

(1) WHA Ltd (2) Viscount Reinsurance Company Ltd v C & E Comrs [2004] EWCA Civ 559

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In the case of a scheme designed to minimise overall liability to VAT related to motor breakdown insurance:

(1) Where a UK-based claims handler, contracted to handle motor insurance claims on behalf of an insurer, instructed a garage to make repairs to a policyholder's vehicle and directly paid the garage's invoice, the carrying out of the repairs was the supply of a service by the garage to the trader, notwithstanding that the service may also have been provided to the owner of the vehicle—the claims handler was entitled to reclaim as input tax the VAT charged by the garage on the supply of the repair service

(2) When the claims handler charged the insurer for the repair costs that it had paid to the garage and an administration fee for all the other activities that it had performed when handling the claim, it received payment in respect of two separate supplies of services—the footing of the bill for the repair works was a separate supply of services of a different character from the claims handling services supplied and was not exempt

(3) Where that taxable supply was made to an insurer that belonged outside the EC, the insurer was entitled to recover the VAT charged by the claims handler.

The Court of Appeal has allowed, in part, the Commissioners' appeal against a decision of the Chancery Division ([2003] STC 648). The Court of Appeal differed from Lloyd J in concluding, in a unanimous judgment, that what was supplied by WHA to an insurer was not a single supply of services exempt under the insurance exemption, but rather two separate supplies of services. WHA had made a taxable supply to the insurer of the footing of the bill for the repair works, a bill that WHA itself had paid directly to the garage. However, the VAT on that taxable supply could be recovered by the insurer to which it was made, even though the insurer belonged outside the EC.

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The appeal concerned the effectiveness of a scheme which was designed to minimise the overall liability to VAT in the context of the handling and meeting of claims made under motor breakdown insurance.

The insurance policies were offered by an English company which reinsured its liabilities with a Gibraltar-based company, Crystal ("C") which, in turn, retroceded most of the reinsurance to another Gibraltar-based company, Viscount ("V"). V entered into a contract with WHA for the latter to handle claims made by policyholders and pay repair bills. WHA would instruct a garage to carry out necessary repairs and a VAT invoice for the cost of the repairs would be rendered by the garage to WHA. WHA paid that bill itself. WHA would then invoice Viscount for an amount made up of the cost of the repair plus a handling fee of £17.60.

The following issues concerning the tax treatment of the arrangement arose:

1. Whether the VAT, charged on the repairs by the garage, was VAT on a supply made to WHA so that WHA was entitled to reclaim the VAT as input tax.
2. Whether or not the amount invoiced by WHA to V, including both the cost of the repairs and the claims handling fee, was consideration for a single, exempt supply, so that WHA did not have to account for output tax to the Commissioners.
3. If the answer to (2) was that part or all of the amount invoiced to V was in respect of a taxable supply, whether V, though based outside the EC, was entitled to claim VAT charged by WHA?

It should be noted that even if the proper analysis were to be that there was a single exempt supply by WHA to V, WHA would nonetheless be entitled to deduct VAT incurred on the services supplied by repairers, so long as the first issue was decided in its favour, because those supplies were used to make a supply to V which, it will be recalled, was outside the EC.

On the first issue, the Commissioners contended that the service provided by the repairer could not be supplied to more than one person and that it was supplied to the policyholder, not to WHA, since the works were carried out to the policyholder's vehicle. In finding for WHA on this first issue, the Court of Appeal agreed with Lloyd J that the starting point for determining to whom taxable supplies were made was the contractual position, though it was not conclusive. Each invoice by a garage was in respect of work that had been carried out pursuant to an instruction by WHA. The contractual relationship was between WHA and the garage, and WHA was the person liable to make payment to the garage. By ensuring that the garage carried out the work, WHA fulfilled its obligations to V and thus became entitled to the handling fee. The Court was unimpressed with both an argument that there was no supply to WHA because it had no ultimate right to select and little control over the garage, and, unsurprisingly, with the argument that there was no supply because the contract was unilateral and did not oblige the garage to carry out repairs once authorised by WHA. In the circumstances, the carrying out of the repairs was a supply of services to WHA, and WHA was entitled to treat the VAT on the supply as input tax.

On the second issue, WHA's primary contention was that the total amount that it invoiced to V in respect of each repaired vehicle, comprising both the cost of the repairs and the handling fee, was to be treated as consideration for a single supply. That supply was an exempt supply of insurance services. Alternatively, WHA argued that, if the two elements of the amount invoiced were to be regarded as being in respect of separate supplies, the supply of the service of meeting the cost of the repairs was an exempt supply pursuant to the finance exemption in Article 13B(d)(3) of the Sixth Directive, implemented by VATA 1994 Sch 9 Group 5 Item 1. The Commissioners primary contention was that the amounts invoiced to Viscount reflected two supplies: a further taxable supply of the repairs to the car, this time by WHA to V, and an exempt supply of the claims handling service.

Applying *Card Protection Plan v C & E Comrs (No 2)* [2002] 1 AC 202, the Court of Appeal agreed with the Commissioners that the amounts invoiced by WHA to V were in respect of two separate supplies of services. The service of footing the bill for the repair works was different in character from the other services performed by WHA, which were claims handling services, and were taxable. The claims handling services were administrative and organisational services typical of the services of agents. Footing the bill for the repairs was the performance of a more fundamental obligation and, having itself paid the repairer's invoice, WHA could be seen as supplying the benefit of the repairer's labour and materials to V. The multiple supply analysis was also supported by the terms of the contract between WHA and V, dividing payment into two legally and commercially separate components, and the factual position with respect to payments. The separate supply of the service of footing the bill for repairs did not fall within the insurance intermediary exemption in VATA 1994 Sch 9 Group 2 Item 4. Nor did it fall within the finance exemption in Sch 9 Group 5 Item 1. This was because the service involved WHA effectively delivering the benefit of the repairs to V to enable V to fulfil its own contractual obligations. Moreover, the payment to the repairer was made by WHA on its own account to fulfil its own obligations to the repairer. The service of footing the bill for repairs was therefore taxable.

The Commissioners had sought to raise a new argument on this issue; that WHA was not entitled to exempt its services because it was not an "insurance broker or insurance agent" within the meaning of Article 13B(a), relying on the decision of the ECJ in *Taksatorringen v Skatterministeriat* (Case C-8/01) (20 November 2003). The Court of Appeal refused permission as the point had not been raised below and could have called for further evidence.

As the second issue was decided in favour of the Commissioners, it was necessary for the Court to consider the third issue. V sought to rely on regulation 186 of the VAT Regulations 1995, in support of its entitlement to reclaim the VAT which the Court had held it was liable to bear on supplies made to it by WHA. Regulation 186 permits recovery on supplies made to a person in the United Kingdom if that VAT would be input tax of his were he a taxable person in the United Kingdom.

It is noteworthy that regulation 186 only applies to input tax incurred on supplies that are made in the United Kingdom. The taxable supply made by WHA to V, the footing of the repair costs, could not be an insurance-related service within Article 9.2(e) of the Sixth Directive, on the basis of the conclusions on the second issue. Accordingly, the ordinary place of supply rules applied and the supply was made in the UK as WHA was an English company carrying on business in the UK.

The Court of Appeal noted, that regulation 186 had to be read with regulation 190(1)(a). The consequence, applying VATA 1994 s 25(2) and s 26(1)–(2), was that V was only able to recover tax if supplies which it made to C outside the UK were supplies specified within s 26(2)(c). The Commissioners contended that they were not because V was required to be a person in the UK making supplies to a customer outside the UK. The Court rejected the contention, concluding that there was nothing in Article 3 of the VAT (Input Tax) (Specified Supplies) Order 1999, which specifies supplies for inclusion in VATA 1994 s 26(2)(c) including re-insurance services such as that supplied by V to C, or s 26, or regulation 190(1)(a) which justified the result contended for by the Commissioners. Regulation 186 effectively required the Court to assume that V was a taxable person in the UK for the purposes of s 26. Section 26 had no requirement dictating that a person actually had to be trading in the UK.

Thus the Court held that V was entitled to recover the VAT that it had incurred on supplies made to it by WHA.

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