TC06415

Appeal number: TC/2015/05770
TC/2017/01024

VAT – whether supply of goods or of services – whether zero-rated as a "booklet" – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PARAGON CUSTOMER COMMUNICATIONS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS JANET WILKINS

Sitting in public at Taylor House, Rosebery Avenue on 12 and 13 February 2018

Andrew Hitchmough QC and Emma Pearce of Counsel, instructed by BDO LLP for the Appellant

James Puzey of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Paragon Customer Communications Ltd ("the Company") describes itself as a business which plans, creates and delivers both printed and digital communication. One of its customers is Direct Line Insurance Services ("DLIS").

2. On 12 December 2014, the Company sought a ruling from HMRC as to whether certain of its supplies ("the Printed Items") to DLIS were zero rated for VAT purposes as "booklets", on the basis that they consisted of multiple sheets of information about an individual's insurance policy; the pages are stapled together and bound in covers.

3. On 29 December 2014 HMRC decided that the Company was making a standard rated supply of services to DLIS ("the Decision"). The Decision was confirmed on reconsideration and again on statutory review. The Company appealed the Decision to the Tribunal.

4. On 21 December 2016, HMRC issued an assessment for £64,871 in relation to certain supplies made to DLIS ("the Assessment"). The Assessment was based on the invoices issued by the Company to DLIS for the periods from 12/14 to 03/16. The Company appealed the Assessment to the Tribunal; the two appeals were subsequently consolidated.

The issues before the Tribunal

5. As is evident from the above summary, the Tribunal had to decide whether the Printed Items were zero-rated supplies of goods, as the Company contended, or standard rated supplies of services, as HMRC contended.

6. However, the Assessment did not charge VAT only on the Printed Items, but on the following supplies, which had also been zero-rated by the Company:

(1) Each Printed Item contains personalised information about an insurance policy, but standard terms and conditions (T&Cs) apply to all policies of the same type. The T&Cs are set out in separate documents, which are despatched sent out to policyholders at the same time as the Printed Items, and in the same oversized A4 envelope;

(2) documents called "Appraisals" which are similar to the Printed Items in that they set out the individual's policy details; in addition they also value one or more assets for insurance purposes, and include details of any related loan; and

(3) the envelopes and the postage for the Printed Items, the T&Cs and the Appraisals.

7. Some of the invoices which formed the basis for the Assessment also zero-rated what are known as "C5 packs", together with the related postage. C5 packs contain information about policies already entered into, such as letters about renewals and changes to terms and conditions. As their name indicates, the C5 packs were sent out in a C5 (also known as an A5) envelope. The Company accepted, at least for the

purposes of these proceedings, that the C5 packs were standard rated in accordance with the "package test" at para 6.5 of VAT Notice 701/10. This said that a "package" consisting entirely of printed items is categorised according to whether a majority of the items in that package are zero-rated or standard rated. Since the C5 packs frequently contain standard rated letters, the Company had accepted that they were standard rated.

8. The Tribunal was therefore required to decide the VAT status of the Printed Items; the T&Cs; the Appraisals, and the related envelopes and postage, but no decision was required on the C5 packs. We have called the Printed Items, the T&Cs and the Appraisals, taken together, "the Disputed Items".

9. In deciding the VAT status of the Disputed Items, the First Issue was:

(1) whether, as the Company contended, the Company was making a single composite supply of goods to DLIS, being the Disputed Items together with the related envelopes and postage, or

(2) whether, as HMRC contended, the Company was making a single composite supply of services to DLIS, of which the Disputed Items did not form the predominant or principal element.

10. If the Company succeeded on the First Issue, the Second Issue was whether the goods were zero-rated booklets, as the Company contended, or standard rated printed matter, as HMRC contended.

Our decision in summary

11. The Tribunal decided that the Company succeeded on both Issues. It was making a composite supply of goods to DLIS, and the Disputed Items are all "booklets". They were therefore zero-rated for VAT purposes, as were the related envelopes and postage, which were part of the same supply.

12. We therefore allowed the Company's appeal against the Decision. We also allowed its appeal against the Assessment, other than in relation to the C5 packs. The parties are to agree between them the part of the Assessment which is so related. In the unlikely event they are unable to agree, they can revert to the Tribunal.

The legislation

13. The UK is permitted to zero-rate certain supplies under a derogation given by Article 10 of Directive 2008/112/EC (the Principal VAT Directive, or "PVD"). Section 30 of the Value Added Tax Act 1994 ("VATA") provides for zero-rating of the supplies specified in Schedule 8. Group 3 of that Schedule is headed "Books etc" and Item (1) of that Group is "Books, booklets, brochures, pamphlets and leaflets".

The evidence

14. The Tribunal was provided with a helpful bundle of documents by BDO, acting on behalf of the Company, which included:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) samples of the Disputed Items and the C5 packs, redacted to remove any references to individual policyholders. Both parties accepted that these samples were representative of the Disputed Items and the C5 packs, and could be relied on as the basis for making findings of fact;

(3) sample invoices between the Company and DLIS;

(4) the Framework Services Agreement between the Company and DLIS dated 10 October 2014 ("the Framework Agreement"); and

(5) the "Statement of Work No 3: Private Insurance" dated 20 November 2014 ("SoW3").

15. Witness statements were provided by Mr Rod Wheldrick, head of financial planning and analysis at the Company, and by Mr Steve Redman, contract manager of print strategy and print supply chains at DLIS. HMRC did not challenge any of the witness evidence and the facts contained within these statements are therefore accepted.

16. The witness evidence focused on the Printed Items rather than on the T&Cs or the Appraisals. The parties agreed that the facts were essentially the same for all three of the Disputed Items, other than where a difference had specifically been identified (such as in relation to the bulk printing of T&Cs, see §41 below). In order to find some of the facts about the T&Cs and the Appraisals we have therefore made inferences from the witness evidence and from the sample T&Cs and Appraisals.

17. On the basis of that evidence, the Tribunal finds the facts set out in the next following part of this decision.

The facts

The Company

18. The Company was previously known as DST Output Limited; its ultimate owner was DST Systems Inc. On 4 May 2017, the Company was acquired by Paragon Group Ltd, and changed its name.

19. The Company operates in many sectors, and has many customers, of which DLIS is only one. The size of its operation can be inferred from its marketing material, which states that it "engages with every UK household at least once a week on behalf of some of the biggest and most influential global brands". The marketing material also describes its "core services" as designing, building and managing databases; supplying customer relationship management software and systems; providing printed communications; and supplying email, video and SMS solutions, and states that it provides "customer led communication" by "planning, creating and delivering both printed and digital communication". It describes the Company as "helping business to deliver exceptional customer experiences via print and digital channels" in its role as "a trusted global communications partner".

Contracting with DLIS

20. DLIS used to be part of the RBS Group; the Company was one of its print suppliers. During 2011-2013 DLIS left the RBS group. Most of the supplier contracts relevant to DLIS's business were novated across, including that with the Company.

21. Before each contract expired, DLIS carried out market reviews to identify a supplier which could provide DLIS with the following:

(1) transactional print items, to be sent to existing and prospective customers in response to their interaction with DLIS, including policy documents and quotations for new business requested via DLIS's website; and

(2) direct mail items, sent on a speculative basis to possible new customers.

22. At the end of its market review, DLIS selected the Company as its supplier. Both parties signed the Framework Agreement, based on a standard template which DLIS uses with all suppliers. We say more about the Framework Agreement at §48ff.

23. DLIS and the Company also signed four further contracts, called Statements of Works ("SoWs"). These too were drafted using a standard DLIS contract as a template. Of the four SoWs, only the third ("SoW3") was in issue in these proceedings: it deals with the production of printed items for DLIS's "private insurance" policies. These policies are aimed at the higher end of the market, and so are more bespoke and expensive than the ordinary policies which DLIS also offers. Some are DLIS's own products, branded under the "Select" name; others are sold by DLIS but underwritten by third party insurers, such as RBS or NatWest. Mr Puzey specifically clarified, in answer to a question from the Tribunal, that HMRC were not seeking to argue that any of the other SoWs were relevant to the Issues before the Tribunal.

24. The printed items encompassed within SoW3 comprise (a) the Disputed Items and (b) C5 packs. As set out earlier in this decision, the Disputed Items are made up of the Printed Items, the Appraisals, and the T&Cs; these are all sent out in A4 envelopes. The C5 packs contain a range of different letters – such as a reminder to policyholders to renew their insurance – and may also contain T&Cs. The C5 packs are sent out in C5 (also known as A5) envelopes.

25. The Company prices the Disputed Items and the C5 packs on a cost-plus basis. In other words, the cost of materials and production overheads are charged to DLIS, along with a profit margin.

Production of the Printed Items and Appraisals

26. When DLIS has agreed to issue a policyholder with a private insurance policy or an Appraisal, the relevant information (such as type of policy, level of cover, customer's name and address) is entered into a template which forms a data file. Every evening, these data files are transferred from DLIS to the Company, using a third party information technology company called CGI. The data files are "print

ready", which means the Company does not need to alter the data in any way – for instance, it does not change where words or images appear on a page.

27. The Company's digital department downloads the data files and runs them through its data-streaming software, called "Onestep". This sorts the files by brand (such as RBS, Select) and by type of product. After streaming, the files are printed off in their streamed order using a laser printer.

28. The printed pages require "stitching", which is carried out by a "stitching machine". The sample Printed Items and the sample Appraisal with which we were provided were "stitched" using two staples in the centre of A3 printed pages, so that when folded along the centre line, an A4 document was created. After "stitching", he Printed Items and the Appraisals are ready for despatch.

Appearance and contents of Printed Items and Appraisals

29. The front and back cover pages of both the Printed Items and the Appraisals are printed in colour, with a matt finish. The front cover has a title, which is generic, not personalised: for instance, "Your Private Insurance Appraisal" (relating to NatWest Private banking) or "Welcome to Select Premier Insurance". The front cover is otherwise essentially pictorial, while the back page contains branding and contact numbers. The thickness of the cover pages is the same as the internal pages. All pages are made of good quality paper, weighing 150 gsm.

30. Some small parts of the internal pages and/or the back page of the Printed Items are also in colour, but for the most part the internal pages use black text on a white background. The Appraisal contains colour photographs of the insured item, such as a property. The sample Printed Items with which we were provided had 12 internal pages, of which three were blank. The sample Appraisal had 32 internal pages, including two pages of pictures.

31. The personalised material is on the internal pages. The samples with which we were provided relate to Select Premier motor insurance. The first internal page is in the form of a letter to the policyholder. The second paragraph states:

> "as your policy has been amended it is important that you read this letter carefully, together with the enclosed documents in order to make sure the information provided is correct."

32. The premium payable follows, in bold. The next section is headed "What to do next", also in bold. It reads:

> "Please
>
> 1. Check your Insurance Schedule(s) carefully
>
> 2. Check your Certificate of Motor Insurance
>
> 3. Read the summary of advice statement, if you feel this document does not reflect your discussions with us please contact us immediately.

> IMPORTANT – it is very important that you check that the information in the enclosed policy documents, schedules and/or certificates is correct. If anything is incorrect, no longer entirely accurate, or if you are unsure about any details, please call us immediately. Failure to do so could invalidate your policy."

33. The next page sets out the "Motor Insurance Schedule" which is followed by the "Motor Statement of Facts" and the "Certificate of Motor Insurance". These pages include the name and address of the insured; his date of birth and policy number; the number and type of vehicles, their registration numbers, registered owners and keepers; the name of the main driver, that person's history of claims and motoring convictions; where the vehicles are kept overnight and their estimated value. Other personalised information relates to the premium; the method of payment; the policy cover; the expiry date; any excesses and/or exclusions; the no-claim discount and any limitations as to use of the vehicle.

34. The final page of the Printed Item is headed a "Summary of advice provided for [name]". This sets out the specific advice given to the individual policyholder and refers to the T&C for further details. It also says:

> "if there are any aspects of your policy document/s or schedules of insurance that are unclear, or that we have captured incorrectly, please contact….as soon as possible."

35. At the bottom of the page is the following:

> "it is very important that you check that the information in the Statement of Facts is correct. If anything is incorrect, no longer entirely accurate, or if you are unsure about any details, please call us immediately. Failure to do so could invalidate your policy."

36. We were also provided with a NatWest Private Appraisal for home insurance. The first page begins:

> "Thank you for letting us know about the changes to your policy
>
> We are pleased to confirm the changes you requested to your NatWest Private insurance policy have been made.
>
> As your policy has been amended it is important that you read this letter carefully, together with the enclosed documents, in order to make sure the information provided is correct."

37. After a brief reference to monthly instalments, it continues:

> **"What to do next**
>
> Please
>
> 1. Check your Insurance Schedule(s) carefully
>
> 2. Check the direct debit confirmation. This gives details of the account you have agreed we may use to collect your insurance premiums. It is important that you read it carefully and contact us if any details are incorrect.

> 3. Read the enclosed Standard European Consumer Credit Information (SECCI)
>
> 4. Read the enclosed Adequate Explanations document
>
> 5. Please retain the Fixed Sum Credit Agreement which gives details of your instalment plan. This should be signed and kept with your policy documents.
>
> 6. Read the summary of advice statement, if you feel this document does not reflect your discussions with us please contact us immediately.
>
> IMPORTANT – it is very important that you check that the information in the enclosed policy documents, schedules and/or certificates is correct. If anything is incorrect, no longer entirely accurate, or if you are unsure about any details, please call us immediately. Failure to do so could invalidate your policy…"

38. The next page begins:

> "This is a revised schedule. It replaces *any* previous schedules we have issued to you and forms part of the policy. You should read the schedule and the policy booklet together and keep them in a safe place."

39. The Summary of Advice page within the Appraisal contains the same statement as set out at §35.

The T&Cs

40. Unlike the Printed Items and the Appraisals, which are bespoke, the T&Cs are generic, in that they contain the general terms and conditions which apply to all policyholders in that category.

41. The Company maintains stocks of each type of T&Cs – such as NatWest travel insurance, and Select home insurance. When stocks of a particular item fall, more copies are printed. From the visual appearance of the T&Cs, and from the witness evidence, we infer that they are also stapled or "stitched" in the same manner as the Printed Items and Appraisals. They have coloured front pages; the internal pages are black print on a white background. We had several samples, and the number of pages varied from 26 to 39.

Enclosing and despatch

42. After "stitching", the Printed Items and Appraisals are moved to the Company's enclosing department, where they are manually placed in envelopes, together with the relevant T&Cs. For example, if the Printed Item contains details of a DLIS customer who purchased a NatWest home insurance policy, the enclosing team will place that Printed Item in a NatWest branded envelope together with the NatWest T&Cs for home insurance. The branded envelopes are purchased from a third party supplier, with the branding already in place.

43. Once the Disputed Items have been placed in the correct envelopes, the envelopes are sealed and put in bags (in no particular order); the bags are then placed in large cages on wheels and moved to the dispatch department. Royal Mail collects the envelopes and delivers them to policyholders by second class post. The Company pays Royal Mail, and adds this cost to the invoice it sends to DLIS. Policyholders are unaware that the Disputed Items are produced, printed, and despatched by the Company.

Monitoring

44. Onestep tracks the number of files received from DLIS and the number of products printed. The Company uses that information to check whether it has printed the right number of items. The Company also checks samples taken from the start, the middle, and the end of each print run. This is standard industry practice, and ensures there are no obvious problems with that particular print run.

45. The Company provides DLIS with the following details: the number of packs of Printed Items and the number of C5 packs; the cost of those packs; whether there have been any errors in the print runs and whether the Company has met the service levels in SoW3 in relation to producing the packs. There is more about these service levels at §78.

46. The Company and DLIS meet on a monthly basis to discuss this monitoring information and any problems which have occurred, not only in relation to SoW3 but also in relation to the other printed matter provided by the Company for DLIS under separate contractual arrangements. During the meetings, the parties also discuss what is happening more widely in both organisations, as well as any risk areas which might be developing in the day to day operations.

47. DLIS and the Company have established a structured hierarchy of individuals ("an escalation tree") to contact if there is an emergency situation; there have never been any such situations, so the escalation tree has never been used.

The Framework Agreement

48. The Framework Agreement is between DLIS and "the Supplier", here the Company. It is 124 pages long, including 15 Schedules, and begins with the following two recitals:

> "(A) DLIS requires the provision of printed matter and certain document management services.
>
> (B) This Agreement is a framework agreement under which DLIS can request, and the Supplier shall provide, the Goods and Services (as defined below) to DLIS and the Service Beneficiaries from time to time. All Goods and Services shall be provided in accordance with the main terms and conditions of this Agreement, the Schedules and the relevant Statement of Work."

49. The term "Service Beneficiary" is defined at Clause 30 as being DLIS or various connected or related parties. The terms "Goods" and "Services" are defined at Clause 1.1 as follows:

"**Goods**: all records, reports, documents, papers, other materials and deliverables (whether in documentary, electronic or other form) produced or supplied by, or on behalf of the Supplier for DLIS as part of the Services including such Goods as are described in a Statement of Work.

Services: the services to be provided by the Supplier as described in a Statement of Work, and the production of Goods and such other services as may be agreed between the parties."

50. Clause 1.13 provides:

"If there is a conflict within this Agreement between the Clauses, the Schedules, the Statement of Work and an Appendix, then such conflict will be resolved by giving precedence to such different parts of this Agreement in the following order of precedence:

(a) any terms set out in a Statement of Work which are unambiguously and expressly stated to vary the terms of this Agreement, but then only to the extent of such variation and in relation to the Statement of Work;

(b) the Clauses;

(c) the Schedules;

(d) the other terms of the Statement of Work; and

(e) the Appendix."

51. Clause 5 is headed "Statements of Work" and opens by saying:

"5.1 If DLIS requires the Supplier to undertake any Services or provide any Goods, it shall discuss its requirements with the Supplier.

5.2 As soon as reasonably practicable following these discussions, the Supplier shall…submit to DLIS in writing for approval a draft Statement of Work, using the Pro Forma Statement of Work."

52. The Pro Forma Statement of Work is at Schedule 2 to the Framework Agreement, and we return to this at §66.

53. Clause 6.1 of the Framework Agreement provides that the Supplier shall provide the goods and services "in accordance with the terms of this Agreement, and in particular, the terms of the relevant Statement of Work".

54. Clause 6.2 reads:

"The Supplier shall ensure that the Goods are (i) in accordance with any specification set out in a Statement of Work (as applicable) or as otherwise agreed by the parties in writing, which should identify the intended purpose(s) for which DLIS (or the relevant Service Beneficiary) will use the Goods and criteria relating to quality standards applicable to the Goods, and (ii) free from material defects in design, materials, workmanship."

55. Clause 6.3 requires the Supplier to provide "the Goods and Services" in accordance with industry practice; "all Laws, codes of practice and applicable British, EU or international standards"; DLIS policies; "all lawful and reasonable directions, instructions and requests from DLIS and "if applicable, the Service Levels, including any minimum standards specified therein".

56. Clause 6.4 requires the Supplier to "maintain at all times all authorisations, licences and/or permissions that it requires to supply the Goods and Services". Clause 6.12 provides that "the Supplier shall at all times act in a professional and courteous manner, be polite, helpful and honest and not do (or omit to do) anything that damages or is in any way detrimental to the reputation of DLIS". Clause 6.13 requires that the Supplier "immediately notify DLIS of any complaints received from a Customer". Clause 6.14 reads:

> "The Supplier shall at all times, as requested by DLIS, co-operate and work with third party suppliers to the Direct Line Group ("Third Party Suppliers") and shall procure that its Subcontractors co-operate and work with Third Party Suppliers. The Supplier shall identify where any Third Party Suppliers are relevant to the performance of its obligations under this Agreement and shall ensure that appropriate arrangements are put in place between the Supplier and each relevant Third Party Supplier to ensure the performance of the Supplier's obligations under this Agreement…"

57. Clause 6.16 provides as follows:

> "the Supplier shall (as instructed by DLIS)
>
> 6.16.1 co-ordinate its efforts with each member of the Direct Line Group and Third Party Supplier and ensure that any issues which develop between the Supplier and Third Party Suppliers are resolved promptly;
>
> 6.16.2 provide a single point of contact to liaise with any relevant Third Party Supplier for the prompt resolution and diagnosis of all Service Level defaults and all other failures to provide the Goods and Services, regardless of whether such failures were caused by the Supplier or the Third Party Supplier;
>
> 6.16.3 report to DLIS on how a Service Level default involving a Third Party Supplier was resolved and the root cause of such failure…;
>
> 6.16.4 provide assistance (including access to relevant Staff, engage in joint testing exercises, licensing Intellectual Property Rights (where agreed), and otherwise taking measures to ensure seamless end to end delivery to DLIS)…; and
>
> 6.16.5 attend on notice meetings with the Third Party Suppliers called by DLIS where input from the Supplier on [sic] Goods and Services the Supplier is providing is relevant to the meeting and required by DLIS."

58. Clause 19 is headed "Staff, TUPE and employment" and provides that "the Supplier shall ensure that the Key Personnel are assigned to provide the Services throughout the Term". Key Personnel are defined as those listed either in Schedule 1,

or in a SoW. If such a person leaves the Supplier, a "suitably qualified replacement" must be appointed, and that appointment "shall be subject to the prior agreement of DLIS". If the Company wishes to remove or replace Key Personnel, the "written consent" of DLIS is required. Clause 19.4 provides that "the Supplier undertakes that it shall only use technically competent and properly trained and qualified Staff in the supply of the Goods and Services".

59. Clause 19.6 requires that the Supplier comply with Schedule 4, which is headed "Pre-employment screening". This requires the Supplier to carry out background checks on any member of staff who are to be "employed or engaged in connection with the performance of the Supplier's obligations under this Agreement". The "screening level" ranges from Level 1 – where the individual has "no access, or accompanied access" to any premises used by Direct Line, and no access to any systems or data used in connection with the provision of the Goods and Services – through to Level 4, where the individual has access to "sensitive data". Clause 19.7 provides that the Supplier's failure to comply the provisions in Clauses 19.1 to 19.6 "will be a material breach of this Agreement which is not capable of being remedied".

60. Mr Redman said:

> "We provide our suppliers with access to a lot of sensitive data. It is therefore important that we have a means of ensuring that our suppliers use employees that we are happy with from a security perspective and that we have a means of removing any employees that we are not happy with."

61. DLIS has never rejected any employee once they have been through the Company's recruitment process, or exercised its right to require that the Company remove a worker.

62. Clause 31 provides that the Framework Agreement is "the entire agreement between the parties with respect to the subject matter of the Agreement" and that no variation to the Agreement or a SoW "shall be valid unless it is in writing and signed by authorised representatives of each party".

63. The Framework Agreement also includes the customary provisions on matters such as confidentiality, disputes, force majeure, notice, assignment, intellectual property rights, termination, governing law and third party rights. None of these were referred to, or relied on, by either party.

64. Schedule 1, headed "Implementation" was relied on by Mr Puzey in his skeleton argument. However, as Mr Hitchmough pointed out, this Schedule relates to the services to be supplied "under the Transactional Print SoW", which is a different SoW from the SoW3 at issue in this appeal.

65. The Supplier is also required to comply with the other Schedules set out at the end of the Framework Agreement, including the Environmental Protection requirements at Schedule 5, with evidence of compliance to be provided "on request"; the Governance requirements at Schedule 6; the Benchmarking requirements at

Schedule 7; the "Continuous Improvement and Innovation" requirements at Schedule 9, and the "Anti-bribery and corruption policy" at Schedule 15.

Statement of Work 3

66. As already noted at §52, Clause 5 of the Framework Agreement provides that the Supplier shall submit a draft SoW "using the Pro Forma Statement of Work", which is at Schedule 2 of the Framework Agreement. That Pro Forma has two recitals:

> "(A) DLIS and the Supplier have entered into a framework services agreement dated [] ("Framework Services Agreement") allowing DLIS to request goods and services from the Supplier from time to time.
>
> (B) Under the terms of the Framework Services Agreement, DLIS requests certain goods and services to be provided by the Supplier, and the Supplier agrees to provide such goods and services to DLIS in accordance with this Statement of Work."

67. On the first page, under the heading "Structure", the Pro Forma SoW states:

> "unless stated to the contrary in this Statement of Work, the terms used in this Statement of Work shall have the same meaning as given to them in the Framework Services Agreement.
>
> The Terms of the Framework Services Agreement are incorporated into, and form part of, this Statement of Work. If there is any conflict between the terms set out in the Framework Services Agreement and this Statement of Work, the Framework Services Agreement shall prevail unless expressly stated to the contrary in this Statement of Work (referencing the provision which is to be superseded/varied)."

68. The Pro Forma ends:

> "The Parties agree that this Statement of Work shall form part of the Framework Services Agreement and each agree to be bound by the terms of both documents."

69. The Pro Forma Recitals, the Structure paragraphs and the concluding words appear verbatim in SoW3, other than that the date is added at Recital A.

70. Clause 3 of SoW3 is headed "Description of Services" and states that the Supplier shall provide DLIS with the services there set out. The first of those specified services is at Clause 3.1(a), which reads:

> "output of DLIS's Private Insurance daily packs and letters, including the composition, printing and distribution of private insurance Customer documentation, including pre-printed materials and Customer policy documents with insert matrices and Customer appraisal."

71. Despite the reference here to "composition", the Company does not carry out any composition, because the data is sent "print-ready" by DLIS.

72. Clause 3.1(b) describes the batch data feeds from DLIS to the Company, and 3.1(c) requires the Company to confirm receipt of those data feeds. Clause 3.1(d) states that where an Appraisal is generated separately from the data feed, DLIS will send a pdf to the Company. Clause 3.1(e) describes the streaming process in detail, and 3.1(f) states that "if required, the Supplier shall perform data cleansing". The unchallenged evidence of both witnesses was the Company is not "required" to carry out any data cleansing, because DLIS maintains its own customer database. Occasionally, DLIS may ask the Company to remove one of the Printed Items before despatch – for instance, if the policy had been changed after the data was sent to the Company, but this is not a process of "data cleansing" but the interception of an individual item before despatch.

73. Clause 3.1(g) provides that "the Supplier shall then process such data, namely the merging of cells and mail sorting of data to achieve optimum postage discounts where volumes allow". Clause 3.1(m) states that "the Supplier will meet the DLIS mail provider collection times and ensure that work is handed over in line with the specifications of the mail provider". However, as already found, the Disputed Items are simply put in bags, and sent out by Royal Mail; they are not "sorted to achieve optimum postage discounts" or handed over to "the "DLIS mail provider". Mr Redman's uncontested evidence was that this had been agreed because the small volumes of post generated by the Disputed Items meant that no discounts were available, and it therefore made no difference which postal service was used.

74. Clause 3.1(i) requires the Company to carry out "final enclosing and despatch" and use the "onestep automated procedure"; Clause 3.1(p) requires the Company to manage stock levels and liaise with DLIS to ensure that there are adequate supplies of the "pre-printed stock" – a reference to the T&Cs.

75. Clause 3.1(o) requires the Company to "work with DLIS's third party paper supplier for the supply of stock to facilitate the production of printed items using the stock grades specified *where appropriate and agreed*". We emphasis the final words: the paper used for the Disputed Items is not supplied by DLIS's third party paper supplier, but sourced by the Company because the scale of its printing business allows paper to be purchased at a significant discount. We find as a fact that it was neither "appropriate" nor "agreed" for the Company to work with DLIS's third party paper supplier, but the paper used for the Disputed Items was instead sourced by the Company. That our finding is correct can be seen from Clause 8.6, which provides that "current paper rates are included within the Unit Price (being the Supplier rates for all digital print…)". The term "digital print" includes the Disputed Items. The Clause only makes sense if the paper is supplied by the Company; otherwise it would not be included in the pricing.

76. As already set out at §54, Clause 6.2 of the Framework Agreement" begins:

> "The Supplier shall ensure that the Goods are (i) in accordance with any specification set out in a Statement of Work…"

77. The relevant specification is set out at Clause 4 of SoW3. It requires that the Company provide the Disputed Items and the C5 packs in accordance with the following specification:

(1) the Disputed Items are to be printed on 150gsm paper and put into A4 oversize outer envelopes;

(2) the C5 Items are to be printed on 100gsm paper and inserted into A5 envelopes; and

(3) in both cases, the Goods must meet or exceed the ISO 9001 quality standard and meet or exceed the ISO 14001 environmental standard.

78. Clause 6 is headed "Service Levels and Service Credits". The parties are required to measure and monitor service levels by "a combination of system monitoring, manual monitoring and process feedback"; the Company's reports on service levels are to be discussed at the monthly management meetings. The specific service level requirements are listed as sub-paragraphs (a) to (i), summarised below:

(a) DLIS must confirm any quotations received from the Company within two business days.

(b) The Company and DLIS will have monthly meetings.

(c) The Company will acknowledge all communications within 4 hours.

(d) All proofs will be provided by the Company in accordance with the agreed production schedule.

(e) The Company will ensure that the proofs are uploaded to the agreed "File Transfer Protocol" site.

(f) The Company will ensure that all products are produced in line with branded guidelines, industry and ISO quality standards.

(g) The Company will ensure that all products are produced in accordance with the proofs provided by DLIS.

(h) The Company shall ensure that all orders are packed so as to provide reasonable protection from damage during transport and delivery.

(i) The Company will liaise with DLIS's postal provider.

79. Clause 6.6 set out the required volume and timing for production of the Disputed Items and the C5 Items. The remaining subclauses deal with delays which make it impossible to achieve agreed delivery dates; notification of problems on the production run; the requirement to produce a plan to correct any failure in service delivery, and the method of operating and applying "service credits". Service credits are a type of penalty, which operate by reducing the invoiced amounts. They apply if the Company fails to meet certain specified service levels. Of the listing in the previous paragraph, items (a) to (e) do not carry service credits; items (f) to (i) carry "service credits" of £200 per month "upon agreement following review via the escalation process". The Tribunal understands this to mean that a service credit would only be applied to those items after the parties had agreed that the failure should be penalised. Under Clause 6.6, service credits of 1% to 5% apply to late

delivery of the Disputed Items and (separately) to late delivery of the C5 Packs; the percentage increases with the degree of lateness.

80. Clause 7 is headed "Key Personnel"; it sets out the names and contact details for of the following members of the Company's staff: the "Client Relationship Director" for DLIS; the Account Manager for DLIS; the Head of Client Services and the Managing Director. The Head of Client Services is described as "the first escalation point" and the Managing Director as "the second escalation point". This is the "escalation tree" referred to at §47; as there noted, it has not been used.

81. Clause 8 provides that the fees are those set out at Appendix 1; Clause 8.6 states that the fee includes the cost of the paper. Appendix 1 specifies the amount to be charged, as follows:

	Maintenance of the infrastructure and application including working day support	£1,250 pcm
	Daily set up process for data processing, laser and "enclose"	£235 pd
Printed Items	DP and download	£10 per 1000 images
	Printing laser colour	£85 per 1000 images
	Paper	£19 per 1000 sheets
	Saddle stitching and enclose with T&C	£775
Deliveries	Courier	£12.50 per UPS delivery
	Royal Mail	£0.82 per pack

82. The remainder of the fees in Appendix 1 relate to the production and postage of the C5 packs.

83. The invoices the Company issues to DLIS identify the postage on-charged from Royal Mail. However, in all other respects, the invoices make no reference to any of the items in the middle column of the table above. Instead, they specify the numbers and price of the Printed Items; the Appraisals; each type of T&C; the C5 packs, and the related postage in each case. The Printed Items are priced at £8.08, as is each Appraisal. The prices for T&Cs range from under £1 to over £4.

84. We have already found, in reliance on the witness evidence, that the Company's charges are on a "cost plus" basis. Taking that evidence, the Appendix, and the invoices together, we find as a fact that each of the Disputed Items is invoiced based on their production cost, using the pricing set out in the Appendix, which includes a profit margin.

The legal principles relating to the First Issue

85. There is extensive case law on (a) the role of contracts in establishing which taxable supplies are being made and (b) whether there is a single ("composite") supply, or a multiple supply. In the next following paragraphs we set out some of the key authorities; others are referred to in the context of the parties' submissions.

86. In *WHA v HMRC* [2013] UKSC 24 at [27], Lord Reed said:

> "The contractual position is not conclusive of the taxable supplies being made as between the various participants...but it is the most useful starting point."

87. In *HMRC v Newey* (Case C-653/11) [2013] STC 2432, the CJEU said:

> "42. As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case law of the court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, *Revenue and Customs Comrs v Loyalty Management UK Ltd, Baxi Group Ltd v Revenue and Customs Comrs* (Joined cases C-53/09 and C-55/09) [2010] STC 2651, [2010] ECR I-9187, paras 39 and 40 and the case law cited).
>
> 43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of arts 2(1) and 6(1) of the Sixth Directive have to be identified.
>
> 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."

88. In *Secret Hotels2 v HMRC* [2014] UKSC 16, Lord Neuberger stated:

> "[31] Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.
>
> [32] When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense…

> [33] In English law it is not permissible to take into account the subsequent behaviour or statements of the parties as an aid to interpreting their written agreement….The subsequent behaviour or statements of the parties can, however, be relevant, for a number of other reasons. First, they may be invoked to support the contention that the written agreement was a sham - ie that it was not in fact intended to govern the parties' relationship at all. Secondly, they may be invoked in support of a claim for rectification of the written agreement. Thirdly, they may be relied on to support a claim that the written agreement was subsequently varied, or rescinded and replaced by a subsequent contract (agreed by words or conduct). Fourthly, they may be relied on to establish that the written agreement represented only part of the totality of the parties' contractual relationship…
>
> [35]…In order to decide whether the FTT was entitled to reach the conclusion that it did, one must identify the nature of the relationship between Med, the hotelier, and the customer, and, in order to do that, one must first consider the effect of the contractual documentation, and then see whether any conclusion is vitiated by the facts relied on by either party."

89. Both parties submitted that the Company was providing DLIS with a composite supply, although they disagreed on whether it was a supply of goods or of services. The following well-established CJEU case law sets out when there is a composite supply:

(1) where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which do not constitute for customers an end in themselves but a means of better enjoying the principal service supplied (*Card Protection Plan Ltd v C&E Comrs* (Case C-349/96) [1999] STC 270 ("*CPP*") at [30]); and

(2) where two or more 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 (*Levob Verzekeringen BV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766 ("*Levob*") at [22]).

90. The difference between the two types of composite supply was explained by Lord Walker in *College of Estate Management v C&E Commrs* [2005] UKHL 62 at [30]:

> "'Ancillary' means…subservient, subordinate and ministering to something else. It was an entirely apposite term in the discussion in *British Telecommunications* (where the delivery of the car was subordinate to its sale) and in *Card Protection Plan* itself (where some peripheral parts of a package of services, and some goods of trivial value such as labels, key tabs and a medical card, were subordinate to the main package of insurance services). But there are other cases (including *Faaborg, Beynon* and the present case) in which it is inappropriate to analyse the transaction in terms of what is 'principal' and 'ancillary', and it is unhelpful to strain the natural meaning of 'ancillary' in an attempt to do so. Food is not ancillary to restaurant services; it is of central and indispensable importance to them;

nevertheless there is a single supply of services (*Faaborg*). Pharmaceuticals are not ancillary to medical care which requires the use of medication; again, they are of central and indispensable importance; nevertheless there is a single supply of services (*Beynon*)."

91. Both parties also referred to the helpful summary of the earlier case law in *Honourable Society of Middle Temple v HMRC* [2013] UKUT 250 (Judges Sinfield and Gort) at [60]:

"(1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.

(2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.

(3) There is no absolute rule and all the circumstances must be considered in every transaction.

(4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.

(5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.

(6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.

(7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

(8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.

(9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.

(10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

(11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.

(12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality."

The parties' submissions on the First Issue

92. The Company's case is that it is making a single composite supply of goods, either because the Disputed Items are the principal element, to which the services are ancillary (*CPP*), or because it is making a single indivisible economic supply of goods, which it would be artificial to split (*Levob*).

93. HMRC's case is that *Levob* applies, because the Company is providing "a comprehensive service to administer and co-ordinate the provision of insurance details and information to the retail customers of DLIS" and the Disputed Items are not the principal or predominant supply. Instead, Mr Puzey said, "there is no principal or predominant element".

Submissions on behalf of the Company

94. Mr Hitchmough said that the Company was supplying goods, namely the Disputed Items and the C5 packs; those goods are then sent directly to DLIS's customers. Although the status of the C5 packs was not in issue in these proceedings, Mr Hitchmough said that this was a separate supply from the Disputed Items. It was clearly distinguished throughout SoW3, and in the pricing.

95. Turning to the Disputed Items, he referred in particular to the following contractual provisions:

(1) Clause 6.1 of the Framework Agreement, which provides (his emphasis) that the Company shall provide the goods and services "in accordance with the terms of this Agreement, and *in particular*, the terms of the relevant Statement of Work". It is therefore the latter which specifies what the Company is to supply to DLIS, and the focus should be on SoW3 rather than on the Framework Agreement.

(2) In any event, Clause 6.2 of the Framework Agreement begins "the Supplier shall ensure that Goods are (i) in accordance with any specification set out in a Statement of Work". That specification can be found at Clause 4 of SoW3, and requires the Company to provide the Disputed Items and the C5 packs, both of which are self-evidently "goods" for VAT purposes.

(3) Although Clause 3 is headed "Description of services", the word "Services" is defined in the Framework Agreement as including "the production of Goods", and that definition carries across to the SoW3, so little if any weight can be placed on the use of the word "services" in either contract.

(4) Clause 3 lists the "services" which the Company is to provide. The first of these is the "output of DLIS's Private Insurance daily packs and letters", which are "goods".

(5) The rest of Clause 3 simply specifies how DLIS will provide the Company with the data it needs to produce those goods, and describes the production process: see for example the references to "streaming" the data and using the Company's "one-step" automated process to ensure that all data received has been dealt with.

(6) The position is the same when "service levels" listed at Clause 6 is considered (see §78). The first three points relate to meetings and communication, so are neutral; the next five points relate to controlling the quality of the Disputed Items and the C5 packs, including checking the proofs, producing the Disputed Items to the agreed timescale and in accordance with the proofs provided by DLIS, adhering to ISO guidelines, and providing reasonable protection from damage.

96. Mr Hitchmough said that the so-called "services" in Clauses 3 and 6 of SoW3 are simply parts of the production process for the Disputed Items. In VAT terms they are objectively part of a single, indivisible economic supply of goods, which it would be artificial to split.

97. The references in the Framework Agreement and SoW3 to meetings, monitoring and staff qualifications ensure that the goods are supplied to the required standard; the requirement for employee checks reflects DLIS's need to protect the sensitive data which is embedded in the goods. In other words, these too are elements of the single supply to DLIS of the Disputed Items. He said:

> "Each of the so-called services either (a) relates to or is part of the goods supplied, such as managing the workflow – or (b) relates to the delivery eg despatch. None of the so-called services constitute for DLIS an aim in itself; instead they are subordinate to and ancillary to the [Disputed Items] and the C5 packs."

98. Although the Company organised the delivery of the Disputed Items, and this was a "service", the position was analogous to that in *C&E Commrs v British Telecommunications* [1999] STC 758 ("BT") where BT bought cars from manufacturers and paid a separate charge for delivery. The House of Lords held what BT wanted as a matter of commercial reality was a delivered car, and the delivery "was incidental to the supply of the car", so BT had received a single composite supply made up of the car and the delivery, and the latter was ancillary.

99. He said that another relevant parallel was *Purple Parking v HMRC* (Case C-117/11) [2012] STC 1680, where the appellant provided airport parking and transported the customers between the airport and the parking area. The CJEU found that there was a single supply in which the parking was predominant, saying at [35]:

> "The customer seeks, first and foremost, parking at an advantageous price. By contrast, the transport service is only the inevitable consequence of the fact that the car park is located at a certain distance from the airport."

100. In reliance on those two cases, Mr Hitchmough submitted that DLIS requires the Disputed Items to be produced, and then delivered to the policyholder. The Disputed Items are either "predominant", or else constitute the principal supply, with delivery being ancillary.

101. Moreover, DLIS is invoiced only for the Disputed Items, for the C5 packs, and for the related postage. The pricing is based entirely on the volume and cost of the

goods which are supplied by the Company. There is no invoiced amount for the mixed bag of "services" which HMRC submit is being supplied. That is because these "so-called services" are part of the same economic supply, or are ancillary to that supply.

102. Mr Hitchmough emphasised that the Framework Agreement was the same standard template used by DLIS for all its suppliers, and SoW3 was also based on a standard template. He referred to *Newey* at [44] where the CJEU said that "sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions". Although the CJEU goes on to say that this was the position "in particular" when the contractual terms "constitute a purely artificial arrangement", that was not the only situation when contractual terms are not conclusive. He cited *U-Drive v HMRC* [2017] UKUT 112 (TCC) ("*U-Drive*") where the Upper Tribunal (Proudman J and Judge Sinfield) said at [36]:

> "As the use of the words 'in particular' by the CJEU in Newey show, artificiality is not the only test of economic reality."

103. Moreover, in *SecretHotels2*, Lord Neuberger had ended his analysis by saying "one must first consider the effect of the contractual documentation, and then see whether any conclusion is vitiated by the facts relied on by either party". Mr Hitchmough submitted that many parts of the Framework Agreement clearly do not apply to the commercial relationship between DLIS and the Company. For example, Clause 6.13 requires the Supplier to "immediately notify DLIS of any complaints received from a Customer", but that has no application because DLIS's policyholders are unaware that the Disputed Items are produced, printed, and despatched by the Company, so it is not possible for them to complain. Similarly, Clause 6.12 requires that "the Supplier shall at all times act in a professional and courteous manner, be polite, helpful and honest…" which applies to suppliers providing call centre services, but is inapt in the context of the relationship between DLIS and the Company. Even within the So3, some Clauses did not reflect what the parties actually did. In particular, there is no data cleansing, no use of DLIS's mail provider; the paper was supplied by the Company, not by DLIS, and there is no requirement for "composition", because the data sent to the Company is "print-ready".

104. Although HMRC referred to the Framework Agreement as imposing obligations on "the Supplier" in relation to third-party suppliers, there was only one such third party, namely CGI, which provided the software which allowed secure data transfer between DLIS and the Company. Nothing in SoW3 imposed any specific obligations on the Company in relation to CGI.

105. Mr Hitchmough summed up this part of the Company's case by saying:

> "when analysing any transaction for VAT purposes, the contract is the starting point, but it is not the end point. In the present case – which involves contracts that are (i) based on templates of standard procurement contracts and (ii) designed to encompass supplies of various (disparate) products – it is particularly important to look at what is actually happening on the ground."

106. He said that HMRC's submission that the Company was making a composite supply of services in which it was not possible to identify a principal or predominant element was not only wrong on the facts, because the predominant element was clearly the supply of the Disputed Items, but in failing to identify the predominant element, HMRC were making an error of law. In *Levob* the CJEU had held at [27]:

> "…with regard to the question whether such a single complex supply is to be classified as a supply of services, it is vital to identify the predominant elements of that supply."

107. Mr Hitchmough also submitted that the Company's case was "materially indistinguishable" from that in *Harrier v HMRC* [2011] UKFTT 725 (TC) ("*Harrier*"). In *Harrier* the Tribunal (Judge Berner and Mr Templeman) considered whether "photobooks" were goods or services. The photobooks consisted of photographs and other images personal to, and selected by, the customer; once the digital pages were populated, a digital file was sent to the appellant. Harrier was then responsible for ensuring that the photobooks were printed, bound and delivered to the customer. HMRC's Counsel in that case, Mr Thomas, argued as follows:

> "[27] …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 supplies, he argued, were described as services in the relevant agreements. 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 a service to its customer."

108. However, the Tribunal in *Harrier* found that the analysis of the contracts did not support Mr Thomas's submission, saying at [28]:

> "The defined term encompassed the provision of products as well as 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."

109. At [34] the Tribunal concluded:

> "In our view, looking at the 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 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."

110. Mr Hitchmough submitted that the key facts in *Harrier* were essentially the same as in this case; the Company too was making a composite supply of goods.

Submissions on behalf of HMRC

111. Mr Puzey's starting point was the Framework Agreement, which he said placed "very significant obligations" on the Company. He described it as a "very comprehensive agreement" which could not properly be said to represent "the responsibilities of someone just doing a printing service".

112. He drew attention to the following provisions of that Agreement:

(1) by Recital A, DLIS requires "the provision of printed matter and certain document management services", and he emphasised the latter;

(2) the definition of "goods" sits within the definition for services, so that "the concept of goods being subsumed within an overall supply of services is written into this contract";

(3) Clauses 6.14 and 6.16 of the Framework Agreement, which refer to third party suppliers and subcontractors, illustrated "the breadth of services required from the Company", with Clause 6.16 imposing an "extraordinary broad and onerous requirement" going beyond anything which was ancillary. The Company was not, he said, simply providing printed matter but "managing and co-ordinating other parties";

(4) the detailed requirements in the Framework Agreement and Schedule 4 as to the background checks imposed on employees. He said that these "extraordinarily draconian" requirements were imposed because the Company was responsible for the "retention and distribution" of client information, one of DLIS's most important assets; and

(5) Schedules 5-7, which require compliance with environmental protection initiatives, governance requirements and benchmarking.

113. In SoW3 Mr Puzey drew attention to the following:

(1) the "description of services" at Clause 3;

(2) the service level requirements at Clause 6; and

(3) the "key personnel" obligations at Clause 7.

114. Taking into account the above provisions, Mr Puzey submitted that "what is supplied goes well beyond a straightforward supply of printed matter" given "the wide and detailed terms of the contract". Instead, they show that the Company had agreed to supply "a service package", being: "the liaison with and coordination of third party suppliers, the checking of data, the production of reports, the demanding reporting and processing requirements". He submitted that these "amount to a portfolio of services in addition to the physical material", so that the elements of the supply comprise both printed material (goods) and administration/delivery (services).

Furthermore, this conclusion was entirely consistent with the Company's marketing material (see §19), which said it was "a trusted global communications partner".

115. Mr Puzey said that the Company's argument amounted to a submission that the contracts do not represent the economic reality, either (a) because they are template contracts and/or (b) because some of their terms are not being operated, such as data cleansing and using DLIS's paper supplier. In Mr Puzey's submission, the contracts have not been varied, so DLIS could at any time require the Company to carry out data cleansing, or use its print suppliers, and the Company would have to comply. Although he acknowledged that in *U-Drive* the Upper Tribunal had held that the absence of artificiality is not the end of the matter, he said that it is not possible to disregard some of the terms of a "valid, current, un-amended agreement simply because from time to time they may not be in use or because the other party to the agreement does not seek to enforce them".

116. In summarising HMRC's case, he said:

> "Objectively and collectively, the Framework Agreement and SoW3 provides for a comprehensive service to administer and coordinate the provision of insurance details and information to the retail customers of DLIS. The elements of that service are inextricably bound together into a single supply and it would be quite artificial to identify the supply of the [Disputed Items] and C5 packs as the principal supply to which the other elements are ancillary or to view it as the predominant supply. There is no principal or predominant element."

117. In submitting that there was "no principal or predominant element", Mr Puzey relied on *HMRC v Metropolitan International Schools* [2017] UKUT 431 (TCC) ("*Metropolitan International*") where the Upper Tribunal (Mann J and Judge Greenbank) said at [55]:

> "…There may be cases where the weighing up of the relevant characteristics of the supply does not produce a predominant element. In such a case a straight predominance test cannot provide a positive answer to what the character of the supply may be, though that may not matter much if the question is a question as to what the characterisation is not--for example, if the question is whether or not the supply falls within a given exemption. In such cases, if the supply has no single predominant characteristic then the supply will not fall within the exemption (see *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* (Case C-44/11) [2012] STC 1951..."

118. Finally, Mr Puzey "categorically disagreed" with Mr Hitchmough's submissions on *Harrier,* saying that the Company and DLIS had concluded an "extensive and very detailed contract for services", and there was no parallel between the Company's position and the facts in *Harrier.*

Discussion of the First Issue

119. We begin with the Framework Agreement. At paragraph 11.1 of her authoritative work, *The Law of Public and Utilities Procurement*, Professor Arrowsmith defines "framework arrangements":

> "Framework arrangements are arrangements whereby a procuring entity and provider establish the terms on which purchases may or will be made over a period of time. The procuring entity makes an initial solicitation of offers against proposed terms and conditions, chooses one or more providers — referred to as the 'framework provider(s)' — on the basis of their offers and then places periodic orders with chosen framework providers as particular requirements arise."

120. In the Northern Ireland case of *Lowry Brothers v Northern Ireland Water* [2013] NIQB 23, McCloskey J endorsed that definition, and added:

> "A framework agreement is clearly designed to operate as a broad, overarching contractual structure giving rise per se to legal rights and obligations on part of the contracting authority and the other parties thereto. However, crucially, it does not constitute a supply contract, a works contract or a services contract. Rather, it represents the first step - itself contractual in nature - in entering into individual contracts of this kind with the economic operators concerned…"

121. Although both the above definitions were provided in the context of public procurement, we nevertheless find that they provide a helpful starting point when considering the purpose and function of the Framework Agreement.

122. In reliance on the unchallenged witness evidence of Mr Redman, we have already found as a fact that DLIS uses the same Framework Agreement for all supplies, so it covers supplies of goods (such as tables and chairs) and supplies of services (such as call centre staff). This can also be seen from the wording of the Framework Agreement itself: Recital B states that:

> "DLIS can request, and the Supplier shall provide, the Goods and Services (as defined below) and all Goods and Services shall be provided to DLIS and the Service Beneficiaries in accordance with the main terms and conditions of this Agreement, the Schedules and the relevant Statement of Work."

123. Furthermore, at the time the Framework Agreement was signed on 10 October 2014, the Company had no specific obligation to supply anything at all: that only came about after DLIS made a request for certain specific goods or services in accordance with Clause 5, which provides:

> "5.1 if DLIS requires the Supplier to undertake any Services or provide any Goods, it shall discuss its requirements with the Supplier.
>
> 5.2 As soon as reasonably practicable following these discussions, the Supplier shall…submit to DLIS in writing for approval a draft Statement of Work, using the Pro Forma Statement of Work."

124. It is the SoWs which specify the "Services" or the "Goods" which the Company is to make to DLIS. Once there is an SoW, its opening "Structure" paragraph states that "The Terms of the Framework Services Agreement are incorporated into, and form part of, this Statement of Work". Its concluding words say "this Statement of Work shall form part of the Framework Services Agreement". What we take from

these provisions is that the Framework Agreement and each SoW are to be read together.

125. SoW3 was signed on 20 November 2014; it is therefore only at that point that the parties contracted for the specific supplies at issue in this appeal.

126. Pausing here, we note that although both "goods" and "services" are defined terms, the definitions are confused and overlapping. Clause 1.1 of the Framework Agreement reads (emphasis added):

> "**Goods**: all records, reports, documents, papers, other materials and deliverables (whether in documentary, electronic or other form) produced or supplied by, or on behalf of the Supplier for DLIS *as part of the Services* including such Goods as are described in a Statement of Work.
>
> **Services**: the services to be provided by the Supplier as described in a Statement of Work, *and the production of Goods* and such other services as may be agreed between the parties."

127. Thus "goods" are defined as "part of the services" and services are defined to include "the production of goods". Mr Puzey is correct that the concept of "goods" has been subsumed into an overall supply of services, but that takes us nowhere. Our task is decide whether the Company is supplying "goods" and/or "services" within the meaning of VATA, not whether it is supplying goods or services within the meaning of the contracts.

128. These overlapping and confusing definitions mean that we cannot rely on the contractual terminology to determine whether the disputed supply is of goods or of services. In particular, we have to be alert to the risk that supplies of goods may be misdescribed as services, and vice versa.

129. So what supplies did the Company agree to make to DLIS when it signed the SoW3? Given that the Recitals and the Structure paragraphs are copied verbatim from the Pro Forma, which is again used for all SoWs, it is to the main body of SoW3 to which we must turn.

130. Clause 3 is headed "Description of Services" and Clause 4 is headed "Specification for the Goods". Taking "the Goods" first, the Company was required to supply the Disputed Items and the C5 packs. These are printed matter, so clearly goods for VAT purposes: HMRC rightly did not seek to argue otherwise.

131. Clause 3 provides that the Supplier shall provide DLIS with the services there set out. The first of those services is at Clause 3.1(a), which reads:

> "output of DLIS's Private Insurance daily packs and letters, including the composition, printing and distribution of private insurance Customer documentation, including pre-printed materials and Customer policy documents with insert matrices and Customer appraisal. "

132. The key word here is "output" – in other words, the end product. The "output" is "DLIS's Private Insurance daily packs and letters", namely the Disputed Items and the C5 packs. The subclause also specifies that it includes (a) "pre-printed materials", namely the T&Cs; and (b) "customer policy documents" being the Printed Items, the Appraisals, and the policyholder letters for the C5 packs. Although headed "services", this subclause is talking about goods.

133. Included in what DLIS requires by way of the "services" at Clause 3(1)(a) is the printing of the Disputed Items, the C5 pack letters, and the T&Cs. Printing is not a separate service, but part of the production of the Disputed Items. In other words, the printing is part of the same, single, indivisible economic supply of goods, and it would be entirely artificial to split that "service" from the supply of the Disputed Items and the C5 packs.

134. Almost all the other "services" required by Clause 3 likewise describe parts of the production process, such as confirming receipt of data and the streaming and processing requirements. These "services" are part of the same economic supply of goods, and it would be artificial to split them out as one or more separate services.

135. Although Clause 6 is headed "service level agreements", it too describes stages of the printing process. It requires the Company to produce the Printed Items and C5 packs in accordance with proofs provided by DLIS, the agreed schedule and the applicable standards. These "services" are not separable from the supply of the Printed Items, but an intrinsic part of producing the Disputed Items and the C5 packs.

136. We have not overlooked the terms of the Framework Agreement, on which HMRC placed so much weight. But, as one would expect from the nature of such an agreement, many of its provisions do no more than impose quality standards on all its suppliers. For example, the Company, as one of those suppliers, must ensure staff are properly trained, and vetted; if required, it must demonstrate it has met appropriate environmental standards and it must comply with DLIS's anti-corruption policy. All suppliers must meet these same quality standards, irrespective of the nature of the supply being made. Given that "every supply must normally be regarded as distinct and independent", these generic clauses do not help us to decide whether a particular supply, contracted for by way of an SoW signed after the Framework Agreement, is a supply of goods or of services.

137. As Mr Hitchmough said, some of the remaining terms of the Framework Agreement are simply irrelevant, including Clause 6.12 ("the Supplier shall at all times act in a professional and courteous manner") and Clause 6.13, which covers "complaints received from a Customer": no policyholder has any contact with, or awareness of, the Company's role in providing the Disputed Items. Other Clauses set out what are essentially standard terms in commercial contracts, about confidentiality, breach, notice, termination, governing law etc, and these too are of no relevance to the issue before the Tribunal.

138. Although HMRC placed significant reliance on the Clauses relating to third party suppliers, these are operative only "as requested by DLIS" and "as instructed by DLIS", see Clause 6.14 at §56 and Clause 6.16 at §57. However:

(1) the only third party which plays any role at all in the supplies at issue in this appeal is CGI;

(2) the Framework Agreement must be read together with the SoW; and

(3) SoW3 makes no reference to the Company having any obligation to liaise with CGI.

139. We therefore find as a fact that DLIS did not request or instruct the Company to take on any obligations to third parties. There is no basis for Mr Puzey's submission that the "third party supplier terms in the Framework Agreement place on the Company the "extraordinary broad and onerous requirement" of "managing and co-ordinating other parties".

140. Instead, the Company has made a composite supply of the Disputed Items together with the inseparable and indispensable elements which are required to produce those Items – receiving and confirming data, streaming data, printing, stapling and enveloping the Printed Items and the Appraisals; and printing, stapling and enveloping the T&Cs. All those elements fall within the definition of "ancillary" approved by Lord Walker in *College of Estate Management*, because they are "subservient, subordinate and ministering to something else", namely the production of the Disputed Items in their finished form.

Despatch and delivery

141. We have found as facts, based on unchallenged witness evidence, that the Company not only supplies the Printed Items, but organises their despatch and delivery via Royal Mail; the related postal costs are then recharged to DLIS. Despatch and delivery are of course services, not goods. We therefore needed to decide whether the delivery was part of the same composite supply of goods, or a separate supply of services.

142. We first considered whether delivery was being supplied under SoW3, or under some separate contractual arrangement. The written terms of SoW3 are inconsistent: Clause 3(1)(a) states that the Company has agreed to provide "distribution", but Clause 3.1(m) and Clause 6 at point (i) require that the Company passes responsibility for delivery to "DLIS's mail provider". Mr Hitchmough said that Clause 3.1(m) and Clause 6 at point (i) had been varied "by conduct", so that responsibility for delivery transferred to the Company under the same contract.

143. We agree, for the following reasons:

(1) the variation brings those two provisions into line with Clause 3(a), so the contract is internally consistent;

(2) the alternative would mean that the Company was in breach of a contractual term, as well as being liable to penalties, see Clause 6(i) at §78. On

the facts that is clearly not the position: instead, the parties had agreed between them that the Company would arrange despatch and delivery;

(3) there is no evidence of any separate contract dealing only with delivery; and

(4) as Lord Neuberger said in *SecretHotels2* at [33], the subsequent behaviour of the parties can be taken into account in order to support a claim that an agreement has been varied.

144. Although Clause 31 of the the Framework Agreement (see §62) specifies that "no variation to the Agreement or a SoW "shall be valid unless it is in writing and signed by authorised representatives of each party", the Court of Appeal has recently held that this does not prevent a variation, see *Globe Motors v TRW Lucas* [2016] EWCA Civ 396 *per* Beaston LJ at [96-113], Underhill LJ at [116-117] and Moore-Bick LJ at [119-121]. We make no finding on whether the variation was "by conduct" as Mr Hitchmough submitted, or oral, or by unsigned written communications, such as email.

145. Thus, the answer to our first question is that delivery is not provided under a separate contract, but under the SoW3. But it could still be a separate supply from the goods. In submitting that the Company was making a single supply, Mr Hitchmough relied on both *British Telecom,* where delivery was *ancillary* to the car, and *Purple Parking,* where parking was *predominant* over transporting the customers.

146. We note that in *College of Estate Management,* which explains the distinction between these two types of composite supply, Lord Walker said that "ancillary" was "an entirely apposite term in the discussion in *British Telecommunications* (where the delivery of the car was subordinate to its sale)". In that case, a decision of the House of Lords referenced as [1999] STC 758, Lord Hope said at pages 767-8:

> "The examination of the question in the present case is, in my opinion, assisted by the terms of art 11A 2(b) of the Sixth Directive. This paragraph of the article states that the taxable amount shall include–
>
> '...incidental expenses such as commission, packing, transport and insurance costs charged by the supplier to the purchaser or customer. Expenses covered by a separate agreement may be considered to be incidental expenses by the Member States.'
>
> I think that this paragraph helps to show that the supply of services such as transport of goods from the factory to the purchaser's premises can be treated as incidental or ancillary to the supply of the goods by the manufacturer to the purchaser, although this need not be so, and accordingly is not deemed to be so, in all cases."

147. What was Article 11A 2(b) of the Sixth Directive is now at Article 78 of the PVD, and reads:

> "The taxable amount shall include the following factors:
>
> (a) …;

> (b) incidental expenses, such as commission, packing, transport and insurance costs, charged by the supplier to the customer.
>
> For the purposes of point (b) of the first paragraph, Member States may regard expenses covered by a separate agreement as incidental expenses."

148. In this case, too, the transport costs are charged by the supplier (the Company) to the customer (DLIS), so are an "incidental expense" within the meaning of the PVD; there is a clear parallel with the position in *British Telecom*. In contrast, it was the customers, not the goods, which were transported in *Purple Parking*.

149. We therefore find that *British Telecom* provides the better parallel, and that delivery was ancillary to the supply of the goods. However, it is a fine line, and we derive some comfort from the Upper Tribunal's comment in *Metropolitan Schools* at [58] that "the predominance test is likely to produce the same answer in the cases in the principally/ancillary test can apply" (although we think this is intended to read "is likely to produce the same answer in the cases *where the principal*/ancillary test can apply").

Surrounding circumstances and commercial common sense

150. Our approach to the Framework Agreement and the SoW3 is consistent with the guidance given in *CPP* and in *Secret Hotels2*. In *CPP* at [28] the CJEU said:

> "where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place"

151. As cited earlier in this decision, in *Secret Hotels2* at [32], Lord Neuberger said:

> "When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense…"

152. The "circumstances in which the transaction took place" and the "surrounding circumstances" of the Framework Contract and SoW3 are not in dispute. As we have already found, DLIS carried out market reviews to identify a supplier who could provide both speculative direct mail items (which are not in issue in this appeal) and the Disputed Items/C5 packs, described as:

> "transactional print items, sent to existing and prospective customers in response to their interaction with DLIS, including policy documents and quotations for new business requested via DLIS's website."

153. Thus, the "circumstances" make it absolutely clear that DLIS is contracting for supplies of goods, namely the Disputed Items, and the C5 packs. DLIS does not require "a service package" made up of the Disputed Items and "liaison with and coordination of third party suppliers, the checking of data, the production of reports, the demanding reporting and processing requirements", as Mr Puzey submitted was the position. These alleged "services" are either not required at all (in the case of the

relationship with third party suppliers) or simply elements which form part of the supply of goods (in the case of the data checks and reports).

154. In *Secret Hotels2* Lord Neuberger also refers to commercial common sense. It would be inconsistent with commercial common sense to read a Framework Agreement which encompasses *all* suppliers, as doing any more than setting out "a broad, overarching contractual structure", as McCloskey J said in *Lowry*. Instead, it is to the SoW3 that we must look to establish what is being supplied.

The C5 packs

155. When considering the relationship between the C5 packs and the Disputed Items, our starting point is again that "every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split".

156. Like the Disputed Items, the C5 packs contain information about DLIS's personalised insurance policies. Clause 3.1(a) of SoW3 refers to the two together:

> "output of DLIS's Private Insurance daily packs and letters, including the composition, printing and distribution of private insurance Customer documentation, including pre-printed materials and Customer policy documents with insert matrices and Customer appraisal. "

157. However, Clause 4 sets out the different paper and envelope requirements: the Disputed Items are to be printed on 150gsm paper as compared to the 100gsm for the C5 packs; the Disputed Items are to be sent out in A5 (or C5) envelopes, not in A4 envelopes. The service credits for C5 Packs are calculated separately, see §79 and the costs and related postage are separately invoiced.

158. Taking all those facts into account, we find that the supply of C5 packs is "distinct and independent" from the supply of the Disputed Items. We are not asked to make a finding on whether this is a supply of goods or a supply of services, and we do not do so.

Other points

159. We agree with Mr Hitchmough that there are similarities between the facts in this appeal and those in *Harrier*, but in coming to our conclusion on the First Issue we have not relied on that decision. Instead, we have considered the facts of this case in the context of the relevant legal provisions.

160. It was unnecessary to consider Mr Puzey's submission, based on *Metropolitan International Schools* (currently under appeal to the Court of Appeal), that it is possible to have a single composite supply in which there is no predominant or principal element.

Conclusion on the First Issue

161. For the reasons set out above, we find that there is a single supply of goods in which the predominant and principal element is the Disputed Items. There is also a separate supply of the C5 packs.

The Second Issue: whether the Disputed Items are "booklets"

162. The second issue is whether the Goods are zero-rated booklets, as the Company contended, or standard rated supplies of printed matter, as HMRC contended.

The legislation and the case law

163. VATA Sch 8, Group 3 is headed "Books etc" and Item (1) of that Group is "Books, booklets, brochures, pamphlets and leaflets". Both parties rightly accepted that the leading authority on the meaning of "book" and "booklet" is to be found in *Colour Offset v HMRC* [1995] STC 85, a decision of May J, who said (at page 89):

> "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 use of the word, its particular meaning will be derived from the circumstances in which it is used…
>
> 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 looked at. (The same applies to 'booklet', which I think is a thin book perhaps with a rather flimsy cover…)…
>
> 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, 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. …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 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 that word does not mean that it is a book within the ordinary meaning of the word."

164. After the Tribunal in *Harrier* decided that the appellant was supplying goods, it went on to consider whether the photobooks were "books" within the meaning of the

zero-rating provisions. At [54] of its judgment, the Tribunal disagreed with the decision of the VAT Tribunal in *Risbey's* (2008) Decision 20783, saying:

> "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."

165. The Tribunal in *Harrier* went on to say that although a book had to have content (so that for example a new diary containing only blank pages was not a "book"), providing that condition was satisfied, the nature of that content was immaterial. The only requirement was that "it is something that can be read or looked at". However, the Tribunal then said at [58]:

> "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."

166. In *Magic Memories v HMRC* [2013] UKFTT 730 (TC) ("*Magic Memories*") a differently constituted Tribunal (Judge Brannan and Ms de Albuquerque) also considered whether "photo-books" were books or booklets. That Tribunal disagreed with the view about spiral binding expressed in *Harrier*, saying at [62]:

> "In our view, there is no reason why a document 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 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 without damage to the ring-binder or the pages."

167. The Tribunal in *Magic Memories* concluded at [63] that "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'." It also found at [57] that:

> "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."

168. In both *Harrier* and *Magic Memories*, HMRC's counsel submitted that the photobooks were not "books" or "booklets", because they were personalised; that submission was rejected, see [56] and [58] of the judgments.

Points not in dispute

169. Mr Hitchmough said that HMRC had accepted in correspondence before the hearing that the Printed Items had the physical characteristics of a book. Although that correspondence did not consider the Appraisals or the T&Cs, these were physically similar to the Printed Items and the position must be the same.

170. Mr Puzey confirmed that HMRC were not seeking to challenge the Disputed Items on the basis of their pages or binding. He also did not seek to argue that the Disputed Items were prevented from being "booklets" because the front and back covers were the same thickness as the internal pages.

171. In his skeleton argument, he had submitted the Disputed Items could not be classified as booklets because DLIS would not "read or look at" them, and "it is the perspective of the immediate recipient of the Appellant's supply, i.e. DLIS, which is important", not the perspective of the policyholder. Mr Hitchmough responded by pointing out that Waterstones purchases books from publishers, but it is Waterstone's customers who "read and look at" those books and they are not thereby prevented from being "books" for VAT purposes. Instead, the test is objective. In oral submissions Mr Puzey changed his position, saying that the right question was whether "the typical recipient" will sit down and read the Disputed Items.

The parties' submissions

172. Mr Puzey submitted that the Disputed Items were not booklets because:

(1) they contain the terms of insurance policies, which are contractual documents, and "do not become books, simply because the pages are stapled together";

(2) they will not be "read or looked at", but instead "sit in a file or a drawer until the next one arrives"; and

(3) could have been issued as letters or as loose pages.

173. Mr Hitchmough's response to these points was as follows:

(1) it is clear from the case law that content is irrelevant when deciding whether something is a "booklet";

(2) the Disputed Items were clearly intended to be read and looked at; this can be seen from the instructions which DLIS gives to policyholders, set out in the wording of the documents; and

(3) although DLIS could have sent the Disputed Items in a different form, such as letters or as loose pages, that too was irrelevant, see *C&E Commrs v Cantor Fitzgerald* (Case C-108/99) [2001] STC 145 ("*Cantor Fitzgerald*").

Discussion

174. Although HMRC did not challenge any of the Disputed Items on the basis that they did not have the physical characteristics of a booklet, the earlier correspondence concerned only the Printed Items. For the avoidance of any possible doubt, we find that all the Disputed Items have the physical characteristics of booklets, for the following reasons:

(1) they consist of between 9 pages (the sample Printed Item, leaving out the blank pages) and 39 pages (the longest of the sample T&Cs). This is "a sufficient number of leaves" to meet the test in *Colour Offset;*

(2) they are "held together front and back by covers". Although these are no thicker than the pages, the front cover is clearly distinguished by the coloured picture and title; the back cover is also different from the internal pages, consisting largely of branding and contact numbers. We note that May J described a booklet as "a thin book perhaps with a rather flimsy cover" and we agree with the Tribunal in *Magic Memories* that an item is not prevented from being a booklet because it has a paper cover; and

(3) the Disputed Items are all stapled along the centre line before being folded. We again agree with the Tribunal in *Magic Memories* that this type of stapling is sufficiently permanent to satisfy the "booklet" requirement.

175. We also have no hesitation in finding that the Disputed Items are intended to be read or looked at. DLIS repeatedly instructed its policyholders to do exactly that. saying for example: "it is important that you read this letter carefully, together with the enclosed documents in order to make sure the information provided is correct"; "Check your Insurance Schedule(s) carefully"; "IMPORTANT – it is very important that you check that the information in the enclosed policy documents, schedules and/or certificates is correct"; and "You should read the schedule and the policy booklet together and keep them in a safe place".

176. Other reasons support our finding. Policies may be invalidated by an error in the wording and policyholders are explicitly warned that this is the position, so failing to read one of the Disputed Items on receipt may have very serious consequences. The Appraisal sets out details of direct debits, so policyholders will not know how much will be removed from their bank accounts every month by the insurer unless they read the document; the Fixed Sum Credit Agreement has to be signed, and it is clearly intended that it first be read. Policyholders cannot successfully claim under a policy unless they are aware of the extent of their cover and any exclusions, and they can find this information by reading their policies. In short, the Disputed Items are plainly intended to be read and looked at; the contrary is not arguable.

177. We agree with Mr Hitchmough that the Disputed Items are not prevented from being booklets simply because they contain insurance policy details. *Colour Offset* contained no requirements as to content, and we agree with the Tribunal in *Harrier* that the nature of the content is immaterial. It is likewise irrelevant that the content is personal to the recipient: the same was true of the photobooks in both *Harrier* and *Magic Memories.*

178. We also agree that it makes no difference that the insurance policies could have been supplied to DLIS's customers in letter form. The VAT treatment of a supply follows from the objective nature of the transaction; it is not permissible to classify it for VAT purposes based on an alternative supply which was not in fact made. As the CJEU said in *Cantor Fitzgerald* at [33]:

> "An approach of that kind would be contrary to the VAT system's objectives of ensuring legal certainty and a correct and coherent application of the exemptions provided for in art 13 of the Sixth Directive."

Conclusion on the Second Issue

179. For the reasons set out above, we find that each of the Disputed Items is a booklet within the meaning of VATA Schedule 8, Group 3, Item (1).

Decision and appeal rights

180. For the reasons set out above, we find that:

(1) the Company is making a single supply of goods (including delivery) in which the predominant and principal element is the Disputed Items;

(2) each of the Disputed Items is a booklet; and

(3) the supply of the Disputed Items is therefore zero-rated in accordance with VATA Schedule 8, Group 3, Item (1).

181. This document contains full findings of fact and reasons for the decision. If HMRC is dissatisfied with this decision, it 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 28 MARCH 2018