



TC03107

Appeal number: TC/2012/04376

VALUE ADDED TAX– supply of photo-books at the visitor attractions – whether supply of goods or services – if supply of goods, whether a supply of photographs or of photo-books – whether photo-books were "books or booklets" within Item 1 of Group 3 of Schedule 8 Value Added Tax Act 1994- appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MAGIC MEMORIES GROUP (UK) LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
CAROLINE DE ALBUQUERQUE**

Sitting in public at Bedford Square, London on 9 – 10 July 2013

Richard Vallat and Thomas Chacko, Counsel, for the Appellant

David Ridley, HMRC Officer, for the Respondents

DECISION

1. This is an appeal against HMRC's assessments to the effect that the supplies
5 made by Magic Memories (UK) Limited (the Appellant) in respect of photo-books at various tourist visitor attractions are standard-rated for VAT purposes, as HMRC contend. The Appellant contends that its supplies are zero-rated.

2. The VAT periods under appeal cover the period 1 May 2010 to 31 October 2011.

3. In short, the dispute concerns the correct treatment of photo-books. Briefly,
10 HMRC contend that the Appellant's supplies of the supply of photographic services which are standard-rated. In the alternative, HMRC argue that the Appellant's supplies constitute the supply of photographs with an ancillary supply of photo-books and, thirdly, even if the supply comprises solely photo-books, photo-books do not
15 constitute "books or booklets" within the meaning of Item 1 of Group 3 Schedule 8 Value Added Tax Act 1994 ("VATA"). The Appellant, on the other hand, says that it makes a single supply of photo-books to visitors at the various attractions and that it does not make a supply of photographic services to its customers. The Appellant contends that the photo-books are zero-rated as "books or booklets".

4. In this decision we refer to "photo-books" for convenience, but without
20 prejudging the issue whether they qualify as "books or booklets" for zero-rating purposes.

The Facts

5. We were provided with witness statements for the Appellant from Ms Amy
25 Johns, Global Operations Manager of the Appellant, Mr Geoff Burns, Director (Special Projects) of the Appellant and Mr Toby Forer, General Manager at Sea Life London Aquarium.

6. HMRC objected to the admissibility of Mr Forer's evidence on the grounds of
30 relevance. This was because the Appellant's contract with Sea Life was dated 20 May 2013, i.e. after the end of the periods under appeal. We decided to admit Mr Forer's evidence and to determine its relevance ourselves.

7. Each of the witnesses gave oral evidence and was subject to cross-examination. We were also provided with a bundle of documents and various samples of photo-books (as to which, see below).

8. From the evidence presented, we find the following material facts.

9. The Appellant was registered for VAT from 1 January 2009. The Appellant is a
35 UK company owned by a New Zealand parent company.

10. The Appellant sells photo-books to visitors at least eight tourist attractions in the UK. We shall deal in more detail with the different tourist attractions concerned but for the periods under appeal they included, for example, London Zoo, Edinburgh Castle, Chester Zoo, Deep Sea World and The Wheel of Liverpool.

5 11. The Appellant operates in the following manner:

(1) At the entrance to the attraction, usually after the visitors have been admitted to the attraction, the Appellant has a "capture set" where photographs are taken of the visitors as they arrive. In most cases, but not for all periods under appeal, the "capture set" includes a green screen as a background for the pictures which enables the photographs to be digitally manipulated so that the photographs of the visitors can be superimposed on a different background specifically themed for the attraction in question.

(2) Sometimes, on busy days at the attraction, when there is a long queue of visitors waiting to purchase entrance tickets to the attraction, members of the Appellant's staff will go outside the attraction to speak to and entertain visitors while they are waiting. There was no evidence, however, that at this time any agreement was made with the visitors to purchase photo-books. On quieter days, the Appellant's staff first came into contact with visitors after they bought tickets for the attraction.

(3) The members of the Appellant's staff taking the photographs are trained to take photographs but they are not professional photographers. They are employed not so much for their photographic skill but rather for their ability to interact with visitors by making the experience fun and for their sales ability. They try to ensure that the photographs are of acceptable quality (i.e. that the visitors photographed are not blinking etc.) by viewing the picture on their camera. There is, however, no other form of quality control. The staff members do not use other forms of software other than those already described (i.e. the digital manipulation to superimpose a themed background). If the photograph of a visitor or group of visitors is unsuitable (e.g. because the subject had his/her eyes closed), when the visitor(s) reaches the sales area near the exit to the attraction, they will be offered the opportunity to have their photograph retaken, otherwise no photo-book is produced for the visitor.

(4) The intention is to photograph all visitors, although visitors are free to refuse to have their photographs taken (apparently this rarely happens). The Appellant's purpose is to enable as many visitors as possible to have the opportunity to buy a photo-book containing their photographs when they leave the attraction.

(5) At this stage there is no contract between the visitors and the Appellant and there is no obligation to buy a photo-book or any other product even though a photograph may have been taken. Essentially, at this stage, the Appellant is acting on a speculative basis. The visitor is usually unaware of the photo-books until the exit to the attraction is reached.

(6) The photographs are printed and inserted into a photo-book which is then displayed close to the exit to the attraction. The photographs can be removed

from the photo-books. The visitors play no part in the selection of the photographs. Usually, the exit sales facility comes after gift shops etc. maintained by the operators of the attraction itself so that money spent by the visitors on purchasing a photo-book does not detract from sales made by the gift-shop.

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(7) The photo-book, containing the photographs, is offered for sale to the visitor at the exit facility. There is no obligation on a visitor to buy a photo-book. Members of the Appellant's sales staff show the relevant photo-book to the visitors and pointing out all the information and educational elements in the photo-book and how their own photographs have been added to complete the photo-book as a record of their day out at the attraction.

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(8) The average size of a visitor group is four persons. Thus, on average, 25 photo-books will be produced for every hundred visitors. For every 25 photo-books produced, again on average, eight photo-books will be sold. Those photo-books which are not purchased will have the visitors' photographs removed and the photo-books are reused with photographs of other visitors and the unused photographs are discarded and recycled.

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(9) The cost of a photo-book was typically around £15 and was sometimes sold as a package with another item e.g. a key-ring or fridge magnet at £20 (the key-ring or fridge magnet being standard-rated for VAT purposes).

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(10) Since December 2011 (i.e. after the periods under appeal), if a visitor does not wish to buy a photo-book, the visitor has been offered the opportunity at some (but not all) attractions to buy the photograph without the photo-book at a much lower price (£5 – £8). The sales of photographs alone i.e. without the photo-books, accounted for only 5% of total sales. The thrust of the evidence of the Appellant's witnesses, however, was that the sale of photographs alone was very much a fall-back and that most visitors who made a purchase bought the photo-books and that it was the photo-book personalised by the photographs that was attractive to visitors.

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12. The Appellant enters into agreements with the operators of the attraction permitting them to operate on the premises of the attraction. The Appellant pays a licence fee to the operators calculated as a percentage of total revenue. This amount is paid monthly.

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13. The Appellant works with the attraction to ensure that the content of the photo-book is suitable in terms of the attraction's own branding and the message and story which the attraction wishes to communicate to visitors. The attraction would give the Appellant access to its imagery and branding. The content of the photo-book would be discussed and eventually agreed with the attraction.

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14. The Appellant seeks to distinguish itself from its competitors by supplying a high-quality photo-book rather than simply taking a photograph which Mr Burns described as a "hero-shot" (and which Mr Vallat in his submissions described as a "going-down-the-water-slide" photograph). The purpose of the photo-book was to provide visitors with a product which broadly matched the visitor's experience of the attraction in terms of the order in which various aspects of the attraction would

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typically be visited. For example, as regards London Zoo, the photo-book contained descriptions of animals in roughly the sequence which most visitors would encounter those animals. It was the Appellant's intention to provide visitors with a book which would remind them of their experience at the attraction. Mr Burns' evidence was that the photo-book was intended to be a high-quality product which visitors would be happy to display on their coffee table at home. His experience was that visitors felt that they got good value for money when they bought a photo-book. The Appellant had a good understanding of "pricing points" i.e. what people will pay for particular photo-books.

15. Mr Burns distinguished a photo-book from a more formal guidebook usually available at these attractions on the basis that a guidebook tended to be more "mechanical" than a photo-book. Often a conventional guidebook was not pitched at the right level for children whereas a photo-book attempted to get closer to the visitors' memory of their day at the attraction and provided an educational element. Mr Burns said that the photo-books told the stories of the attractions that the customers were visiting. These stories had built into them the photographs of the Appellant. Each attraction had its own storybook which was personalised by the insertion of the photographs.

16. In most photo-books there would be a pocket at the rear of the book containing postcards bearing pictures of the visitors and a CD. The CD merely contained generic pictures of the attractions. Thus, in the case of London Zoo the CD contained generic images of animals at the zoo. The CD did not contain personalised photographs of the visitors. The photographs contained a website and a code which enabled visitors to access their photographs online.

17. The cost to the Appellant of the various components of a photo-book was as follows: the book – 75 pence, the CD – 19 pence and the photographs – 0.05 pence.

18. We were provided with various examples of photo-books. We confine our comments to those photo-books which were used in the periods under appeal. The photo-books were as follows:

(1) London Zoo – version 1: this version was used until 4 February 2011. This document was spiral-bound. Its front and back pages were, as far as we could tell, marginally thicker than the internal pages and had a glossier finish. The internal pages – there were five internal leaves (i.e. 10 pages) – were printed on thick quality high-quality paper with a semi-gloss finish. The first internal page advocated membership of the Zoological Society of London, the next page described some aspects of the history of London Zoo and some of its best known and loved animals (e.g. "Winnipeg", an American black bear said to be the inspiration for Winnie the Pooh and Guy the Gorilla, who arrived at the zoo on Guy Fawkes' night 1947 and became a celebrity in the 1960s and 70s). The second page contained a description of gorillas, the third a description of butterflies, the fourth lions, the fifth meerkats, the sixth penguins, the seventh reptiles and the eighth giraffes. On each of these pages above the text were photographs of the animals to which the text related. On most of the pages there

were "balloon" items giving extra information about the animal in question (for example, "Did you know? Butterflies taste through their feet!"). Between the eighth page and the back cover was a plastic wallet which contained two photographs of the visitors – in fact it was the same photograph of the visitors
5 digitally superimposed on different backgrounds. Inside the back cover was a small pocket containing postcards advertising London Zoo containing the pictures of the visitors together with an information leaflet produced by London Zoo and a CD containing generic animal pictures.

(2) London Zoo – version 2: this version was used from 5 February 2011 to
10 24 June 2011. Version 2 was essentially the same as version 1 except that in the section between butterflies and lions there was a photograph of the visitors in a framed page and on the reverse a picture of lions (with an additional information "balloon"). Another framed picture was found in the section between monkeys and meerkats. Both pictures appeared to be printed on
15 ordinary paper rather than high gloss paper. There was an additional leaf with a large photograph of penguins on one side and a frog on the other (with a "Did you know?" information balloon on both pages). The back cover contained a similar pocket containing postcards with photographs of the visitors. There were, therefore, six internal leaves and two further leaves containing
20 photographs. Again, Version 2 was spiral-bound.

(3) London Zoo – version 3: this version was used from 25 May 2011 and was in use at the time of the hearing. This version was identical to version 2 the photo frames were covered by transparent acetate which, the Appellant's witnesses indicated, was intended to enhance the appearance of the
25 photographs.

(4) Edinburgh Castle: in use from 24 August 2011 to March 2012. This was a spiral-bound document the covers of which were glossier and slightly sturdier than the internal leaves. There were three internal leaves i.e. six pages the photographs were inserted in a plastic wallet attached to the inside of the front
30 cover. The internal leaves contained pictures of Edinburgh Castle and its contents and text running to about three or four sentences per page. The headings on each page were: "3000 Years of Human History", "Whose Castle Is It?", "Firepower at the Castle", "Glittering Jewels", "A Military Machine" and "A Scottish Celebration". The back cover opened out to give a panoramic photographic view of Edinburgh from the castle and also contained a wallet containing a CD and photograph postcards of the visitors.
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(5) Deep Sea World: this version was used from July 2009 to August 2012. This photo-book was in identical format to that for Edinburgh Castle. There were three internal leaves, the photographs were attached to the inside of the front cover – the only difference being that the front cover was partly cut out to enable the visitors' photograph to be seen through and be framed by the front
40 cover. The front cover was marginally stiffer than the internal leaves. The headings on the internal pages were: "Coral Reef", "Sharks", "Seals", "The Amazon", "Rocky Shores" and "Reptiles [and] Amphibians". The back cover also opened out to give a panoramic underwater view and contained the same
45 wallet for photograph postcards and CDs.

5 (6) Great City Attractions ("GCA") – version 1 used until 2 July 2011. This photo-book was used for Ferris wheels, in particular, the Wheel of Liverpool. In this case, the front cover appeared to be marginally thicker than the internal leaves – it was made of glossy stiffened paper – although the effect of stiffness was diminished by the fact that the front page was cut out to frame the photograph contained in the plastic wallet attached to the inside of the front cover. The format was very similar to Deep Sea World except that there were seven internal leaves (14 pages) containing pictures of different Ferris wheels around the world, statistics of tallest Ferris wheels, information on the history of
10 Ferris wheels, a map entitled "Wheels Around the World", statistics about GCA's wheels and location of GCA wheels in the UK and Ireland. The back cover again folded out but simply contained further pictures of Ferris wheels and the usual pocket. On the back of the rear cover was a rotating wheel device. One difference from the previous photo-books was that this version was not
15 spiral-bound – instead, the leaves were stapled.

(7) Great City Attractions – version 2 used from 3 July 2011 until the date of the hearing. Unlike version 1, version 2 was spiral-bound and the covers were marginally thicker than the internal leaves. Again, the internal leaves were almost identical to version 2, both in number and content. The photographs,
20 however, appeared on the penultimate page and were slotted into frames with an acetate covering. The rear cover contained the usual wallet for photograph postcards.

(8) Bristol Zoo – version 1 used from 17 May 2010 until 22 June 2012. This was very similar to Great City Attractions – version 1. The front cover appeared
25 to be very marginally thicker than the internal leaves and the front cover did not give an impression of greater stiffness than the internal leaves because it was cut out to reveal the photograph attached in a plastic wallet to the inside of the front cover. There were four internal leaves dealing with gorillas, Asiatic lions, meerkats, lemurs, African penguins, red pandas, butterflies and lorikeets. The
30 rear cover had a wallet containing photograph postcards and a CD. This photo book was spiral-bound.

19. In all the photo-books described above, the rear cover had additional stiffness provided by the attached wallet containing the photograph postcards and CDs.

20. In addition, we were shown photo-books for Bristol Zoo Gardens – version 2, the Brighton Wheel, London Sea Life Aquarium and Leeds Castle. These photo-books were used in periods outside those covered by these appeals and, therefore, were not strictly relevant. Nonetheless, we would simply observe that they were very similar variations upon the theme of the seven photo-books described above. All were spiral-bound except that on two of the photo-books the front cover concealed the
35 spiral binding, which was only visible from the rear and the Leeds Castle photo-book covered the spiral binding front and back. We should, perhaps, add that the photo-book in respect of Leeds Castle contained more narrative than most of the other
40 photo-books.

21. We were taken to the various contracts between the Appellant and the attractions. For reasons which are set out later in this decision, we found this exercise of limited usefulness. Nonetheless, we set out below some of these salient provisions of these contracts but note that a number of contracts between the Appellant and the attractions which were in force during the relevant periods for this appeal could no longer be found and were therefore not produced in evidence.

22. The contract between the Appellant and London Zoo was dated 20 August 2009. Under the heading "Background" it was recited that the Appellant "has developed certain photographic software, systems and procedures which enable the provision of photographic services to tourism operators." Also in the recitals, the agreement provided: "The Licensor has agreed to grant a licence to [the Appellant] for the supply and promotion of photographic products and services to the Licensor's customers...." A similar reference (under the heading "Permitted use") to the Appellant being able to use the Licensor's premises to provide "photographic services and products to the Licensor's customers" was contained in clause 4. Similarly, clause 10 provided that:

"(a) In order to promote and provide photographic services and products to the Licensor's customers, [the Appellant] agrees to perform the following services:

(i) take photographs of the Licensor's Customers visiting the site, including providing a Green Screen capture system at London Zoo and Whipsnade if mutually agreed (the Photos);

(ii) produce prints of the Photos and other photography-based products: and

(iii) advertise and promote the Photos and other products and offer them for sale to the Licensor's Customers

(collectively, the Services)."

23. The contract between the Appellant and GCA was dated 1 June 2011. In the recitals to this agreement it was provided that the Appellant "has developed certain photographic software, systems and procedures which enable the provision of souvenir books and associated products to tourism operators." The recitals further provided that GCA had agreed to license the Appellant for "the supply and promotion of souvenir books and associated products to the Licensor's customers...." The definition of "Permitted use" permitted the Appellant to use GCA's sites "to promote and provide souvenir books and associated photographic products...."

24. It will be seen that the Appellant's contract with GCA emphasised the supply of books and products rather than the supply of services in contrast to the contract with London Zoo, which referred to a mixture of services and goods.

25. The Appellant's contract with Brighton Wheel was dated 13 September 2011. This contract was in very similar terms to the one between the Appellant and GCA. In addition, the contract provided that Brighton Wheel would permit the Appellant "to photograph people prior to boarding the Wheel including within the entry queue." The Appellant also agreed:

"In order to promote and provide souvenir books and associated photo-based products to the Licensor's customers, [the Appellant] agrees to perform the following services:

- 5 (i) take photographs of the Licensor's customers visiting the site during the opening hours of the wheel (the "Photos");
- (ii) produce prints of the Photos and incorporate these into a souvenir book; and
- 10 (iii) advertise and promote the souvenir books and any other paper-based photographic products and offer them for sale to the Licensor's Customers."

26. The Appellant further agreed with Brighton Wheel that the associated photo-based products which it would offer the sale would include "the-rings, magnets, snow globes, picture frames, notebooks, travel mugs and other such items that allow a souvenir photograph to be inserted." These associated products would be unbranded unless the Licensor permitted its logo to be used.

27. Mr Forer's evidence was that Sea Life, prior to its involvement with the Appellant, had produced and sold its own photographs inserted into a basic folder. This product retails for £10. The Appellant's photo-book was significantly more comprehensive in its content than Sea Life's previous photographic product. Whilst the photography was of a similar nature, the photo-book produced by the Appellant told the story of Sea Life in a rich and compelling way which Mr Forer knew that his attraction's guests would value highly. Revenue from the Appellant's photo-book, when compared with Sea Life's previous product had significantly increased "from day one." The unchallenged evidence of Ms Johns was that there was no difference in the Appellant's method of operation in relation to Sea Life from that in relation to London Zoo and that the Appellant operated from the same business model.

28. The confirmation by Ms Johns that the Appellant operated in the same way in relation to Sea Life as with other attractions led us to the conclusion that Mr Forer's evidence was relevant, albeit indirectly.

30 **The law**

29. 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), entitling the supplier to recovery of attributable input tax.

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

“ **Group 3 — Books, etc**

Item No

- 10 1. Books, booklets, brochures, pamphlets and leaflets.
2. Newspapers, journals and periodicals.
3. Children's picture books and painting books.
4. Music (printed, duplicated or manuscript).
15 5. Maps, charts and topographical plans.
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.”

32. 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
30 (b) a supply by him of those goods to the person to whom he supplies the services would be of a description so specified.”

Discussion

33. Mr Ridley for HMRC argued, first, that the supply made by the Appellant to customers of the attractions consisted of the supply of photographic services which were standard-rated. Alternatively, if we concluded that the Appellant's supplies were
35 supplies of goods, those supplies were predominantly supplies of photographs which were standard-rated and that the supplies of photo-books were ancillary to the supply of photographs. Further, if we concluded that the Appellant's supplies were predominantly those of photo-books, Mr Ridley argued that the photo-books were not books or booklets for the purposes of Item 1 Group 3 Schedule 8 VATA.

34. We shall deal with each of these issues in turn.

Supplies of goods or services?

35. In advancing his first argument (that the Appellant's supplies were those of services rather than goods) Mr Ridley drew attention to the various contracts between
5 the Appellant and the attractions and, particularly, to those provisions which referred to the Appellant supplying "services".

36. In addition, Mr Ridley referred us to the decision of the VAT Tribunal in
10 *Risbey's Photography Ltd v HMRC*, *Digital Albums Ltd v HMRC* (2008) VAT Decision 20783. In that case, as regards the first appellant, a professional photographer specialising in wedding photography, as part of the package sold to customers, was engaged by customers to take photographs (arrangements having been made for the photographs to be taken), made arrangements for the viewing of photographs and, finally, for the production of a wedding book displaying selected
15 photographs of the wedding. The wedding book was dependent entirely upon the photographs having been taken and could not be purchased separately from the photographs. The first appellant retained the copyright in the photographs and used digital technology to design the wedding book. The Tribunal held that the first appellant had made a single supply of photographic services. The wedding book was ancillary to and a means of better enjoying the photographic services.

20 37. The facts in relation to the second appellant were slightly different. The second appellant produced wedding books for other professional photographers. The Tribunal found that the outside photographer commissioned the wedding book from the second appellant and paid a single price. The photographs were supplied by the outside photographer. The second appellant applied digital photographic processes to the
25 materials supplied to produce the wedding book. The outside photographer retained the copyright in the photographs. The layout of the wedding book and the photographs were approved by the outside photographer. The Tribunal held that the second appellant made a single supply of photographic services by assembling the photographs supplied with the use of photographic processes. However, the Tribunal
30 gave no reasoning to support its conclusion.

38. Mr Ridley relied on the Tribunal's findings in relation to the first appellant. In our view, however, his reliance on this decision was misconceived. As Mr Vallat put it, a wedding photographer would hardly arrive at a wedding uninvited, take photographs speculatively and produce a wedding album without consulting the
35 happy couple. In this appeal, the visitors to the attraction did not engage the services of the Appellant to take their photographs. On the contrary, the photographs were taken by the Appellant on an entirely speculative basis. The evidence was that approximately two out of three photographs taken were never used. There was no contract between the visitor and the Appellant until the visitor agreed to buy a photo-
40 book towards the end of the visit. The supply, therefore, consisted of what was bought by the visitor at the sales area. The supply did not consist of the activities of the Appellant preparatory and prior to that point. In our view, the supply consisted of the sale of photo-books (containing photographs) not of general photographic services

and photographic digital processing expertise. Those services and that expertise were necessary for the production of the product sold to the visitors but they were not what the visitors bought.

5 39. The analysis was not changed by references in the agreements between the Appellant and the operators of the attractions to "services". Those agreements were between the Appellant and the attraction, not between the Appellant and the visitor and it is the latter supplies to which this appeal relates. The agreements were in the nature of licences to the Appellant which enabled it to carry on its activities on the premises of the attraction in consideration of the payment of a licence fee. The description of the permitted activities of the Appellant contained in those agreements cannot change the actual nature of the supplies made by the Appellant to the visitor. 10 Furthermore, the London Zoo agreements referred both to services and products, whereas other agreements only referred to products. It is understandable that the Appellant might want a licence to be in broad terms, but that does not mean that its supplies made to visitors were as broad as those permitted by the license agreement. 15 In any event, the question whether a supply is one of goods or services is not a question of labels used in agreements but a question to be determined objectively on the facts relating to the supply.

20 40. In our view, the facts of this case are somewhat more akin to those relating to the second appellant in the *Risbey's/Digital Albums*, where the second appellant produced wedding books for other photographers who supplied their photographs to the second appellant. In other words, there was no initial engagement with the supplier of the wedding books to take photographs. The VAT Tribunal held that the second appellant had supplied services. The decision of the VAT Tribunal was considered by this Tribunal in *Harrier LLC v HMRC* [2011] UKFTT 725 (TCE) (Judge Berner and Mr Templeman). The Tribunal noted that in *Risbey's/Digital Albums* the VAT Tribunal had not given reasons for its decision in relation to the second appellant. 25

30 41. With respect, we have some doubts about the decision in *Risbey's/Digital Albums* in respect of the second appellant (as, we infer, did the Tribunal in *Harrier*). This appeal is, however, clearly distinguishable on the facts from that decision. In this case, the visitors did not supply the Appellant with photographs which required processing (which customers did in *Harrier* where, in any event, this Tribunal held constituted a supply of goods with an ancillary supply of services). In the present appeal any processing required was done before any supply was made by the Appellant. The finished product – the photo-book, complete with photographs – was presented to the visitor as an item which the visitor could buy or not as the case may be. 35

40 42. As regards photograph postcards and CDs, these were tucked into the back pocket of the photo-book. In our view, these items were clearly ancillary to the main supply of the photo-book.

43. For these reasons, we have concluded that the Appellant made only a supply of goods when it sold photo-books to visitors.

A single supply of goods?

44. Mr Ridley argued in the alternative that if we held that the Appellant supplied goods rather than services to the visitors, the supply made by the Appellant comprised both photographs and the photo-book. Mr Ridley submitted that the photographs
5 constituted the dominant supply and that the photo-book was ancillary to the supply of the photographs and was supplied in order that the photographs may be better enjoyed by the visitors.

45. Mr Ridley referred to the decision of the Court of Appeal in *International Masters Publishers Ltd v HMRC* [2006] EWCA Civ 1455. In this case the taxpayer
10 supplied "CD books" which consisted of the supply of a binder containing a CD and bound pages describing the composer, historical context and musical extracts contained on the CD. The VAT Tribunal held that there was a single supply and that the CD was the predominant element of that supply even though the cost to the appellant of the book was greater than the cost of the CD. The VAT Tribunal's
15 decision was upheld by the Court of Appeal.

46. The correct approach to be adopted in addressing this issue was summarised by Judge Berner in *Harrier*:

20 "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 separate supplies of the basic software and the customisation services or a
25 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.

30 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 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
35 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."

40 47. In addition, in *College of Estate Management v HM Customs and Excise Commissioners* [2005] UKHL 62 the House of Lords held that mixed supplies should not in general be split into separate supplies where there was a principal supply and an ancillary supply of several articles. There were, however, cases in which it was inappropriate to analyse the transaction in terms of "principal" and "ancillary" supplies.

48. In our view, applying the above principles, there was a single supply of the photo-book. It would, we think, be artificial to split the supply into two independent elements: the photo-book and the photographs. Until December 2011 visitors had the choice of buying the photo-book or buying nothing. The fact that they paid one price for the photo-book and its contents (photographs, postcards and CDs) is not determinative. Nonetheless, the product that they were offered and which they bought was the photo-book. There was no option to buy the photographs separately in the periods under appeal. In any event, even when this option was introduced in December 2011 (after the period under appeal) it accounted for only for 5% of sales.

49. Furthermore, it seemed to us artificial to say that the photo-book's only purpose was for the better enjoyment of the photographs (including postcards). The photo-books contained information and printed photographs and were, in our view, a simple but attractive product in their own right, albeit that they were not sold separately. They were not, unlike a photograph album, of no interest or use without the photographs.

50. The evidence of Mr Burns and, indirectly, of Mr Forer was that it was the photo-books that were attractive to customers, albeit personalised by the photographs. There was no evidence that it was the photographs which were of predominant value or attractiveness to visitors. Indeed the evidence of Mr Forer that sales increased after the introduction of the Appellant's photo-books and the evidence of the lower price and volume of "photograph only" sales from December 2011 indirectly support the conclusion that the main value was not in the photographs.

51. Mr Ridley submitted that a feature of the photo-books was that the photographs could be taken out and substituted with different pictures, suggesting that this was a deliberate and attractive design feature. This point was not put to the Appellant's witnesses in cross-examination and, accordingly, we did not think that this submission could fairly be put forward (see, for example, *Joseph Okolo v HMRC* [2012] UKUT 416 (TCC) at [50]-[61]).

52. We have therefore decided that the only supply made by the Appellant was a supply of the photo-books (and not a supply of photographs with an ancillary supply of photo-books).

Are the photo-books 'books or booklets'?

53. It was common ground that the leading authority on the expression "books or booklets" for the purposes of Item 1, Group 3, Schedule 8 VATA was judgment of May J in *Customs and Excise Commissioners v Colour Offset Ltd* [1995] STC 85 in the High Court. That case concerned the issue whether diaries and address books came within the meaning of "books" or "booklets." May J decided that they did not do so. The learned judge considered the meaning of those terms and said ([1995] STC 85 at 89 – 90):

“In my judgment, the English word 'book', although it always refers to an object whose necessary minimum characteristics are that it has a

5 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
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
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
10 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
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
15 word obviously has to be understood in the context of the objects
which the testator in fact has to bequeath.

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
20 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
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
25 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
which is affected by the context. If you ask instead what I regard as the
right question here, i.e. 'what is the ordinary meaning of the word
30 "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
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
35 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
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
40 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
that word does not mean that it is a book within the ordinary meaning
of the word.

45 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.”

54. We respectfully agree with the comments of May J and in reaching our decision
we have applied the test as he stated it. We would add, however, that when a word is
50 given its ordinary meaning, that meaning may change over time in accordance with

common usage and understanding. In addition, we do not consider that May J, when he referred to “things to be read”, intended to limit the words “book” or “booklet” to books filled with words rather than content which was mainly pictorial, as his reference to “or looked at” we think makes clear, but was intending to point out that a book would usually have content rather than blank pages.

55. We also consider, with respect, that there is a danger in reading May J’s formula as if it were a statutory definition. We can think of a number of examples of documents that would be generally considered to be books but which may fail one of May J’s tests. For example, a storybook for young children may have thick pages to assist youngsters turning the pages, but the covers may be no thicker than the pages. There is no doubt in our mind that this would be generally regarded as a book in the ordinary meaning of the word. May J’s guidance is of great assistance but there may be cases at the margin where the question may be more one of impression than definition (although, to be clear, we have not found it necessary to stray from May J’s formulation in reaching our decision).

56. The words "book" and "booklet" therefore must be given their ordinary meaning, devoid of context. The test is objective and must have regard, as Judge Berner said in *Harrier* at [57] "to all the physical characteristics of the product in question. That includes both the external characteristics and the internal characteristics."

57. In our view, the photo-books (with the exception of Great City Attractions version 1: see below) fall within the meaning of the word "booklet." The photo-books were thin or small books. They contained relatively few pages (five leaves, for example, in the case of London Zoo) and, therefore, seemed to us to be "booklets" (small books) rather than "books". Their covers (at least the front covers) were, in our view, marginally more substantial than the internal pages, although the difference was very slight. The rear covers seemed more substantial. As May J recognised, a booklet was likely to have a flimsy cover and, in our view, a booklet may often have a paper cover. The covers and leaves were generally held together by a spiral binding. In one case, (Great City Attractions – version 1) the document was stapled together, but we do not think that such a method of binding pages together disqualifies that photo-book from being a "booklet." Their content was such that they were clearly intended to be read and their pictures (not just the photographs of the visitors, but the illustrations in the photo-book) looked at. Their purpose was not simply to hold the photographs of the visitors.

58. Mr Ridley argued that the photo-books did not possess the basic characteristics of a "book" or "booklet". He drew attention to the flimsy covers, the inclusion of photographs, the small number of pages and the lack of a story element. We have already discussed the covers of the photo-books and do not consider that this aspect disqualifies them from being "booklets". Moreover, inclusion of photographs in the photo-book does not, in our view, prevent the photo-books being "booklets" as long as the other characteristics of the product were such that it fell within the ordinary meaning of the word "booklet." There is no reason why a book or booklet cannot be personalised. Moreover, there is no need for a "booklet" to tell a story in order to

satisfy the minimum characteristics described by May J. It simply needs to have content which is to be read or looked at.

59. Mr Ridley compared the photo-books with the wedding books in *Risbey's/Digital Albums*. The photo-books were, in his submission, analogous to those wedding books or, alternatively, they were simply photograph albums and were not, therefore, books. It seems to us that attaching a label (e.g. "an album") to an item and deciding that it was therefore not a "book" is the wrong approach. This error in approach was helpfully explained by Judge Berner in *Harrier* whose views we respectfully adopt:

10 "53. With respect, we are unable to follow the tribunal's approach in
15 *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
20 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
25 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
30 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.

35 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
40 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."

60. We agree that the question was not whether the photo-books in this case were photograph albums but whether they were books or booklets in the ordinary meaning of those words. In our view, for the reasons given, we consider that the photo-books were "booklets." Whether they could also be described as souvenirs, photograph albums or photograph wallets seems to us to be addressing the wrong question.

61. There is one further matter that needs to be addressed. In *Harrier* at [58] it was held that the nature of the binding was also an essential minimum characteristic of a "book" or "booklet":

5 "We consider that a book or booklet must have the spine, which will be narrower in the case of the 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 [of a book or booklet]."

62. With respect, we disagree. In our view, there is no reason why a document
10 which is spiral-bound should be disqualified from being a book or booklet. This was not an essential characteristic listed by May J in *Colour Offset*. That there must be some form of binding is clear enough – a set of unattached sheets of paper would not be a book in the ordinary sense of that word. Also, the binding should in most cases have some degree of permanence. Thus, a ring-binder file would not generally be
15 regarded as a book but, by contrast, we consider that stapling would have sufficient permanence provided the other characteristics of a "book" or "booklet" are present. It is, of course, possible to remove staples (as it is possible to tear pages from a spiral-bound or conventionally bound book) but that will usually result in the disintegration of the stapled document. A ring-binder, by contrast, can have its pages removed
20 without damage to the ring-binder or the pages.

63. These considerations apart, the nature of the binding does not seem to us to be material. We take notice of the fact that there are many spiral-bound documents, to use a neutral word, which would most certainly be regarded as books within the ordinary meaning of that expression. For example, many school textbooks and student
25 course books are spiral-bound (as are many cookery books) for the simple reason that the book can be opened and laid flat, with both pages on view. In the course of his submissions, Mr Vallat produced a book of short stories by a well-known contemporary writer which was spiral-bound. There was no doubt in our minds that this was a book and would be regarded as a book in the ordinary common usage of
30 that term. There are certainly many other examples that could be given. Accordingly, we consider the fact that most of the photo-books were mainly spiral-bound (and one was stapled) does not disqualify them from being "books" or "booklets." In argument, Mr Ridley did not press the point and seemed content to accept that spiral binding did not prevent a document from being a "book" or "booklet" and we consider that he was
35 right to do so.

Decision

64. We have therefore decided that in the periods under appeal, when the Appellant sold a photo-book to a visitor:

- (1) the Appellant supplied goods (the photo-books) and not services;
- 40 (2) the Appellant made a single supply of photo-books; and
- (3) the photo-books were "booklets" within the meaning of Item 1 Group 3 Schedule 8 VATA.

65. Accordingly, we allow this appeal.

66. 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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**GUY BRANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 6 December 2013