification number of each policy[12]. The Customer Goods Policy was defined as "the SCG Policy". In the preamble to the 2010 and subsequent agreements it is stated that Assay "provides insurance cover to Original Insureds [i.e. Safestore customers] *under the SCG Policy* in the United Kingdom through its agent Safestore Holdings Plc." (Emphasis added).

140. It seems to me clear, therefore, that the Customer Goods Policy in each year was *not* a series of different individual contracts of insurance taken out with each Safestore customer, but rather one policy of insurance under which cover would be extended to each customer to whom, as the Reinsurance Agreement stated, a confirmation of insurance cover had been issued under the SCG Policy. It was *that one* policy of insurance that was reinsured and the plain understanding expressed in each of the Reinsurance Agreements was that any confirmation of insurance cover (the Confirmation) was "issued *under the SCG Policy*." It seems to me that the terms of the Reinsurance Agreements, taken together with Mr Beavers' evidence and the other evidence referred to above, clearly indicate that the notion that there existed a separate and individual insurance policy in respect of each Safestore customer is simply wrong. That is not what the Reinsurance Agreements, to which Assay was a party, contemplated: risks under any such series of individual policies were not risks which were reinsured nor is that what Mr Beavers had in mind. When a Safestore customer completed a Confirmation and an Application Form, that customer was

[12] The 2009 Reinsurance Agreement did not identify the number of the "Original Policy" but simply referred to "Policies in the form, approved by the Reinsurer and issued by the Re-insured during the Period." Because the other Reinsurance Agreements referred to Customer Goods Policies of the relevant year, I infer that the 2009 Reinsurance Agreement will have referred to the specific Customer Goods Policy for that period.

receiving cover under the Consumer Goods Policy of which Safestore was the policyholder and not under a separate policy.

141. Mr Kendall, in his report, stated:

> "Subject to one overriding reservation, the [Customer Goods] Policy could be described as a block insurance, because it ensures multiple insureds (i.e. Safestore's customers) in respect of their different insurable interests), or an "open cover" policy because it is arguably a kind of marine insurance and ensures any particular insured (being a Safestore customer) at the point at which Safestore issues a Confirmation of Insurance Cover to the insured. My reservation is that the [Customer Goods] Policy does not contain any provisions concerning the premium payable for the insurance offered under the policy and accordingly is not a stand-alone contract of insurance but has to be seen in the context of the overall arrangements by which insurance is sold to Safestore's customers."

142. Instead, Mr Kendall analysed the arrangements as a series of individual contracts of insurance between Assay and each Safestore customer, with Safestore acting as an intermediary. For the reasons I have just given, I reject Mr Kendall's analysis.

143. Mr Purves submitted that the arrangements between Assay and Safestore were such that, on inception and on each annual renewal, Assay effected a single group or master policy, the benefits of which were then extended (by Safestore, acting as agent for Assay) to each of Safestore's qualifying customers over the course of that year.

144. In relation to Mr Kendall's "overriding reservation", Mr Purves considered Mr Kendall's analysis to be wrong in law. He acknowledged that it was a component of the common law description of a contract of insurance[13] that the insurer's binding obligation to respond to an uncertain and adverse event was assumed in return for one or more payments (commonly described as 'premiums'). There was no authority, in Mr Purves' submission, for the proposition that the amount of the premium had to be reduced to writing or appear on the face of the contract of insurance.

145. Mr Purves submitted that the arrangements between Safestore and Assay contemplated annual insurance policies and the payment of the premium calculated and paid quarterly in arrears. That premium was in fact paid, a matter on which there was no dispute.

146. Properly characterised, therefore, Mr Purves argued that each annual Assay policy was a contract of group insurance (sometimes referred to as a 'master policy', 'block insurance' or 'open cover' – the labels applied to the contract being irrelevant to its characterisation).

147. Mr Purves contended that Mr Kendall was wrong to suggest that the insurance arrangement established by Safestore during the Relevant Period took effect as a series of individual contracts of insurance between Assay and a storage customer, each such contract being effected in the UK by Safestore, acting as agent for Assay.

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[13] see *Prudential v Commissioners of Inland Revenue* [1904] 2 KB 658 and FCA's guidance: "Perimeter Guidance Manual, chapter 6 at 6.6.3 and 4 G.

Instead, the correct analysis, according to Mr Purves, was that, at inception and on each annual renewal, Assay effected a single group or master policy. Safestore was the policyholder under each annual Assay group policy. Safestore's customers became insureds under the same Assay group policy. Each qualifying customer was then issued with a Key Facts document and a Confirmation, which enabled the customer to evidence that he was an 'insured' under the single Assay group policy (i.e. that he fell within the class of persons for whose benefit the policy had been effected), alongside and on the same terms as all the other qualifying customers in that year.

148. In my view, Mr Purves' analysis is correct. The Customer Goods Policy was a policy of insurance between Safestore and Assay in respect of which the policyholder was Safestore. Safestore was not, however, itself an insured party. The insured parties were Safestore's customers. The Customer Goods Policy was an open cover or master policy which contained the terms, agreed between Safestore and Assay, on which insurance cover would be extended to Safestore's customers, when they completed the Application Form, paid the premium and received the Confirmation. It is clear from the evidence that there was a collateral unwritten agreement between Assay and Safestore that Safestore should remit 70% of the premiums (which were determined by Assay but on the advice of Marsh, with input from Marsh UK and Safestore) collected from customers to Assay. Safestore kept a record of the names of the customers who became "insured" under the Customer Goods Policy. There is no requirement that the premium agreed between the insurer and the policyholder must be in writing. Indeed, most of the arrangements between Assay and Safestore were informal and were not reduced to writing.

149. When viewed in this way, the relationships between Safestore, Assay and Safestore's customers are, in my judgment, materially indistinguishable from those in *CPP*. In *CPP* it was found that CPP had a block insurance policy with the insurer, Continental, of which CPP was the policyholder. CPP was able to add its customers to that policy so that they became insured persons, notifying the brokers of their names. This had the result that, if an insured risk occurred, CPP's customers could claim directly against Continental. CPP itself, like Safestore, was not an insured person under the block insurance policy even though it was the policyholder. CPP thus, in the judgment of the CJEU supplied insurance services to its members by procuring the supply of insurance for them.

150. It is true that in the Customer Goods Policy the policy starts with the sentence:

> "Assay Insurance Services Ltd… and the Insured [defined as any customer of the Intermediary[14] to whom a Confirmation of Insurance Cover has been issued] agree that…."

151. This, however, represents the agreement between Assay and Safestore as to the insurance terms which would be extended to Safestore's customers when those customers applied for insurance under the Customer Goods Policy. Moreover, I do not think that the fact that the Customer Goods Policy, rather self-consciously, labels Safestore Holdings Plc and its subsidiary companies (which would include Safestore)

[14] defined as Safestore Holdings Plc and subsidiary companies

as "the Intermediary" affects the position. The VAT analysis must proceed on an objective view of the facts and labels, as *Wheels* demonstrates in relation to the description of the insurance policy, are not determinative.

152. Similarly, a different view is not dictated by the fact that the Key Facts states:

> "Our customers are covered by an insurance policy arranged by Safestore Ltd with Assay Insurance Services Ltd."

153. In my view, that is in fact an accurate description of the Customer Goods Policy as I have analysed it above.

154. In addition, when Safestore received the Application Form and issued the Confirmation, the fact that it did so as agent for Assay does not, in my view, alter the analysis. In each case Safestore was providing coverage to its customers which it had procured from Assay (under the terms of the Consumer Goods Policy) and whether it did this is Assay's agent or its own behalf seems to me immaterial.

155. Furthermore, I do not think the position is affected by the fact that Safestore retained 30% of the premium payable by its customers. In *BGZ* the CJEU specified that the re-invoicing had to be the exact amount of the cost of the insurance [69]. I confess that I find this requirement in *BGZ* puzzling and probably an oblique reference to the principle of fiscal neutrality[15]. Be that as it may, it seems to me that that requirement relates to re-invoicing of the cost of insurance in circumstances akin to that in *BGZ* i.e. where the third-party lessees were not themselves insured under the contract of insurance and were not added to the insurance policy by the policyholder. That is a very different position from the facts of this appeal.

156. Mr Cordara attempted to distinguish the present case from *CPP*. In that case he submitted that the individual member ("Dr Howell") received a package of services for his membership payment. In the present case, there was a cross-selling opportunity which was entirely consistent with Safestore's intermediary function. I do not find that distinction persuasive or relevant. In any event, a Safestore domestic customer was effectively sold a package of storage services combined with compulsory insurance.

157. Secondly, Mr Cordara distinguished *CPP* on the basis that in that case the member received a multiple supply which had insurance embedded in it. The member in that case did not specifically pay an insurance premium but a fee for a variety of services. I accept that the facts are different in the present case but, again, that does not seem a ground on which the extended definition of insurance services explained in *CPP* can be distinguished. In *CPP* the Court focused on the fact that CPP had procured insurance under a pre-existing block policy which it had agreed with

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[15] It was conspicuous that neither party directly referred to this principle of interpretation in argument. I do not base my decision on this principle but I do harbour doubts whether the principle of fiscal neutrality would permit the VAT treatment in this case to be different from that in *CPP*. Mr Cordara referred on a number of occasions to the dicta of Lord Reed in *Aimia/Loyalty Management* [2013] STC 784 at [68] to the effect that a "small modification of the facts can render the legal solution in one case inapplicable to another." That is no doubt so, but that observation cannot override the principle of fiscal neutrality where it applies and I am sure that Lord Reed did not so intend.

Continental. That is what happened in this case, the name attached to the policy ("block", "open cover", "master" and "group") being immaterial.

158. Thirdly, the fact that CPP paid the premium at the outset of the policy year was different from the present case because domestic customers paid premiums to Safestore and Safestore accounted to Assay quarterly in arrears. Again, I do not find this distinction persuasive. I do not see why the timing of the payment of the insurance premium should result in a different VAT treatment.

159. Lastly, Mr Cordara argued that, in *CPP*, CPP had promised its members to provide insurance and that CPP had an enforceable contractual promise from Continental to back up CPP's promise to its members. Once again, I do not find this persuasive ground of distinction and see no reason why this difference on the facts should result in a different VAT treatment. In this case, Safestore is requiring its domestic customers to take out the insurance which it has procured from Assay and had Assay's agreement to provide that insurance on pre-agreed terms.

160. In my judgment, therefore, Safestore arranged a master or open cover policy – the Consumer Goods Policy – with Assay. Safestore has procured for its customers the insurance services specified in the Customer Goods Policy. That is a supply of insurance within Item 1 Group 2 Schedule 9 VATA under the extended meaning of insurance transactions explained in *CPP*. Therefore, the appeal against the First Decision and (as regards the Item 1 issue) against the Assessment, must, in principle, be dismissed and the appeal against the Assessment now depends on the time-bar issue, to which I now turn.

The time-bar issue

The legislation

161. Sections 73(6) and 77(1) VATA provide as follows:

> "73. Failure to make returns etc.
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.
>
> …
>
> 77. Assessments: time limits and supplementary assessments.

> (1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made—
>
> (a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned…"

Facts

162. The Assessment was made on 30 October 2015. It relates to the 10/11, 01/12, 04/12, 07/12 and '99/99'[16] VAT periods. The Assessment was made after the end of two year time limit from the end of the prescribed accounting period in section 73(6)(a). It was therefore necessary for HMRC to show that the Assessment was made within the one-year period required by section 73(6)(b).

163. The sequence of correspondence between the parties, relevant for present purposes, was as follows:

(1) on 17 July 2013, Safestore provided HMRC with a copy of the Confirmation;

(2) on 30 July 2013, Safestore provided HMRC with a voluntary disclosure. On 14 May 2014, Safestore provided HMRC with a List of Documents with documents;

(3) on 4 July 2014, HMRC requested further information from Safestore including the Reinsurance Agreements;

(4) on 4 August 2014, Safestore provided the further information referred to in (3) above;

(5) on 3 November 2014, HMRC wrote to Safestore stating that HMRC may wish to apply to amend its statement of case, on the basis that it was not clear from the evidence provided to that date whether Assay was supplying insurance to Safestore's customers or whether Safestore was making an onward supply of insurance which was being supplied to it by Assay.

(6) on 2 December 2014, Safestore provided further documents including a Customer Goods Policy document; and

(7) on 30 October 2015, the Assessment covering periods 10/11, 01/12, 04/12, 07/12 and 09/12 was raised.

164. The letter from HMRC to Safestore of 3 November 2014, referred to above, stated:

> "On the basis of our review of the facts as we currently understand them to be, we also put you on notice that we may seek to amend our Statement of Case currently before the Tribunal. From the information provided to date it is not in fact clear whether Assay is supplying insurance to Safestore's customers or whether Safestore is making the supply with Safestore in turn supplied with insurance by Assay. This would be an arrangement similar to CPP's policy with Continental as discussed in the case of [*CPP*]. If for VAT purposes Safestore is in fact making exempt supplies of insurance to its customers, then there would be no related input tax entitlement."

[16] Which I assume is the 09/12 VAT period.

165. After requesting information about any contract between Safestore and Assay, the letter continued:

> "Assay policies
>
> We note that the 26 August 2010 to 8 May 2013 Reinsurance agreements between Assay and RSA refer in the schedules to 2 original policies approved by RSA:
>
> 1. Storage Customer Goods Policy No 1-01001-00 2010 …
>
> Note: the later reinsurance agreements keep the same policy names and numbers but the dates are changed to 2011, 2012 & 2013 accordingly.
>
> The 11 March 2010 reinsurance agreements similarly refers [sic] to "Original Policies" in the form approved by RSA."

Submissions on the time-bar issue

166. Mr Cordara submitted that the question, in relation to the time-bar issue, was to determine whether the last relevant piece of information came into the Commissioners' hands in the year prior to the Assessment, i.e. the year 1 November 2014 to 30 October 2015 (see *Pegasus Birds* [2000] STC 91 (CA) at [15-16]).

167. In this this context it has been held that it is HMRC's collective mind is relevant (see *Royal College of Paediatrics* [2015] STC 1243 (UT) at [47] [52]).

168. Mr Cordara submitted that all material facts in the present case were in the possession of HMRC more than 12 months prior to the date of the assessment. HMRC's initial decision letter was dated 9 December 2013 and HMRC's original statement of case was dated 15 April 2014. The Error Correction was submitted on 30 July 2013 and the first Notice of Appeal was filed and served on 3 January 2014.

169. In HMRC's Further Amended Statement of Case stated 1 February 2016, HMRC sought to justify their delay by reference to the timeline of events between 17 July 2013 and 2 December 2014. At paragraph 55(i) HMRC state:

> "The Customer Goods Policy document provided on 2 December [2014] was the key document which confirmed HMRC's provisional view communicated on 4 November 2014 that the supply made by [Safestore] was akin to that in *CPP*"

170. Mr Cordara submitted that I must evaluate any fact which is proffered as the "last piece of the jigsaw", to see whether it is a material addition to the Commissioners' collective knowledge of the facts. (see *NPI* [18944][17] at [136]-[160] and *St Martins Healthcare* [20778] at [82]-[90]).

171. Mr Cordara argued that HMRC had failed to identify any aspect of the Customer Goods Policy which caused HMRC to re-characterise their understanding of the supply chain and to issue the Assessment. There was nothing in the Customer Goods Policy which materially added to or altered the evidence of relevant facts that had

[17] In that case the VAT Tribunal formed the view [146] that the new information before the Commissioners "was not of sufficient weight" to justify the making of a further assessment.

previously been available to HMRC. Moreover, HMRC had called no witnesses to give evidence on this point. Accordingly, Mr Cordara urged me to conclude that the Assessment was time-barred.

172. Ms McCarthy argued that it was unnecessary to have witness evidence in relation to the time-bar issue because the documents spoke for themselves.

173. Ms McCarthy drew attention to the chronology of the correspondence outlined above.

174. The letter from HMRC to Safestore of 3 November 2014, referred to above, stated:

> "On the basis of our review of the facts as we currently understand them to be, we also put you on notice that we may seek to amend our Statement of Case currently before the Tribunal. From the information provided to date it is not in fact clear whether Assay is supplying insurance to Safestore's customers or whether Safestore is making the supply with Safestore in turn supplied with insurance by Assay. This would be an arrangement similar to CPP's policy with Continental as discussed in the case of [*CPP*]. If for VAT purposes Safestore is in fact making exempt supplies of insurance to its customers, then there would be no related input tax entitlement."

175. After requesting information about any contract between Safestore and Assay, the letter continued:

> "Assay policies
>
> We note that the 26 August 2010 to 8 May 2013 Reinsurance agreements between Assay and RSA refer in the schedules to 2 original policies approved by RSA:
>
> 1. Storage Customer Goods Policy No 1-01001-00 2010 …
>
> Note: the later reinsurance agreements keep the same policy names and numbers but the dates are changed to 2011, 2012 & 2013 accordingly.
>
> The 11 March 2010 reinsurance agreements similarly refers to "Original Policies" in the form approved by RSA."

176. Ms McCarthy argued that the Customer Goods Policy provided by Safestore to HMRC on 2 December 2014 was the key document which confirmed HMRC's provisional view that the supply made by Safestore was akin to that in *CPP*. It was clear from HMRC's letter of 3 November 2014 that HMRC was unsure whether the supply to Safestore's customers fell within the extended *CPP* concept of the supply of insurance services. The Customer Goods Policy indicated to HMRC for the first time that there was a *CPP*-type policy.

177. Ms McCarthy therefore submitted that all the periods forming part of the Assessment were within the time prescribed by sections 73(6) and 77(1) VATA.

Discussion of the time-bar issue

178. The leading authority on section 73 (6) VATA is the judgment of the Court of Appeal in *Pegasus Birds Ltd v Customs and Excise Commissioners* [2000] STC 91. The Court of Appeal made it clear that it is the task of the tribunal to assess whether as a matter of fact the officer held the opinion in question. Aldous LJ said at [15].

> "The true construction of s 73(6)(b) does not suffer from the difficulties suggested by Mr Ewart. An opinion as to what evidence justifies an assessment requires judgment and in that sense is subjective; but the existence of the opinion a fact. From that it is possible to ascertain what was the evidence of facts which was thought to justify the making of the assessment. Once that evidence has been ascertained, then the date when the last piece of the puzzle fell into place can be ascertained. In most cases, the date will have been known to the taxpayer, as he will be the person who supplied the information."

179. Applying this principle, it is clear to me that the "last piece of the puzzle" fell into place in December 2014 when Safestore, finally, provided the Customer Goods Policy to HMRC. Until that time, as the letter of 4 November 2014 evidences, HMRC were unclear whether the nature of the arrangements between Safestore and Assay fell within the extended concept of the supply of insurance in accordance with the decision in *CPP*. For the reasons explained above, I consider that the various versions of the Customer Goods Policy go to the heart of the issue in this appeal. Its provision therefore, in my view, constituted the "last piece of the puzzle". For this reason, I have concluded that the Assessment is not time-barred.

180. There is, however, one issue which I should address. It may be apparent from the above discussion that each party's insurance law expert to some extent provided solace to the other party. Thus, Mr Kendall, in concluding that the insurance coverage extended by Assay comprised a series of individual contracts arranged by Safestore seemed, possibly, to undermine the arguments of HMRC in relation to the Item 1 issue and *CPP*. Similarly, Mr Purves' submissions to the effect that the Customer Goods Policy constituted a master policy or open cover policy held by Safestore might be construed as unhelpful to Safestore's arguments in relation to the Item 1 issue.

181. It was against this background that Ms McCarthy, whilst not abandoning the Item 1 issue analysis, indicated a preference for the Item 4 analysis. She appeared to suggest, incorrectly in my view, that Assay entered into a series of individual contracts of insurance with Safestore's customers, adopting Mr Kendall's analysis. She did not, however, abandon the Item 1 argument and referred in particular to Mr Purves' analysis, which I have explained above.

182. Perhaps not surprisingly, Mr Cordara focused on Ms McCarthy's reliance on Mr Purves' analysis and asked how this could have been in the mind of HMRC in 2014.

183. Whatever the vagaries of the arguments before me may have been, I do not think that this can alter the fact that, on the face of the correspondence, HMRC were concerned about the *CPP* analysis in November 2014 and that the Customer Goods Policy was an essential document in that analysis. I therefore do not consider that the reliance of Miss McCarthy on Mr Purves' submissions alters that position.

184. In conclusion, therefore, I consider that the Assessment was not time-barred under section 73(6)(b) VATA. I therefore dismiss the appeal in relation to the Assessment.

The Item 4 issue

185. In the light of my conclusion on the Item 1 issue, it is strictly unnecessary for me to consider the Item 4 issue. Nonetheless, because the point was fully argued before me, I shall express my views briefly. Obviously, the Item 4 issue proceeds on the assumption that I am wrong on my Item 1 analysis and that Safestore was acting as an insurance agent or intermediary. The real question then becomes that of the place of the supply of those intermediary services to Assay.

Submissions for Safestore on Item 4 issue

186. Safestore contended that the input tax in question was incurred in the course of Safestore's making supplies of services that fell within the scope of Item 4 of Group 2 of Schedule 9 VATA (within the meaning of Article 3(c) of the 1999 Order).

187. Safestore further submitted that the intermediary services were supplied to a person who belonged outside the member states (within the meaning of Article 3(a) of the 1999 Order), namely Assay in Guernsey. In Safestore's submission, it followed that the under-claimed input tax, the subject of the First Decision, was deductible.

188. Mr Cordara argued that the fact that Safestore carried out a number of activities at its UK storage depots, with a view to facilitating the arrangement and operation of the insurance arrangements between Assay and Safestore's customers did not mean that Assay was established in the UK. Assay was established only in Guernsey, where it received Safestore's intermediary supplies.

189. Mr Cordara submitted that:

(1) Assay was incorporated in Guernsey and has had only one business establishment which was in Guernsey (at Marsh's offices);

(2) Assay's business was the supply of insurance;

(3) all decisions relating to the operation of Assay's business and board meetings were taken or conducted in Guernsey;

(4) during the Relevant Period, the majority of Assay's directors were based in Guernsey;

(5) the day-to-day activities of Assay were delegated to Marsh (in Guernsey) under the terms of a management agreement dated 4 July 2008;

(6) Assay had no human or technical resources of its own in Safestore's depots. Assay's human and technical resources (and, thus, its business establishment) were located only in Guernsey.

190. Mr Cordara also challenged HMRC's assertion in its Amended Statement of Case that "Assay does not actively carry out any part of the insurance transactions." Mr Cordara noted that Assay's insurance risk-based liability was set out in its

contract(s) of insurance entered into between the insurer (Assay) and the insured (the customers). The premiums were ultimately received by Assay and Assay pooled its premiums to enable the settlement of claims. Any shortfall in Assay's assets was met by the Reinsurance Agreements which Assay had concluded with RSA. Claims were settled out of Assay's bank account in Guernsey. Certain activities that required less in the way of technical expertise (e.g. marketing, claims handling and other administrative tasks) were subcontracted to third parties. Thus, for example, Assay subcontracted to Safestore in its capacity as an intermediary and RSA as claims handler.

191. Therefore, the central administration of an insurance company, in Mr Cordara's submission, was concerned with maintaining the pool of premiums and having the human, technical and financial resources to settle legitimate claims. In relation to assay, all these matters occurred only in Guernsey.

192. Assay, Mr Cordara argued, did not have any place of business in the UK for the purposes of sections 9 (3)(b)-(c) and 9 (4) VATA. Assay's place of business was, he said, in Guernsey, within the meaning of section 9(3)(a) VATA. It was artificial to attribute to Safestore, as HMRC argued, approximately 80 places of business to Assay as multiple fixed establishments. Assay had no human or technical resources at Safestore's facilities. Thus, it was in Guernsey that Safestore supplied intermediary services to Assay and where Assay received those supplies.

193. Furthermore, Mr Cordara argued that for a "fixed" establishment to exist, there had to be a dimension of objectivity and continuity. Therefore, the interaction between Safestore's staff (who were solely under the control and direction of Safestore) could not constitute a fixed establishment of Assay.

194. Mr Cordara noted that HMRC had relied on three authorities, namely Case C-290/95 *DFDS A/S* ("*DFDS*"), Case C-542/03 *RAL (Channel Islands) Ltd* and Case C-168/84 *Berkholz*.

195. Any argument based on *DFDS* was, said Mr Cordara, misconceived. All the basic elements required to render each of Safestore's approximately 80 UK storage sites a local fixed establishment for a Guernsey-based insurer (Assay) were missing. First, there was not the parent-subsidiary relationship between Assay (putative parent) and Safestore (putative subsidiary), which would be needed to draw Assay onshore (see *per* Briggs J in *MBNA* [2006] STC 2089 at [20]-[22]) - both were owned by a higher company in the group – namely Safestore Acquisitions Limited. Mr Cordara submitted that, according to *DFDS*, ownership/control of one by the other is the critical foundation of any attempt to interpret a supply by A Co in country M to B Co in country X, as rendering A Co potentially an 'auxiliary organ' of B Co, and so drawing B Co onto the shores of M. In order to be a mere auxiliary organ, A Co (here, Safestore) must be lacking any economic independence, and even then it would not automatically be treated as a fixed establishment of B Co. (see *DFDS* [1997] STC 384 at Ct [24]-[29] & A-G at [20]-[24]). Safestore was not 'wholly owned' by Assay (or *vice versa*) during the Relevant Period – neither was one the *alter ego* of the other.

196. Assay maintained no staff or any other indicia of establishment at any of Safestore's depots in the UK. It did not control the actions of Safestore's staff. The

mere fact that Safestore acted as an agent for Assay did not, in Mr Cordara's submission, render it a non-independent entity.

197. Mr Cordara contended that *RAL (Channel Islands) Ltd* and *Berkholz* could be easily distinguished from the present case. In those cases, the supply was entirely delivered *via* a machine (gaming machines), with issues centering on the fiscal conclusions to be drawn from the location of the machine. No parallel existed in the present case.

Submissions for HMRC on the Item 4 issue

198. Ms McCarthy submitted that if Safestore was supplying insurance intermediary services it supplied those services to a fixed establishment of Assay in the UK. Further, if Assay was making supplies of insurance to customers, it was making those supplies from fixed establishments in the UK as well under the principles established in *DFDS*. It was at those UK fixed establishments that Assay received intermediary services from Safestore. Accordingly, as Safestore made exempt supplies to a person in the UK (section 7A (2) (a) VATA), the supplies did not fall within Article 3 of the 1999 Order and, therefore, Safestore was not entitled to recover related input tax under section 26 VATA.

199. Ms McCarthy referred to the decision of the CJEU authorities which explained the concept of a fixed establishment for the purposes of place of supply. A branch was a fixed establishment if it was of "a certain minimum size and both the human and technical resources necessary for the provision of the services are permanently present." (see *Berkholz* at [17]). Those must be sufficient "to supply the services on an independent basis" (Case C-190/95 *ARO Lease* [1997] STC 1272 ("***ARO Lease***") at [16]) and "to enable it to receive and use the services supplied to it for its own needs." (Case C-605/12 *Welmory* [2015] STC 515 ("***Welmory***") at [59]). However, "A fixed installation used … for preparatory or auxiliary activities, such as recruitment of staff or purchase of the technical means needed for carrying out the undertaking's tasks, does not constitute a fixed establishment." (Case C-73/06 *Planzer* [2008] STC 1113 ("***Planzer***") at [54]).

200. Safestore's UK depot staff had full discretion to insure a customer. Customers who entered into a contract for insurance were put on risk immediately, provided that they sign the necessary declarations and pay the required premium to Safestore (all of which occurred in the UK stores). The material records and paperwork were retained in the UK where payment was also made and received. Most of the activity took place in the UK and there was minimal activity in Guernsey.

201. Assay entered into its insurance transactions where and when its policy cover was provided to its customers i.e. in the UK. Ms McCarthy submitted that Assay did not actively carry out any part of the insurance transactions. Instead, Safestore marketed and sold the cover, participated in the setting of the premiums, collected the premiums distributed insurance documentation, handled complaints and dealt with any changes, cancellations and renewals. Claims were handled by RSA. Assay had no technical or human resources to do any of those things in Guernsey.

202. Ms McCarthy analysed the components of an insurance transaction as follows:

(1) Meeting capital requirements, demonstrating sufficient capital to support risks; obtaining regulatory authority – Guernsey (largely delegated to Marsh);

(2) Underwriting – assessing risk and setting premium – UK (Safestore);

(3) Marketing and selling – gathering customer information, calculating the premium payable by the customer, collecting premiums, handling complaints – UK (Safestore);

(4) Claims handling – i.e. the performance of the insurance contract – notification to Safestore in the first instance (UK) and then referred to RSA (UK).

203. On this basis, Miss McCarthy submitted that Assay's involvement was minimal.

204. Ms McCarthy accepted that Assay had no human or technical resources of its own in the Safestore depots. Nonetheless in *DFDS* the CJEU confirmed that one company could form a fixed establishment of another company if they were closely bound by contractual and commercial ties. Safestore was not an independent agent but a tied agent, operating under close commercial ties with Assay. There was no formal agreement between them. The two entities operated together to earn income from insurance and in this role Safestore was, according to Ms McCarthy, an auxiliary organ of Assay in the provision of insurance.

205. In contrast to Mr Cordara's submissions, Miss McCarthy submitted that no parent-subsidiary relationship was required. All that was needed was stable access to the human and technical resources needed to make the supplies in question. Because all the customer-facing work was done by Safestore, Assay must be instructing/controlling Safestore in respect of the actions of Safestore's staff in concluding contracts and conveying relevant information to customers. Moreover, control was necessarily exercised by the ultimate parent company, Safestore Holdings Plc. Mr Hodsden was a director of Safestore, Assay and Safestore Holdings so that strategy within the Safestore group could be aligned.

206. Accordingly, Miss McCarthy submitted that the principle set out in *DFDS* applied so that the human and technical resources supplied by Safestore, without which Assay could not operate, formed a fixed establishment of Assay from which it made supplies to the insured customers in the UK. Ms McCarthy referred to Mr Beavers' evidence summarised at [66]-[69] above.

207. In response to Mr Cordara's submission that it would be nonsensical for Assay to have a fixed establishment at each of Safestore's 80 depots, as McCarthy observed that the legislation was not concerned with identifying actual premises. Instead it was concerned with identifying the Member State in which the supply was made and, consequently, the tax authorities who had responsibility for the VAT in relation to those supplies.

208. Ms McCarthy accepted that "high-level" activity was carried on in Guernsey either by Assay or by Marsh. However, none of Assay's day-to-day activity was carried out in Guernsey.

Discussion of the Item 4 issue

209. In my view, on the hypothesis that Safestore was providing Item 4 services as an insurance intermediary, Assay did not have a fixed establishment in the UK through which it received those services within the meaning of Article 44 PVD and Articles 10 and 11 of the Implementing Regulation.

210. Ms McCarthy placed considerable reliance upon the decision of the CJEU in *DFDS* in order to demonstrate that Safestore constituted a fixed establishment of Assay in the UK on the basis that Safestore was an "auxiliary organ" of Assay. In that case, a Danish tour operator entered into an agency agreement with its English subsidiary. The subsidiary (which employed about a hundred members of staff) was appointed the sales agent and United Kingdom booking office for passenger services of the parent. The parent was assessed to VAT in the UK on package tours marketed by the subsidiary on its behalf on the ground that, by virtue of the agency agreement, the parent had established its business or had a fixed establishment in the United Kingdom from which the services were provided, within the meaning of UK legislation which implemented the special scheme for tour operators and travel agents provided for in Article 26a of EC Council Directive 77/388. The parent appealed contending that the services were taxable at the place where it had established its business, namely Denmark which exempted such supplies. The High Court referred to the CJEU for a preliminary ruling a question to determine the circumstances in which the services which a tour operator established in one member state supplied to travellers through the intermediary of a company operating as an agent in another member state were liable to VAT in the latter state under Article 26 of the Sixth Directive.

211.The CJEU noted the similarity between Article 26 and what was (then) Article 9 of the Sixth Directive:

> "16. As regards the place of taxation, art 26(2) provides that the services of a travel agent are to be taxable in the member state in which the travel agent has established his business or has a fixed establishment from which the travel agent has provided the services.
>
> 17. As has been pointed out by all the participants in these proceedings, that provision uses the same concepts of place where a supplier's business is established and fixed establishment as those used in art 9(1) of the Sixth Directive to define the two main fiscal points of reference which may be applied to supplies of services in general. It is therefore appropriate to refer to the rules arising from that definition of place of supply."

212. The core of the CJEU's reasoning, however, is found in the following passages:

> "24. In those circumstances, it must be concluded that, where services have been provided by a tour operator from a fixed establishment which that operator has in a member state other than that in which he has established his business, such supply of services to the customer is taxable in the state where that fixed establishment is located.
>
> 25. In order to determine whether, in circumstances such as those of this case, the travel agent actually has such an establishment in the member state in question, it is necessary first to ascertain whether or

not the company operating in that state on behalf of the agent is independent from him.

26. The fact, mentioned by the tribunal, that the premises of the English subsidiary, which has its own legal personality, belong to it and not to the Danish company is not sufficient in itself to establish that the subsidiary is in fact independent from the Danish company. On the contrary, information in the order for reference, *in particular the fact that DFDS's subsidiary is wholly owned by it and as to the various contractual obligations imposed on the subsidiary by its parent*[18], shows that the company established in the United Kingdom merely acts as an auxiliary organ of its parent.

Second, it is necessary to verify whether, in accordance with the case law cited in para 20 of this judgment, the establishment in question is of the requisite minimum size in terms of necessary human and technical resources.

28. It is apparent from the facts set out in the order for reference, particularly as regards the number of employees of the company established in the United Kingdom and the actual terms under which it provides services to customers, that that company does display the features of a fixed establishment within the meaning of the above-mentioned provisions.

29. The answer to be given to the national court must therefore be that art 26(2) of the Sixth Directive is to be interpreted as meaning that, where a tour operator established in one member state provides services to travellers through the intermediary of a company operating as an agent in another member state, VAT is payable on those services in the latter state if that company, which acts as a mere auxiliary organ of the tour operator, has the human and technical resources characteristic of a fixed establishment." (Emphasis added)

213. From [26], it is clear that the CJEU considered it important that the subsidiary was wholly owned by DFDS.

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[18] These were summarised in paragraph 3. of the Advocate General's opinion as follows: "In that document [the services agreement between the Danish parent and the UK company] the English company was appointed general sales and port agent for the Danish company (or, more precisely, for the passenger division of that company, Scandinavian Seaways) and it was entrusted with making reservations—throughout the United Kingdom and Ireland for the passenger services operated by the Danish company (cl 1). The agreement places other obligations on the subsidiary. The tasks required of it include the following: providing assistance to the parent company in supervising and controlling tours (cl 2); making available qualified sales and operational personnel (cl 3.1); consulting the parent company regarding the employment of management staff (cl 3.2); obtaining the approval of the parent company before concluding any major contracts and for the appointment of advertising and public relations agents (cl 3.3). The English company is also required to promote its commercial image in accordance with the parent company's strategies and within the financial constraints specified by it (cl 3.5). The English company must (cl 3.8) deal with passengers' complaints and is subject to other obligations in accordance with the company's policy, including refraining from taking any legal proceedings without the parent company's prior approval. Clause 3.9 of the agency agreement provides, finally, that the English company is not authorised to work for other passenger transport companies without the parent company's prior consent. In return for such activities (cl 4.1.1) the parent company pays a gross commission of 19% on all fares sold by the English company."

214. In *MBNA Europe Bank Ltd v Revenue and Customs Commissioners* [2006] STC 2089. A bank ("MBNA") entered into a securitisation scheme. MBNA assigned credit card receivables to specially established trust ("CCSE") in order to raise capital through a special purpose vehicle. HMRC argued that MBNA was an "auxiliary organ" of CCSE. Briggs J dismissed the argument as follows:

> "[119] It was common ground that the combined effect of art 9 of the Sixth Directive and art 9 of the Value Added Tax (Place of Supply of Services) Order 1992, SI 1992/3121 is that any 'supply' of the receivables effected by the assignments was made to CCSE's fixed establishment in Jersey, and therefore made there, unless it can be shown that both (1) CCSE had another fixed establishment in the UK and (2) the receivables were 'used' there.
>
> [120] [Counsel for HMRC] sought to prove both those propositions, based upon the fact (which is also common ground) that MBNA as servicer for CCSE continued to administer the day-to-day collection of the receivables and management of its end of the continuing contractual relationship with its credit card holding customers from offices in Chester. This fact he said served two purposes. First, it showed that CCSE had a fixed establishment in Chester, by a loose analogy with *Customs and Excise Comrs v DFDS A/S* (Case C-260/95) [1997] STC 384, [1997] 1 WLR 1037. Second, it showed that the receivables were used in Chester, where they were serviced.
>
> [121] In my judgment, neither of those points are made good by the factual base upon which they are advanced. Whereas the outsourcing of the servicing function might be capable of constituting an activity of the outsourcer *if (as in DFDS) the outsourcer controls the person to whom the function has been outsourced, in this case the control was exercised, if at all, the other way round. MBNA controlled CCSE. Therefore MBNA's Chester office was not a fixed establishment of CCSE*." (Emphasis added)

215. Ms McCarthy argued that in the present case, there was common control of Assay and Safestore by Safestore Holdings Plc. Moreover, Safestore was not, she submitted, an independent agent – it was a "tied" agent. Ms McCarthy submitted that Safestore did not have any effective independence from Assay in the conduct of its insurance business. Ms McCarthy drew attention to the fact that, during the Relevant Period, the finance director of Safestore Holdings Plc sat on the board of Assay.

216. I reject Ms McCarthy's submissions. There was no evidence before me to lead me to conclude that Assay controlled Safestore. Nor was there any evidence to indicate that Safestore Holdings Plc controlled Assay other than the sense that any parent company controls a subsidiary. There was not, as far as I could gather, a commonality of directors, as Ms McCarthy suggested. At all material times, Assay had a majority of Guernsey independent directors. There was nothing to suggest that either Safestore or Safestore Holdings Plc had somehow usurped board-level control of Assay or that the directors of Assay had in some way abdicated responsibility for the conduct of Assay's affairs in breach of their fiduciary duties. By the same token, there was no evidence that conduct of the affairs by the board of directors of Safestore had been usurped by Assay or that Safestore's directors had abdicated their responsibilities.

217. In short, there is no reason to suppose that the relationship between Assay and Safestore – companies controlled by a common ultimate parent but neither of which had control of each other – was the same as a relationship in *DFDS* between the Danish parent company and the English subsidiary. It is true that companies with the same group will often act in accordance with the wishes of the parent company, but that is not to say that, in so doing, each subsidiary company becomes either an "auxiliary organ" of the common parent or of one another. That view would have far-reaching consequences and, in my judgment, cannot of itself be correct.

218. I accept that there was an informal, unwritten agreement between Safestore and Assay concerning the insurance services Safestore would provide to Assay. The terms of that agreement are best understood by reference to the services which Safestore actually provided to Assay, and which are summarised earlier in this decision. Even in the absence of the relevant degree of control, which I have just discussed, none of those services brings the present case close to the facts in *DFDS*. Proceeding on the hypothesis that Safestore was providing Item 4 intermediary services (which assumes that I am wrong on my primary conclusion on the Item 1 issue), it seems to me that the functions that Safestore performed were consistent with its role as an insurance intermediary.

219. Therefore, I would have concluded the Item 4 issue in favour of Safestore.

Conclusion

220. I therefore conclude the preliminary point on the Item 1 issue and the time-bar issue in favour of HMRC. Had it been necessary to do so, I would have concluded the Item 4 issue in favour of Safestore.

221. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 26 APRIL 2019