

# UK Tax Authority Employs Kvaerner Case Rules to Pursue IPT Payments

DSG International Insurance Services v HM Revenue and Customs (2007) IPT Decision 00013

A recent legal case involving a subsidiary of DSG International plc – the electrical retailing group formerly known as Dixons – has shown that the UK’s national tax authority, HM Revenue & Customs, is beginning to pursue payment of Insurance Premium Tax (“IPT”) by calling on the precedent of the Kvaerner case. Greg Sinfield, partner at law firm Lovells, says that the DSG case has potential implications for many international organisations.

## Background

The case concerned DSG International Insurance Services (“DSG”), an Isle of Man company. DSG provided insurance to another Isle of Man company, Appliance Serviceplan Limited (“Appliance”), which in turn sold service contracts to Dixons customers covering their electrical goods. The insurance cover protected Appliance against claims being made by Dixons customers in the UK. Appliance sold the insurance through its agent Coverplan in the UK. The administration of the service contracts and repairs were carried out by another business, Distribution, as subcontractor.

The DSG case is the first time that the UK’s VAT and Duties Tribunal, or indeed any UK court, has had to consider and apply the principles laid down by the European Court of Justice in *Kvaerner plc v Staatssecretaris van Financiën* (Case C-191/99) [2001] STC 1007 to determine the meaning of the Establishment of the policyholder.

## The Opposing Arguments

HM Revenue & Customs (“HMRC”) decided that the risk insured by DSG under the contract of insurance was located in the UK and was therefore subject to IPT. It followed that DSG was liable to register and account for IPT from the time it first received premiums. However, DSG appealed, arguing that the risk insured was located in the Isle of Man, rather than the UK, and that the contract of insurance was therefore not subject to IPT.

The question of where the risk was located turned on:

- Whether Appliance had a single Establishment (in the Isle of Man) or more (in the Isle of Man and UK); and
- if Appliance had more than one Establishment, whether the policy related to the Establishment in the Isle of Man or UK.

DSG argued that the risk under the contract of insurance was located in the Isle of Man because that was where Appliance had its Establishment. On the date that the contract of insurance was entered into (6 May 1997) Appliance had only one Establishment, which was in the Isle of Man. The contracts between Appliance and Coverplan and Distribution did not commence until 11 May 1997. DSG accepted that, after 11 May, Coverplan was an agent of Appliance and therefore an Establishment of Appliance in the UK. Distribution was a sub-contractor not an agent of Appliance and so the fact that Distribution had an Establishment in the United Kingdom was not relevant. DSG further argued that, even if Appliance had an Establishment in the UK, the Establishment to which the policy related was Appliance’s head office in the Isle of Man.

HMRC argued that the insurance contract, the sales agreement and the administration and repair agreement were all dated on the same day and all came into effect on the same day. They all had interlocking obligations and it was not possible therefore to consider the insurance contract in isolation. HMRC argued that Appliance had Establishments in the UK and it was therefore necessary to identify the place where the activity which created the risk took place. It argued that it was the repair contracts that gave rise to the risk, and that the relevant activity was therefore the entering into of these contracts. As this was done by Coverplan, the contract of insurance related to the Establishment of Coverplan, and this was in the United Kingdom.

## Kvaerner as Precedent

The Tribunal considered the relevant legislation and how it had been applied by the ECJ in *Kvaerner*. The legislation is contained in Article 2(d) of the European Union’s Second Non-life Directive (Council Directive 88/357/EEC), which is implemented into UK law now by the Financial Services and

Markets Act 2000 (Law applicable to Contracts of Insurance) Regulations 2001. There are specific tests for determining the Location of Risk in relation to buildings, vehicles and travel. In relation to general risks, the Directive provided that the risk was situated in the member state where the policyholder had his habitual residence; alternatively, if the policyholder was a legal person, it provided that the risk was situated in the member state where the policyholder's 'Establishment' was situated – 'Establishment' was defined by the Directive as the head office, agency or branch of an undertaking. The UK law is consistent with the Directive, save that the UK legislation applies the test at the date the contract is entered into.

## Tribunal Decision

The Tribunal held that the date when the contract was entered into was the same for all three agreements. The Tribunal concluded that, at time of entering into contract, Coverplan, as agent, was an Establishment of Appliance. The Tribunal held that Distribution, as subcontractor rather than agent, was not an Establishment of Appliance.

The Tribunal considered Kvaerner and held it to be authoritative on the principle for determining the Location of Risk: in considering the Establishment of the policyholder to which the insurance contract relates, it is necessary to ascertain the location of the activities the risks of which are covered by the policy; if that location is the Establishment, then that is where the risk is located.

The Tribunal concluded that the activity covered by DSG's policy was the obligation of Appliance to pay Distribution for repairs. The activities of Coverplan and Distribution were not covered by policy. The Tribunal held that the only location of Appliance's obligation to pay for repairs was the Isle of Man and, accordingly, that was where the risk was located and therefore no UK IPT was chargeable.

## Significance of Decision

The significance of this case is not that the taxpayer won, nor the fact that the Tribunal embraced and followed Kvaerner (it had no choice but to do so). The most significant thing about the DSG case is that HMRC have at last shown that they are prepared to use Kvaerner arguments to try to bring overseas insurers into the UK IPT net. In the DSG case, HMRC's catch got away; however, the next time HMRC might be more successful.

A further point that might become significant is that the location of financial risk insurance was accepted as being the principal Establishment of the insured. As many types of commercial insurance can be structured as cover against a financial loss (e.g. reduction in balance sheet value), rather than direct insurance of the underlying assets, the DSG case might show the way to place location of risk wherever it is most desirable from a fiscal or regulatory point of view.

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