

Trader Media Group Ltd

VAT Exemption for Comparator Websites?

We wrote a short article, *Insurancewide.com: a Flawed Decision*, at the end of last year (*The Tax Journal*, Issue 912, 3 December 2007) calling into question the Tribunal decision in *Insurancewide.com Services Ltd 20394*. The case was about the VAT exemption for introductory and comparator websites through which insurance could be purchased. It is, therefore, with some satisfaction that we can report that a different Tribunal in a case quite similar to *Insurancewide.com* has come to the opposite conclusion.

Without expressly dissenting from the earlier decision, the Tribunal in *Trader Media Group Ltd 20671* indicated that it thought in *Insurancewide.com* the Tribunal had paid too much attention to the definition of 'agent' and not enough attention to what *Insurancewide* actually did.

If HMRC's win in the *Insurancewide.com* case was correct, its case against *Trader Media* looked even stronger. *Insurancewide.com* was set up as an insurance comparator website by persons with a background in insurance. The *Trader Media* case was about the online version of *Auto Trader*, which made its money from selling advertising space and was now diversifying into online broking. *Insurancewide* dealt directly with insurers, whereas *Trader Media* dealt only with an insurance intermediary (BISL). Nevertheless, although HMRC won the case against *Insurancewide*, it lost the case against *Trader Media*.

Our view was that the decision in *Insurancewide.com* was wrong, likely to be appealed and would probably lead to challenges to similar providers in the market place. It is no surprise that the mainstay of HMRC's attack on *Trader Media* was the *Insurancewide.com* decision. Indeed, in the case HMRC's counsel was reported as saying that *Insurancewide.com* 'resolved' the 'issues regarding selling insurance through Internet websites and insurance intermediaries'. The Tribunal in *Trader Media* did not agree.

Nick Warner, VAT Director, and **Barbara Mosedale**, Senior Manager, PKF (UK) LLP, look at *Trader Media Group Ltd 20671* and discuss the VAT implications for comparator websites

The facts

The facts of the *Trader Media* case were similar – but not identical – to those in *Insurancewide.com*. A 'prospect' (someone browsing *Auto Trader* online) would be invited to go to the Insurance Centre section of the website. This page contained general information on car insurance and an invitation to press the 'get a quote' button. Clicking this would take the prospect to a website operated by BISL (Budget Insurance Services Ltd). BISL was the insurance intermediary, which traded also as *comparethemarket.com*, with which *Trader Media* worked jointly in the operation of the Insurance Centre. BISL paid *Trader Media* a fixed

site was able to take the information direct from the completed questionnaire on *Insurancewide*'s site.

Who is an agent?

Both cases consider what an insurance agent is. EU law, which has the advantage of brevity if not necessarily of clarity, provides exemption for the 'related services performed by insurance brokers and insurance agents'. In *Insurancewide.com* the Tribunal concluded that the taxpayer was not an agent: in *Trader Media* the Tribunal came to the opposite conclusion. So which ruling is right?

On the definition of an agent, to repeat what we said in our earlier

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commission for each policy sold from the page. On this co-branded page the prospect could complete a questionnaire and then be given quotes for car insurance from which to choose. If the prospect went ahead and purchased, the sale would be immediate if payment was made online. Documents would follow in the post.

In *Insurancewide.com* the facts were slightly different. In the latest phase of the taxpayer's software, a prospect was given quotes on *Insurancewide*'s site but if the prospect decided to choose one the prospect had to click through to the insurer's website to complete the transaction. No further forms had to be completed, as the insurer's

article, the leading ECJ authorities in this area, *Taksatorringen C-8/01* and *Arthur Andersen C-472/03*, looked at the Insurance Intermediaries Directive 77/92/EC. The first case concluded that under the Insurance Intermediaries Directive an agent had to have the power to bind. The second case suggested that the power to bind was not, in itself, sufficient to make the taxpayer an insurance agent. In both these cases the ECJ seemed to read the Directive as requiring an agent to have power to bind the insurer to a contract of insurance. Neither *Trader Media* nor *Insurancewide* could do this. However, for the reasons given in our earlier article, this seems to be a misreading



Nick Warner

of Directive 77/92.

Is this important? Directive 77/92 was superseded by Directive 2002/92, which does not refer to agents, but to insurance intermediaries, and does not require such intermediaries to have a power to bind. More importantly, the ECJ expressly declined to rule that the definition in Directive 77/92 applied to the Sixth VAT Directive (see *Arthur Andersen* at paragraph 32 and *Taksatorringen* at paragraph 45).

The Tribunal in *Insurancewide.com* thought it did matter. It ruled that the taxpayer was not an agent for five reasons, the main one being that it did not have power to bind any insurer to an insurance contract. This goes much further than required by the ECJ decision in *Arthur Andersen* (where the taxpayer was said not to be an agent despite having a power to bind).

In *Trader Media* – a better reading of the law and authorities we think – the Tribunal said that an agent merely has to be part of the chain that brings prospect and insurer together (see page 29 of the ruling). The agent does not have to have a power to bind the insurer, nor a contract with the prospect. *Trader Media* introduced prospects to BISL with a view to the issue of insurance to the prospect from BISL's panel of insurers. This was enough. It is consistent with *Arthur Andersen*, where the ECJ ruled that introduction was essential for a person to be an insurance agent.

Two asides occur to us here. Firstly, neither case was concerned with whether the taxpayer was a broker, because it was assumed, from the definition in Directive 77/92, that a broker must have complete freedom of choice as to which insurance



Barbara Mosedale

company he recommends to the prospect. In both *Insurancewide.com* and *Trader Media* the taxpayer could only quote from a panel of insurers, albeit a large panel.

The second aside is that BISL's VAT-exempt status did not appear to be under challenge from HMRC. Could *Insurancewide's* position be more comparable to that of BISL than *Trader Media*? On reflection, probably not: *Insurancewide* did not have power to issue an insurance policy nor to collect premiums. BISL probably did do both these things and, unlike *Insurancewide*, it was regulated by the FSA.

Facilitation

If a power to bind is not essential to be an insurance agent, but providing an introduction is, how is the line drawn between mere advertising and introduction? The *Trader Media* case seems to bring a new term into the debate: facilitation. This word already appears in HMRC's guidance, which in *Notice 701/36/02* at paragraph 10.5 says 'pure facilitation' is not exempt. The Tribunal in *Trader Media* made a distinction between pure facilitation and 'active facilitation', stating that only the latter is exempt as introductory services. It said that pure facilitation was merely advertising.

HMRC said the *Auto Trader* online site only provided advertising of insurance products. The Tribunal disagreed, stating that *Trader Media* was effectively in partnership with BISL with a view to selling as much insurance as possible – both companies devoted resources to creating the best website to sell insurance. It was not a case of hosting a third party's website. As the Tribunal said, *Trader Media*

provided product development and product endorsement, which were not typically provided by advertisers. In the Tribunal's view this amounted to active facilitation of the sale of insurance contracts by insurance companies to prospects introduced via their website.

Of course the taxpayer in *Insurancewide.com* also provided this kind of active facilitation but it did the taxpayer no good in court, as the Tribunal had decided the taxpayer could not be an agent without a power to bind. It will be interesting to see if the distinction between active and pure facilitation will be taken up on appeal.

What of EU law?

Would the ECJ have agreed with the decision in the *Trader Media* case? It looks as if the Tribunal decided *Trader Media* under UK law (see pages 25 and 29). In particular, it seems that the Tribunal thought that UK law was more generous to the taxpayer as, under VATA 1994, Sch 9, Group 2, Note (1), an insurance intermediary includes at (a) 'someone who brings together prospect and insurer'. On the other hand, Directive 77/92, Article 2(1)(a) appears to require in addition the introducer to carry out work preparatory to the conclusion of contracts (which arguably *Trader Media* did not do). However, as noted above, the ECJ has only considered and not actually applied the definitions from the Insurance Intermediaries Directive to the Sixth VAT Directive and so this distinction may be more apparent than real.

No mention of a requirement of preparatory work is made in the *Arthur Andersen* case, which does describe, on the other hand, as essential aspects of an insurance agent 'the finding of prospects and their introduction to the insurer'. This *Trader Media* certainly did, so we conclude that *Trader Media* does appear to be consistent with the decision in *Arthur Andersen*.

What about HMRC guidance?

HMRC's response to *Insurancewide.com* was to issue *HMRC Brief 69/07*, stating that the case confirmed its current published policy. We don't expect HMRC to follow its loss in *Trader Media* promptly (or at all) with another *Brief*. But, as we said in our earlier article, if *Insurancewide.com* is right, HMRC's guidance in *Notice 701/36/02* 9.1-9.2 is surely wrong, as it does not require an insurance agent to have the power to bind.

As we said before, HMRC seems to have concerns over applying exemptions to electronically provided services. Although its guidance accepts that the exemption is not limited to old-fashioned agents and

brokers and that online services can qualify, in practice HMRC seems to expect the website to provide an old-fashioned service of negotiation and conclusion of a contract, whereas in a commoditised market, price and add-ons are the driving forces. *Brief 69/07* indicates that HMRC's reading of the guidance is narrower than our interpretation and certainly narrower than the Tribunal's reading in *Trader Media*. In fact, in a number of places the Tribunal seems almost to cite the guidance against HMRC. An example can be found at page 37 of the ruling. Here the Tribunal refers to HMRC guidance in *Notice 701/36/02* at paragraph 8.3.1, which says the following three factors indicate exempt introductory services and not standard rated advertising:

- paid per policy;
- targeting own customer base; and
- endorsing the product.

Trader Media was doing all of these. So was Insurancewide, although there is a distinction here in that Insurancewide's customers were already, if you will, 'insurance-focused' by virtue of being on its website, whilst Trader Media's probably originated from a 'motor car' focus, before moving to the Insurance Centre. If you are in a business' website, is this similar to being in the shop? Are you a customer or a potential customer, and is there any meaningful distinction? Yet HMRC still took the cases arguing that the commission was standard-rated – so its practice does not appear to agree with its own published guidance.

What should taxpayers do now?

Taxpayers don't have to apply the decision in *Insurancewide.com*. It is only a Tribunal decision and one we understand that is under appeal, with the High Court due to hear the case early next year. Another Tribunal has come to the opposite conclusion on the same facts. And until it is withdrawn, the taxpayer ought to be able to rely on HMRC's guidance – although it seems HMRC's interpretation of its guidance is narrow.

The future?

Whatever conclusion the High Court comes to in *Insurancewide.com* (and *Trader Media* if HMRC appeals) may be beside the point shortly, as the new exemption for finance and insurance is due to come into force by 1 January 2010. The Commission's draft Directive (Com/2007/747) and draft Regulation (COM/2007/746) were published last November.

Will comparator websites be exempt under the new law? From the recitals, the future looks positive. They mention the

need to update the definition for modern insurance and finance transactions. They say that 'exemptions should be linked to the nature of the services concerned, on the basis of objective economic criteria, and not to the persons supplying them'.

Closer reading of the draft legislation, however, suggests that HMRC may have had considerable input into the drafting. Gone is the old brevity of the Sixth VAT Directive definitions, to be replaced with a much longer clause in the new Directive and even longer text in the Regulation. The exclusions read as if specifically drafted by the UK to overturn any decisions HMRC doesn't happen to like (such as *C&V (Advice Line) Services Ltd* 17310 and *Teletech UK Ltd* 18080). Indeed, contrary to the recitals, a quick read of the draft almost suggests that care was taken to ensure traditional brokers and agents retain exemption, while specifically excluding from exemption the more modern commoditised selling of insurance.

This is achieved by removing 'related services performed by insurance brokers and insurance intermediaries' and replacing it with the concept of 'intermediation in insurance and reinsurance transactions'.

but will never include:

- standardised services provided by call centres;
- brand hosting, web hosting, other web services or hosting services; or
- advertising and other information services.

Clearly, HMRC will consider the commission earned by Insurancewide or Trader Media to be standard-rated under this new definition. Nevertheless, it may find that view mistaken. Their service should be a 'distinct act of mediation' as it falls within Article 10(1)(b) as an activity which may result in the creation of an insurance contract. It is a standardised service but that should not matter as Article 10(2) does not apply to services under Article 10(1)(a)-(c). Further, the exclusions in Article 11 should not apply as it is not 'web hosting'. Both Insurancewide and Trader Media did a great deal more than advertising or merely providing a platform for someone else's website. They were very actively involved in creating a website through which customers could easily buy insurance.

So all may not be lost for web-based insurance 'facilitators' – depending on the exact form of the final version of the new

We think it wrong in principle for HMRC to seek to tax insurance comparator websites

There are two parts to the definition of 'intermediation'. In the Directive it is defined as 'the supply of services rendered to and remunerated by a contractual party as a *distinct act of mediation* in relation to the insurance or financial transactions ...'.

Then the Regulation (Article 10(1)) provides a definition of 'a distinct act of mediation' as always including a service which:

- includes a power to bind
- will possibly result in the creation of an insurance contract; or
- involves the provision of specialised insurance advice.

The definition (Article 10(2)) allows the possibility that a distinct act of mediation could be something else but excludes (other than in the above three situations) a service which is 'standardised'.

Then the Regulation at Article 11 provides another limb to the definition of 'intermediation'. This says that it will always include:

- negotiation of the product; and
- stock and mortgage brokering

Directive and Regulation. It is an important issue that the industry needs to keep to the forefront of its discussions with HM Treasury and HMRC.

Online comparator websites are part of the future for the insurance industry, complementing, and sometimes displacing, traditional agents and brokers – the new legislation was intended to recognise this. So like the commission earned by traditional agents and brokers, the fees from such websites should be similarly free of VAT. We think it wrong in principle for HMRC to seek to tax insurance comparator websites: if insurance is to be exempt from VAT it should not include hidden costs. We hope that is the conclusion the High Court will come to in *Insurancewide.com* on the interpretation of existing law, and be supported by the ECJ in any future case on the new law.

Nick Warner may be contacted at nick.warner@uk.pkf.com; Barbara Mosedale may be contacted at barbara.mosedale@uk.pkf.com.