



TC01562

Appeal number: TC/2010/5337

VAT – lead case - photobook supplies by appellant to website operators and retailers – whether supplies of goods or services – whether supplies of goods were of “books” or “booklets” – VATA, Sch 8, Group 3, Item 1

FIRST-TIER TRIBUNAL

TAX

HARRIER LLC

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ROGER BERNER
MICHAEL TEMPLEMAN (Member)**

Sitting in public at 45 Bedford Square, London WC1 on 24 – 25 October 2011

Leslie Allen, Solicitor, DLA Piper UK LLP, for the Appellant

Owain Thomas, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Harrier LLC (“Harrier”) appeals against a decision of HMRC, in a letter dated 19 May 2010, to refuse a voluntary disclosure for an alleged amount of overpaid output VAT in respect of certain supplies made by Harrier to, amongst others, Hewlett Packard and Tesco. The decision relates to the VAT periods 06/06 to 12/09, and the amount of alleged overpaid VAT is £545,800.66.
2. The dispute concerns the correct treatment of the supplies Harrier makes in relation to what are termed “photobooks”. Put briefly, Harrier says that its supplies are of goods, and that those goods are books or booklets and as such the supplies of them are zero-rated within Item 1, Group 3, Schedule 8 of the Value Added Tax Act 1994 (“VATA”). HMRC, on the other hand, say that, firstly the photobooks in question are not books or booklets for the purposes of the legislation, and secondly that Harrier’s supplies in this respect are not properly to be viewed as supplies of goods (the photobooks themselves) but are instead supplies of photographic services which do not fall within the zero-rating provision.
3. This appeal has been directed to be a lead case under rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, and cases which have common or related issues of fact and law have been stayed behind this appeal. The common or related issues have been directed as follows:
- (1) Whether the supply of “photobooks” is a supply of goods, and if so whether such supply is a supply falling within the definition of “books, booklets, pamphlets and leaflets” and therefore zero-rated by virtue of Item 1, Group 3, Schedule 8 VATA.
 - (2) Alternatively, whether the supply of “photobooks” constitutes a supply of services, in particular photographic services.
 - (3) In so far as it is determined that a supply of “photobooks” is in principle capable of falling within either (1) or (2) above, what are the characteristics of the supply that determine whether the supply falls within (1) and (2)?
4. Harrier was represented by Leslie Allen of DLA Piper. Owain Thomas appeared for HMRC.

The facts

5. We had witness statements for Harrier from Mr Graham Clark, the finance director and company secretary of the company since March 2004, and from Mr Andrew Bascombe, the IT director of Harrier since January 2001. For HMRC, we had a witness statement from Mr Michael Hill, a higher officer of HMRC, who was engaged in a review of the voluntary disclosure with which we are concerned. Each of these witnesses gave oral evidence and was subject to cross-examination. We also had a bundle of documents.
6. From the evidence before us we find the following material facts.

7. Harrier is a limited liability company registered in the State of Maryland, USA. It is registered under the Companies Acts as a foreign company.

8. Harrier's business is currently that of a high-tech digital printing, photo-processing and personalised gift manufacturing company. It was originally solely focussed on its photo-processing business, under the well-known trading style of "Truprint". This included processing analogue film sent to the company in a freepost envelope, with the developed printed photographs and negatives being received by the customer through the post a few days later.

9. With the onset of digital photography the world of analogue film has all but gone. It has given way to internet driven, digital photo processing. Harrier's business has changed from a "direct to consumer mail-order photo processing" business to a wholesale "business to business" digital photo-processing operation, and expanding into digital printing and personalised gift manufacturing.

10. The photobooks business is largely web-based. The Truprint brand is now more commonly associated with a website that is operated by Hewlett Packard under licence from Harrier. This creates what is described as a co-brand relationship between Harrier and Hewlett Packard in relation to Truprint. Hewlett Packard also has its own website in the UK called "Snapfish"; Harrier is one of the suppliers dealing with the fulfilment of orders for that website.

11. In addition, Harrier produces photobooks for customers who create their products by uploading images to kiosks in high street stores, such as Tesco, Sainsbury and Asda.

12. The process of ordering a photobook from the Truprint website involves the customer in the following (abbreviated) steps:

(1) Following registration, the customer will navigate to the "Photo Books" page. This exhorts the customer to "Get creative with personalised photobooks! Create custom books to celebrate birthdays, special occasions, new babies, or even archive favourite family recipes." The different products (which we shall consider later) are described.

(2) The customer can then navigate to a new page for the type of photobook chosen. The customer chooses photos from albums that are uploaded by the customer, and other images. The images chosen by the customer may be of anything: they could be photographs from a digital camera uploaded to the website, text, drawings, sketches, handwritten text and printed material, which are scanned and uploaded to the website.

(3) Those photos and other images are then used to populate the particular photobook format that has been selected. The customer chooses the layout for each page and the relevant image is then dropped into a template or slot. The layout is shown, with the position of the photo or text, and with space for additional text to be uploaded or added by the customer. Although Harrier's own processes can accommodate any size of printed book, there is a limit of 120 -150

pages that can be ordered through the websites. There are also restrictions on page numbers for individual products.

5 (4) Once the customer has populated the pages with all the desired material, a choice is made of the colour of the cover, and the quantity of the order. The price is calculated by the site and an order can then be placed and confirmed.

13. Harrier has no control over these websites, including Truprint, nor any technological involvement with them. Its only involvement is on the marketing side.

10 14. Once the customer has placed the order, Harrier is sent an electronic data file for each page of the photobook that the customer has created, accompanied by instructions about exactly what product to make and the delivery address in a further electronic file. Harrier imports the individual page data files into pdf files (multi page computer data files, designed for printing). Once the pdf file has been created, it is submitted to the printer. The printed sheets are then guillotined and bound as required, in the same manner as book manufacturing. All photobooks are printed on
15 Indigo presses. The process is very much a physical process with little involvement of computer data processing. The process does not involve any photographic developing.

20 15. Once the photobook or photobooks have been printed Harrier delivers the product either to the customer directly or to the retail store through whose site the order was made. All content uploaded by the customer is personal to that customer, and the customer has to confirm that it owns the copyright or has permission to use the content. Harrier cannot sell the photobooks it produces on the open market. None of the photobooks has an ISBN number; nor is any copyright information included in the print.

25 16. The relationship between Harrier and Hewlett Packard in respect of photobooks is governed by the terms of a Co-Branded Photo Center Agreement effective from 1 August 2008, which refers back to a Cooperation Agreement dated 14 April 2005, as subsequently amended. The Cooperation Agreement includes the grant of various licences to Hewlett Packard, and for the provision by Harrier of what are described as
30 “photofinishing services”, of which Hewlett Packard is the retailer. These “photofinishing services” are defined as meaning both the photofinishing services and products, including gifts and customer support as more particularly described in two exhibits to the agreement.

35 17. In the first of those exhibits the “photofinishing services” are described in very generic terms. Harrier’s obligations are to provide (a) photofinishing services capable of extracting images in digital form from links, interfaces and other connections from the Hewlett Packard products and sites; (b) a digital photo-processing lab to fulfil all orders for photofinishing services”; (c) resources to continually increase the quality of the photofinishing services (including colour rendition) as mutually agreed; and (d)
40 access to order data required for Hewlett Packard customer support.

18. The second exhibit consists of price schedules. This covers a wide range of items, including prints, CDs and Flip Books and Photo cards, as well as other gift

products. Film developing, printing and scanning is included in the price schedule. These price schedules were superseded by the 2008 Agreement. An exhibit to that agreement contained financial provisions for numerous items ranging from prints, postcards, notebooks and stickers to products such as mugs, placemats and T-shirts. Included in the pricing schedule are the various categories of memory book, a term synonymous with photobook.

19. Harrier's relationship with Tesco is governed by a Services Agreement. We were shown the agreement which commenced on 1 December 2010, outside the period to which this appeal relates. That agreement recites that Tesco wishes to appoint Harrier as its provider of personalised gifts and photographic prints both in stores and online, and that Harrier wishes to be appointed to provide services to Tesco.

20. In this agreement both "Products" and "Services" are defined by reference to separate schedules. The services are described separately as "Online service" and "In-store service". As regards the Online service, Harrier undertakes to supply and produce the relevant Products ordered by customers online. Harrier also agrees to provide support services, including promotional support, and to deliver the Products to the customer's home or to the relevant Tesco store within a specified period. The Products are listed in a separate schedule, and again range from regular prints, through photo gifts, to memory books and various descriptions of goods.

21. We were provided with a number of examples of the photobooks produced by Harrier which are concerned in this appeal. The following is our own description taken from our own observations of the items exhibited:

(1) *3" x 2" Mini memory book*. This consists of a bound series of single photo images on both sides of the leaves within it. The leaves have the character and appearance of thin glossy paper, and not of photographic prints. Its cover and back is a little thicker than the leaves within. The cover has a photo image and a title, but there is otherwise no text.

(2) *6" x 4" Flipbook*. This comprises single photo images on glossy paper bound together by spiral binding. Each leaf has a single image on one side only and has the character and appearance of an individual photographic print. Some of the images are accompanied by short textual descriptions on the same page as the relevant image. The back cover is the same quality as the leaves, but there is a front cover of translucent plastic material. (In the example we had there were two leaves of this translucent plastic at the front. We think it likely that the second sheet should have been at the back.)

(3) *7" x 5" Flipbook*. Apart from the example we had having only one sheet of translucent plastic on the front cover, and also having a translucent sheet on the back, this was identical in description to the 6" x 4" Flipbook (save only for its size).

(4) *7" x 5" Memory book ("Everyday memory book")*. This consists of a series of leaves bound in a medium soft card cover, of greater thickness than the leaves within. The front cover has a window through which the photo image on the first inside leaf can be seen. The images in this case are on both sides of the

inside leaves, and range from single to multiple images per page. Images other than photos are included, and there are text descriptions on many of the pages. One page consists entirely of text written by the customer.

5 (5) *8" x 8" Photobook*. This has a hard cover front and back with a downloaded photo and a title on the front cover. A downloaded photo also appears on the back cover. Inside is a blank non-glossy sheet front and rear. The leaves are glossy and include photo images, between one and four per page, and text, on both sides of the paper. Some leaves have photo images only, some have only text, and others a mixture of the two.

10 (6) *11" x 8" Classic memory book*. This has a hard linen cover front and back, and a dust jacket with a full page photo image on the front, including title, and a small image on the back. There is an inside front page which has the title printed on it. A blank back page – save only for a logo, barcode and product description – is also included. The inner leaves comprise a mixture of photo images, some full-page, some not, and text, on both sides of the page.

15 (7) *11" x 8" Classic memory book*. This is effectively the same product as that described in (6), except that it does not have a dust jacket and its front cover has a window through which the first leaf – a title page can be observed. In this example the content is principally photo images, with text confined to headings and short descriptions.

20 (8) *11" x 8" Picture cover book*. This product is similar to (6) and (7), but its front cover is a laminated full-page photo image, and its back cover is also laminated, with a smaller photo image and some text. Although its photographic pages are similar to those in (7), this example was distinguished by having 7 pages wholly devoted to text at the beginning.

25 (9) *Picture me book*. This is a small bound volume comprising leaves of laminated card bound together. The cover and the inner leaves are of identical material. Most of the content appears to have been pre-populated with pictures. The added content from the customer is limited to pictures of a child's or children's faces that are superimposed into the spaces in the pictures provided.

The law

22. Where the supply of goods or services is zero-rated, no VAT is charged on the supply, but it is otherwise treated as a taxable supply (s 30 VATA), so entitling the supplier to recovery of attributable input tax.

35 23. The authority for a Member State to apply zero-rating derives from Article 110 of Council Directive of 28 November 2006 ("the Principal VAT Directive") (2006/112/EC):

40 "Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates.

The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must be adopted for clearly defined social reasons and for the benefit of the final consumer.”

5 24. The zero-rating description at issue in this appeal is that in Item 1, Group 3, Sch 8 VATA. Group 3 is short, and the applicable version can be reproduced in full:

“ **Group 3 — Books, etc**

Item No

- 1 Books, booklets, brochures, pamphlets and leaflets.
- 10 2 Newspapers, journals and periodicals.
- 3 Children's picture books and painting books.
- 4 Music (printed, duplicated or manuscript).
- 5 Maps, charts and topographical plans.
- 15 6 Covers, cases and other articles supplied with items 1 to 5 and not separately accounted for.

[Note: Items 1 to 6—

- (a) do not include plans or drawings for industrial, architectural, engineering, commercial or similar purposes; but
- 20 (b) include the supply of the services described in paragraph 1(1) of Schedule 4 in respect of goods comprised in the items.”

25. Section 30 (2A) VATA treats certain services associated with the production of goods as zero-rated, if the supply of the goods would itself be zero-rated. It provides:

- 25 “(2A) A supply by a person of services which consist of applying a treatment or process to another person's goods is zero-rated by virtue of this subsection if by doing so he produces goods, and either—
- (a) those goods are of a description for the time being specified in Schedule 8; or
- (b) a supply by him of those goods to the person to whom he supplies the services would be of a description so specified.”

30 **Discussion**

26. As we outlined at the beginning of this decision, there are essentially two issues between the parties. Taking them in the order in which we intend to address them they are, firstly, whether, as Harrier says, the supplies it makes in respect of photobooks are single supplies of goods, or, as HMRC argue, are supplies of services, 35 namely photographic services, which are not zero-rated, and secondly, if the supplies are supplies of goods, whether they are supplies of books or booklets, so as to be zero-rated.

Supplies of goods or services

27. Mr Thomas submitted that the analysis of the contracts entered into by Harrier shows that the supplies it makes are supplies of services. The supplies made by Harrier are not to the final consumer, but to the retailer, or website operator. Those
5 supplies, he argued, were described as services in the relevant agreements. Mr Thomas argued that Harrier is not supplying books to its customer. It is supplying a digital photograph printing and processing service. The content is provided by the ultimate consumer, via the website of Harrier's customer. Harrier has no influence over the content. Accordingly, Mr Thomas reasoned, Harrier's role is the provision of
10 a service to its customer.

28. We do not consider that an analysis of the contracts in question supports Mr Thomas' arguments. The references in the agreement with Hewlett Packard to "photofinishing services" were not confined, according to the definition of that term, to services. The defined term encompassed the provision of products as well as
15 services. The price schedule covers pricing for both goods and services, each of which is included in this global agreement. Accordingly, the nature of the supply is not determined by the label the parties to the agreement have chosen to use to describe the obligations in relation to the supply of both goods and services.

29. In our view, on this analysis, the supplies of photobooks by Harrier to Hewlett
20 Packard are supplies of goods. We accept, however, that the obligations of Harrier in respect of those supplies include elements of service provision, as set out in the description of "photofinishing services" in the first of the exhibits to the Cooperation Agreement to which we referred above.

30. A similar analysis applies to the Tesco Services Agreement. That agreement also
25 covers both services and goods. The services and goods are covered by separate schedules, with memory books firmly in the schedule related to goods. As regards the online service, Harrier agrees to provide certain services related to the supply of the goods. We find that in this respect also, Harrier's supply of the photobooks is one of goods, with some related services.

30 31. As we have found that there are supplies of both goods and services, we have to consider whether the transaction should be regarded as a single composite supply, notwithstanding the inclusion within it of components that are identifiable as separate supplies, and, depending on the outcome of that analysis, whether the resultant supply is a supply of goods or services.

35 32. In this context it suffices for us to refer only to one authority, that of the ECJ in *Levob Verzekeringen BV and another v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766. That case concerned a supply of a customised version of standard software. The contract broke the price down into a sum payable for the basic software and the cost of customisation. The issue was whether there had been
40 separate supplies of the basic software and the customisation services or a single supply. The ECJ held that there was a single supply which, in the light of the degree and importance of the customisation process, had to be classified as a supply of services.

33. Referring to the earlier case of *Card Protection Plan Ltd v Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270, the Court affirmed that a transaction which comprises a single supply from an economic point of view should not be artificially split, and that there is a single supply in particular where one or
5 more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded as ancillary supplies which share the tax treatment of the principal supply. The Court also held that the same is true where one or two elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply which it would be artificial to split.

10 34. Mr Thomas argued that even Harrier established that it supplies goods to its customers (which we have found to be the case) the digital photographic printing service provided was the dominant element such that the particular format of printing is a means of better enjoying that service, and is an enhancement on the simple
15 objective characteristics of the supplies that Harrier makes, the principal supply is clearly that of the photobooks themselves, a supply of goods. The services that surround that supply, including the making available of the production process, are ancillary to the supply of the goods. Those supplies are so closely linked that, viewed objectively, they form a single, indivisible supply, and that is, in this case, a supply of
20 goods. This is not a case, unlike *Levob*, where an existing product was customised to such an extent that the customisation service dominated. Here what Harrier does is provide a product, which it produces to a customer specification. That supply of the product itself is the predominant supply, and the composite supply by Harrier is accordingly a supply of goods.

25 35. We are not deflected from this finding by what was decided by a VAT tribunal in *Risbey's Photography Limited, Digital Albums Limited v Revenue and Customs Commissioners* (22 August 2008; no 20783). In the case of Digital Albums the supply position was analogous to that in this case. As the tribunal found, Digital
30 Albums designed a wedding book to the order of a particular photographer by assembling the photographs supplied with the use of digital photographic processes. The layout of the wedding book and the photographs included were approved by the customer, and the customer retained the copyright in the photographs.

35 36. The tribunal concluded on this basis that on balance the supplies made by Digital Services were a single supply of photographic services. However, the tribunal provided no reasoning for this finding. We have reached a different conclusion in this case, for the reasons we have given.

37. We should note that we were in the course of argument referred to paras 7.1 and 7.3 of Public Notice 701/10 (*Zero-rating of books etc*). Whilst we place no reliance on that Notice, we note that in para 7.1 it states that where a service is of the
40 production of goods it will be zero-rated where the service has produced new goods and those goods are themselves zero-rated. Paragraph 7.3 expands on that to explain the view of HMRC as to when new goods are produced. For example, zero-rating applies to preparatory and post-production work (other than alterations) that are performed in conjunction with the supply of zero-rated goods. With respect, we

consider this to be a correct analysis. It follows, we consider, from the fact that the supply of the zero-rated goods in those circumstances is the dominant supply, so that any ancillary supply of services in connection with it is likewise zero-rated.

5 38. In view of our decision on the nature of the supply, we do not need to consider the application of s 30(2A) VATA.

Are the photobooks “books or booklets”?

39. In light of our conclusion on the nature of the supplies made by Harrier, the real issue is whether the photobooks supplied by it are “books or booklets” within Item 1, Group 3, Sch 8 VATA.

10 40. Mr Thomas referred us to Article 110 of the Principal VAT Directive, and to the derogation it provides for the zero-rating regime. In this context he took us to the judgment of the ECJ in *Talacre Beach Caravan Sales Ltd v Customs and Excise Commissioners* (Case C-251/05) [2006] STC 1671. He submitted that the provisions of the Directive laying down exceptions to the general principle that VAT was to be
15 levied on all goods and services supplied for a consideration by a taxable person were to be interpreted strictly. He argued that the zero-rating regime must be interpreted so as to comply with the provisions and conditions setting out the scope of the derogation. He referred in particular to paras 17 and 18 of the judgment:

20 “17. It should be noted from the outset that, in authorising member states to apply exemptions with refund of the tax paid, art 28(2) of the Sixth Directive lays down a derogation to art 12(3) thereof, which governs the standard rate of VAT.

25 18. It is apparent, secondly, from the wording of art 28(2)(a) of the Sixth Directive that the application of exemptions with refund of the tax paid is subject to a number of conditions. Those exemptions must have been in force on 1 January 1991. In addition, they must be in accordance with Community law and satisfy the conditions stated in the last indent of art 17 of the Second Council Directive 67/228 of 11 April 1967 on the harmonisation of legislation of member states concerning turnover taxes—structure and procedures for application of
30 the common system of value added tax (JO L71 14.4.67 p 1303 (S Edn 1967 p 16)), now repealed, which provided that exemptions with refund of the tax paid could only be established for clearly defined social reasons and for the benefit of the final consumer.”

35 41. *Talacre Beach* was concerned with a claim by the taxpayer that certain items that were at the relevant date for the derogation (1 January 1991) specifically excluded from zero-rating, should nonetheless be zero-rated as part of a single supply the principal supply of which was itself properly zero-rated. The ECJ held that the provisions of the Directive (at that time the Sixth Directive), construed restrictively,
40 could not cover items that were, as at 1 January 1991, excluded from the zero-rating by the national legislature. The fact that the transaction in question could be characterised as a single supply did not affect that conclusion. The case law on the taxation of single supplies (including *Card Protection Plan* and *Levob*) does not

preclude some elements of a supply from being taxed separately where that complies with the conditions of the derogation (*Talacre Beach*, judgment, paras 23 and 24).

42. In *Talacre Beach* the taxpayer was relying on the terms of the principles, those regarding single supplies, of the Sixth Directive. In this case we are not concerned with the construction of the terms of what is now the Principal VAT Directive, but with the meaning of the domestic legislation which is permitted under the terms of the derogation. It is right that exemptions (including, in this context, zero-rating) in the Directive fall to be construed strictly (but not, it should be observed, restrictively; see *Commissioners for Customs and Excise v Axa UK plc* (Case C-175/09) [2010] STC 2825, at [25]), but what we are concerned with here is the construction of the UK domestic provision, which will fall to be construed in accordance with ordinary principles of statutory construction. Nor is this case concerned with any items that are specifically excluded from the zero-rating treatment.

43. If, applying a strict construction of the derogation provisions of the Directive, we were to conclude that the UK domestic legislation went too far, that would not assist HMRC. It is a well-established principle that, whereas an affected person can rely upon the Directive if the domestic legislation does not properly implement it, such reliance is not available to the Member State (see, for example, *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* [1986] QB 401, judgment para 48). If therefore the zero-rating provisions go further than the derogation would allow, the taxpayer is entitled to rely on the domestic provisions.

44. Nor can the domestic provisions be construed so as to reflect only the circumstances applicable at the relevant date of 1 January 1991. Mr Thomas referred in argument to Article 110 being a “standstill” provision. It is that, in the sense that the domestic law had to provide for the zero-rating at 1 January 1991, and no new zero-rating could later be introduced. But a provision which provides for zero-rating for a category of goods cannot itself stand still, any more than the commercial world can (or will) do so. Technological advances in printing mean that products which in 1991 would not have been conceived of are now a reality, and fall to be classified for VAT purposes. If the construction of the domestic provisions encompasses those new products, they will fall to be zero-rated.

45. Both parties agreed that the leading domestic authority on the approach to the meaning of “book” or “booklet” for the purpose of Item 1, Group 3, Sch 8 VATA is *Customs and Excise Commissioners v Colour Offset Limited* [1995] STC 85 (QB) in the High Court. The issue in that case was whether diaries and address books came within the meaning of “books” or “booklets”. It was held that they did not.

46. In his judgment May J considered the meaning of these terms for these purposes and said (at pp 89 – 90):

40 “In my judgment, the English word 'book', although it always refers to an object whose necessary minimum characteristics are that it has a significant number of leaves, now usually of paper, held together front and back by covers usually more substantial than the leaves, is a word with a variety of possible more particular meanings. For any particular

5 use of the word, its particular meaning will be derived from the
circumstances in which it is used. For instance, if a barrister in the
clerks' room of his chambers points to a blank counsel's notebook and
says to his clerk 'please hand me that book', he would not expect the
10 answer 'that is not a book'. (Mr Tallon surprisingly submitted that a
counsel's notebook might not be a book because it was perforated—a
point which he also made in relation to a cheque book.) On the other
hand if the same counsel, having a substantial collection of law reports
and legal textbooks in his room, asked the same clerk to count all the
15 books in his room, he would not expect the clerk to include blank
counsel's notebooks in the count. If a testator uses the word 'books', the
word obviously has to be understood in the context of the objects
which the testator in fact has to bequeath.

15 In the first instance, the only circumstance here is that the words
'books' and 'booklets' are used in the Schedule to a statute. They are
accordingly relevantly devoid of context. Devoid of context, in my
judgment the ordinary meaning of the word 'book' is limited to objects
having the minimum characteristics of a book which are to be read or
20 looked at. (The same applies to 'booklet', which I think is a thin book
perhaps with a rather flimsy cover. I am not sure about the *Shorter
Oxford English Dictionary* definition of booklet as 'a tiny book', since I
would not myself call a tiny book with many pages a booklet.) If you
ask of a particular object 'is this a book?', you immediately provide a
context, which the words in the statute lack. You will get an answer
25 which is affected by the context. If you ask instead what I regard as the
right question here, ie 'what is the ordinary meaning of the word
"book"?', you should get an answer which accords with the ordinary
meaning to which I have referred. As Mr Richards submitted (although
he accepted that these diaries and address books might be books or
30 booklets within one possible meaning of those words), people
generally think of books as things to be read rather than as blank pages
bound together. A filled-in diary of historical or literary interest may
be a book because it is retained to be read or looked at. But a blank
diary is not a book in the ordinary sense of the word. Likewise a blank
35 address book is not in the ordinary sense a book and it does not
become one simply because its name includes the word 'book'. A
cheque book is plainly not a book nor, in my view, is it a booklet in the
ordinary sense of that word. The fact that in some contexts you would
say of a blank diary that it is a book within one possible meaning of
40 that word does not mean that it is a book within the ordinary meaning
of the word.

There is in my view no reason for reading the words 'books' and
'booklets' in item 1 of Group 3 of Sch 5 to the 1983 Act in a more
extended meaning than their ordinary meanings.”

45 47. The words “book” and “booklet” are accordingly to be given their ordinary
meaning, devoid of context. The ordinary meaning of “book” refers to an object that
has the necessary minimum characteristics of having a significant number of leaves,
usually of paper, held together by front and back covers usually more substantial than
the leaves. The word “booklet” refers to a thin book, perhaps with a more flimsy
50 cover, having a less significant number of leaves. But in each case those minimum

characteristics are not enough. To be a book or booklet the item in question must be one that is to be read or looked at. A diary or address book could not qualify on this basis, because it consisted of blank pages. But books and booklets are not confined to literary works to be read; works comprised solely of images to be looked at can equally be books or booklets.

48. We were referred to a number of tribunal decisions. In *Ormesby St Michael PCC v Customs and Excise Commissioners* (24 August 2001; no 17375), the VAT & Duties tribunal followed *Colour Offset* and held, albeit reluctantly, that a church memorial book that was a leather-bound book of A4 size containing 150 blank pages did not constitute a book. *Colour Offset* was also followed in *Tudor Print & Design Limited* (2 October 2002; no 17848), a case concerning a diary which included a substantial amount of text relating to sporting events.

49. In *Global Games International Limited v Customs and Excise Commissioners* [2005] V&DR 246, the VAT Tribunal held that a “Full Licence Pass the Test Theory Test Card Game” which consisted of 54 cards, bound together at their left-hand edges by transparent paper, was not a book. The cards were to be used as a game, and the tribunal found that the game could only effectively be played by removing the cards from the spine. The tribunal considered the physical characteristics, the function and the content. The fact that the game was viewed as a book by booksellers and buyers was irrelevant.

50. The tribunal in *Global Games* expressed the view that “the nature of a book, be it a work of fact or fiction, is that it has a beginning and an end and, in between the beginning and the end, one is taken on a journey between various points, absorbing information in so doing.” We respectfully disagree with this view. It assumes that a book must contain a narrative, which is not the case, as illustrated by the reference made by May J to the object being “looked at” as well as read. This is thus too restrictive a construction.

51. That said, we respectfully agree with the tribunal’s conclusion in *Global Games*. As the tribunal pointed out, even if the cards were simply read, without separating them to play the game, that would not be reading a book; it would be reading a series of cards that just happen to be bound together. But that is not, in our view, because there is no indication of a systematic approach that is to be adopted; it is because in substance the item was a mere collection of cards bound together. It did not have the inherent quality of a book.

52. In *Risbey’s* the VAT tribunal decided that wedding books did not constitute books. The wedding books consisted of images with some accompanying text. After referring to *Colour Offset*, and another (unpublished) tribunal decision, *Donald Arthur Draper v Customs and Excise Commissioners* (27 April 1981), the tribunal said (at paras 24 and 25):

“24. The Appellants’ wedding book shared many of the physical characteristics of a book, in that it has leaves of paper bound together within a hard cover. We would, however, agree with the Respondents’ observation that the pages were thicker than what would normally be

5 found in a book. We consider that the wedding book was a pictorial record of a wedding which was of interest only to the persons immediately connected with the event. The text in the wedding book did not convey information and had no value in its own right, which could be deleted if the bride and groom did not want it. The Appellants marketed the wedding book on their websites as a wedding album. The fact that the pictorial record of the wedding book was permanent and could not be altered after publication did not, in our view, alter the fundamental character of the book as a wedding album. The Appellants' wedding book was a consequence of advances in photographic technology which increased the range of physical manifestations of wedding albums. We find the term wedding album should not be restricted to a traditional form which allowed the removal and insertion of photographs. Such a restriction would be contrary to the Community principle of equal treatment which ensures that similar goods in competition with each other, are not treated differently for the purpose of value added tax. We conclude that the Appellant's wedding book was to all intents and purposes a wedding album.

20 25. We find that the Appellants' wedding book did not come within the ordinary meaning of a book. The wedding book in essence was a collection of photographs which was of interest only to the persons immediately connected with the wedding. The text included in the book was optional, and if incorporated did not convey information and had no value in its own right. The functional characteristics of the wedding book as a wedding album outweighed its physical similarities to a book. We hold that the Appellants' supplies of a wedding book were standard rated for VAT purposes.”

30 53. With respect, we are unable to follow the tribunal’s approach in *Risbey’s*. In our view it does not properly follow the approach adopted in *Colour Offset*, namely to consider the ordinary meaning of “book” as one having the minimum characteristics of a book which is to be read or looked at. The basis of the tribunal’s decision was that the fundamental character of the item in question was as a wedding album, essentially because it was in essence a collection of photographs which was of interest only to the persons immediately connected to the wedding. It seems to us that this analysis falls into the error of attaching a label to an item which does not feature in any specific exempting or zero-rating provision, and concluding that such an item must therefore be standard-rated (see *Bophuthatswana National Commercial Corporation Ltd v Customs and Excise Commissioners* [1993] STC 702, per Nolan LJ at p 708). The diaries and address books in issue in *Colour Offset* did not fall outside the description of books or booklets because those labels could be attached to them; they failed to satisfy the test of being a book or booklet because, on account of the blank pages within them, they did not fall within that description, according to the ordinary meaning. We do not ourselves consider that it follows from the application of the description “wedding album” to something that has the characteristics of a book that the item is not a book for VAT purposes. A wedding album will in many cases not have the characteristics of a book, but if it does, we can see no reason why it should not be a book for these purposes.

54. In particular, we do not share the tribunal's views on the weight to be attached to matters such as the limited interest in the contents, the tribunal's assessment that the text did not convey information and had no value in its own right, or the label attached to the book in its marketing. Nor do we consider that the tribunal was right to attempt to construe the label "wedding album" by reference to the principle of equal treatment. The question was not whether the item was a wedding album, but whether it was a book.

55. Mr Thomas argued that the express inclusion of children's picture books serves to demonstrate that such items would otherwise be excluded. We agree, but we concur with Mr Allen that this is not because picture books would be otherwise excluded, but because children's picture books may not satisfy the minimum characteristics of a book at all, by reason of being made of cloth or plastic or some other child-friendly material. Mr Thomas also argued that the express exclusion of plans or drawings for industrial, architectural, engineering, commercial or similar purposes also serves to exclude charts which are of benefit only to particular individuals. But here the express exclusion is in our view mainly because such items could otherwise fall within Item 5, although the fact that they are excluded from Item 1 as well suggests that otherwise such items could, in particular circumstances, be within the ordinary meaning of "book", so that the fact of limited benefit or interest cannot prevent an item being within that ordinary meaning.

56. We do not accept therefore Mr Thomas' submission that the personal nature of the photobooks is such as to distinguish them from books on any ordinary appreciation of that word. Nor do we accept that the ordinary meaning of books is confined to those published for public consumption and public benefit. Mr Thomas argued that the same public interest justifies the inclusion of the other items in Group 3, Sch 8, and that the printing of family or other photographs in a series of different formats to function as an album does not obviously engage any particular social benefit which is the underlying basis for the zero-rating regime. We do not agree. Group 3 could have imposed a social benefit condition, but it did not; instead it applies where an item objectively falls within any of the stated classes. We do not think it can be said that all of the items necessarily engage any social benefit. Some, like newspapers, journals and periodicals, are perhaps more likely to do so than others, such as brochures and pamphlets. There is in our view, therefore, no social benefit gloss on the ordinary meaning of books or booklets for this purpose.

57. In our view, and following *Colour Offset*, we must have regard to the ordinary meanings of the words books and booklets, devoid of context. The test is an objective one, and must be determined by reference to all the physical characteristics of the product in question. That includes both the external characteristics and the internal characteristics.

58. As far as external characteristics are concerned, the essential minimum characteristics are that the object must have leaves (a significant number for a book, less so for a booklet), and those leaves must be held together front and back by covers that are usually more substantial than the leaves. In our view the nature of the binding is also an essential minimum characteristic. We consider that a book or booklet must

have a spine, which will be narrower in the case of a booklet than it is with a book. For this reason, in our view, a product that is simply spiral bound does not have the necessary minimum characteristics.

59. It is clear that a book (or booklet) must have content. Something that has the physical characteristics of a book, but no content, such as a memo book with blank pages, a diary with printing confined to the days of the week and ancillary information, or an address book with printed headings and ancillary material, is not a book (or booklet) in the ordinary sense of the word.

60. The nature of the content, provided it is something that can be read or looked at, is not, however, material. A book can have content that is exclusively text, or exclusively material such as photographic images or diagrams or drawings, or any mixture of that content. If not excluded by Note (a) of Group 3, such products can fall within Item 1 as books or booklets. It is true, as Mr Thomas submitted, that a VAT tribunal in *Interleisure Club Limited* (25 March 1992; no 7458) decided that case by reference to the contents of a leisure guide published and sold by the taxpayers, but the basis of that decision was not that the guide was not a “booklet” (it clearly was), but that the supply was of a service, by means of the vouchers contained within the booklet. The contents did not prevent the guide from being a booklet, but they had the effect that the supply was of a service, and not of goods.

61. On the other hand, although the nature of the content is not material, it is necessary to consider the internal physical characteristics. The inner leaves of what would otherwise have the external appearance of a book (or booklet) must also, in substance, have the appearance and quality of the pages of a book. This will not, in our view, be the case if those inner leaves merely have the appearance and quality of a series of individual photographs bound together (whatever may be the nature or appearance of the binding itself).

62. We have reached this conclusion without reference to a Dutch case, in the District Court of Haarlem, under the name *X BV* (Procedure numbers ANW 08/6319 and AWB 08/6320, judgment delivered 18 December 2009) to which we were referred by Mr Allen. The facts of that case are similar to those in this appeal, and the issue was whether the reduced VAT rate of 6% under Dutch law for supplies of books applied.

63. The District Court held that the printed matters supplied were books within the meaning of the Dutch VAT Act. In making this finding the court rejected a number of arguments by the Dutch tax authorities, including that the products did not have the appearance of a book as the name of the author and the title were not stated on the cover, and that a product could not be a book if it was not intended for public distribution. The court held that the fact that the product consisted of images and photographs and little text need not preclude that its contents could be regarded as a book. However, it should be noted that the parties in that case did not dispute that a book of photographs could be a book. Arguments on fiscal neutrality relating to the printing of photographs, and the supply of empty photo albums were also rejected, as those goods were found to be dissimilar to the products in question.

64. We have placed no reliance on this Dutch case, but we refer to it here because we heard argument on it. We base our conclusions solely on the legal principles applicable to the construction of our own domestic law. In so far as the conclusions of the Dutch court correspond to our own, that would appear to support our own findings, but it has played no part in our determination.

65. With the tests we have concluded are applicable in mind, we turn to consider each of the photobook products at issue before us.

(1) *3" x 2" Mini memory book*. We find that this is a booklet. It has the external appearance of a booklet, and although it consists entirely of photographic images, the pages on which those images are printed have the appearance and quality of the pages of a booklet.

(2) *6" x 4" Flipbook*. In our view this fails the test. It does so both on account of its spiral binding which does not satisfy the minimum characteristics for the external appearance of a book or booklet, and the fact that its leaves have the quality and appearance of individual photographic prints, and not pages of a book. Accordingly, we find that this is not a book or a booklet.

(3) *7" x 5" Flipbook*. This fails for the same reasons as its smaller cousin and we make the same finding in respect of it.

(4) *7" x 5" Memory book ("Everyday memory book")*. We find that this is a booklet. It has the appearance of a thin book and its pages, which include both photographic images and some text, have the appearance and quality of the pages of a booklet.

(5) *8" x 8" Photobook*. We find that this is a book. Its external appearance, including its hard covers front and back, and its spine, has the appearance of a book. Inside its front and back sheets also have the appearance of a book, and its pages have the appearance and quality of the pages of a book.

(6) *11" x 8" Classic memory book*. We find this is a book. Its hard linen cover, and dust jacket have all the external appearance of a book. The inside pages also have the appearance and quality of the pages of a book.

(7) *11" x 8" Classic memory book*. Likewise we find that this is a book. The absence of a dust cover, and the fact that the title page can be observed through a window in the front cover, do not make it distinguishable from the product in (7).

(8) *11" x 8" Picture cover book*. This again we find is a book. It is again distinguishable from similar products in (6) and (7) only in the style of its cover. That does not detract from its appearance as a book in common with those products.

(9) *Picture me book*. Although this product has a cover and back of identical material to the inner leaves, and those leaves are of laminated card and not paper, we consider that it nevertheless has both the external and internal appearance of a book. If we are wrong on this we would find that it should be zero-rated as a children's picture book in Item 3, Group 3.

66. Mr Thomas submitted that to treat the photobooks as books or booklets within Item 1, Group 3 would extend the scope of the zero-rating provision beyond its terms and evident scope and would thus amount to an illegitimate extension of the derogation authorised by the Sixth and now the Principal VAT Directive. To the extent we have decided that certain of the photobooks do fall within the ordinary meaning of those terms, we do not agree. The derogation authorised the continuation of an existing statutory provision, and we have decided that on its proper construction it encompasses certain of the products at issue in this appeal. That is a recognition of the scope of Item 1, not an extension of it. In our view, HMRC's argument is for a restricted meaning of books and booklets, and an effective exclusion of items that would otherwise fall within the ordinary meaning of those terms. That is something that can only be achieved by legislation.

Decision

67. Accordingly, we allow this appeal in part. It will be a matter for the parties to seek to agree the figures on application of our decision. Any dispute in that respect may be referred back to us.

Lead case direction: common or related issues

68. We provide the following responses to the common or related issues as directed:

(1) Whether the supply of "photobooks" is a supply of goods, and if so whether such supply is a supply falling within the definition of "books, booklets, pamphlets and leaflets" and therefore zero-rated by virtue of Item 1, Group 3, Schedule 8 VATA.

The supply of photobooks is a supply of goods. The supplies of certain photobooks identified in this decision fall within that definition and are zero-rated. Certain others, also identified, do not. The basis for the distinction is set out in this decision.

(2) Alternatively, whether the supply of "photobooks" constitutes a supply of services, in particular photographic services.

The supply of photobooks does not constitute a supply of services.

(3) In so far as it is determined that a supply of "photobooks" is in principle capable of falling within either (1) or (2) above, what are the characteristics of the supply that determine whether the supply falls within (1) and (2)?

Not applicable. Although we found that the activities of Harrier in relation to the photobooks did involve the performance of certain services, we found, for the reasons set out in this decision, that the composite supply was a supply of goods.

Application for permission to appeal

This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber)

Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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ROGER BERNER

TRIBUNAL JUDGE

RELEASE DATE: 10 November 2011

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