



Appeal number: UT/2019/0143

VALUE ADDED TAX – Whether supplies of an “action day planner” are zero-rated as supplies of a book – no – appeal allowed and decision remitted to First-tier Tribunal

**UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)**

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

Appellants

-and-

**THORSTEIN GARDARSSON
T/A ACTION DAY A ISLANDI**

Respondent

TRIBUNAL

**JUDGE SWAMI RAGHAVAN
JUDGE JONATHAN RICHARDS**

Sitting in public at The Royal Courts of Justice, Strand, London on 12 March 2020

Matthew Donmall, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

The Respondent in person

DECISION

1. The Appellants (“HMRC”) appeal against a decision (the “Decision”) of the First-tier Tribunal Tax Chamber (the “FTT”) released on 8 July 2019. In the Decision, the FTT determined that an “action day planner” (which we, like the FTT will refer to as the “ADP”) is a “book” with the result that supplies of it made by Mr Gardarsson are zero-rated for VAT purposes.

2. That issue came before the FTT because although Mr Gardarsson resides in and operates his business from Iceland, he has since 2013 made supplies of the ADP to customers in the UK over the Amazon platform. HMRC became concerned that these supplies were standard-rated for VAT purposes and wrote to Mr Gardarsson suggesting that he needed to be registered for VAT in the UK. Mr Gardarsson maintained that supplies of the ADP were zero-rated (on the basis that the ADP was a “book”) but nevertheless applied for voluntary registration and was initially registered with effect from 1 July 2017. He submitted a VAT return for the period 08/17 which recorded no VAT payable (on the basis that his supplies were zero-rated).

3. However, HMRC formed the view that the ADP was not a “book” and that supplies of it were standard-rated. Having formed that view, HMRC made the following decisions:

(1) They backdated the date of Mr Gardarsson’s VAT registration to 26 July 2013 (the date when he started making supplies of the ADP to UK customers) and made an assessment for £158,024.77 in respect of VAT they considered due for his first VAT period (from 26 July 2013 to 30 June 2017).

(2) They charged Mr Gardarsson a penalty of £33,188.98 under paragraph 1 of Schedule 41 of Finance Act 2008 (“Schedule 41”) on the basis that he had failed to notify HMRC of his liability to be registered, albeit that the failure was not deliberate.

(3) They made an assessment for £12,769.59 in respect of Mr Gardarsson’s 08/17 VAT period.

(4) They imposed a penalty of £1,915.43 under Schedule 24 of Finance Act 2007 (“Schedule 24”) on the basis that Mr Gardarsson’s return for 08/17 contained a careless inaccuracy, namely a failure to acknowledge that supplies of the ADP were standard-rated.

Applicable statutory provisions

4. Section 30 of the Value Added Tax Act 1994 (“VATA”) provides for zero-rating in the following terms:

30 Zero-rating

(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section—

(a) no VAT shall be charged on the supply; but

(b) it shall in all other respects be treated as a taxable supply; and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.

5. The relevant provisions dealing with zero-rating are found in Group 3 of Schedule 8 as follows:

Group 3 Books, etc

Item No

1 Books, booklets, brochures, pamphlets and leaflets.

2 Newspapers, journals and periodicals.

3 Children's picture books and painting books.

4 Music (printed, duplicated or manuscript).

5 Maps, charts and topographical plans.

6 Covers, cases and other articles supplied with items 1 to 5 and not separately accounted for.

6. Schedule 1A of VATA deals with the liability of persons such as Mr Gardarsson, who have no business establishment in the UK, to be registered. Paragraph 1 of Schedule 1A provides as follows:

Liability to be registered

1—

(1) A person becomes liable to be registered under this Schedule at any time if conditions A to D are met.

(2) Condition A is that—

(a) the person makes taxable supplies, or

(b) there are reasonable grounds for believing that the person will make taxable supplies in the period of 30 days then beginning.

(3) Condition B is that those supplies (or any of them) are or will be made in the course or furtherance of a business carried on by the person.

(4) Condition C is that the person has no business establishment, or other fixed establishment, in the United Kingdom in relation to any business carried on by the person.

(5) Condition D is that the person is not registered under this Act.

7. We observe, therefore, that a liability to become registered arises when a person makes taxable supplies in the United Kingdom. Since zero-rated supplies are taxable supplies, even if, as Mr Gardarsson argues, supplies of the ADP are zero-rated, that would not of itself prevent the requirements of paragraph 1 of Schedule 1A from being

met. There is, however, a power, in paragraph 13 of Schedule 1A for HMRC to exempt a person from registration where that person is making entirely zero-rated supplies.

8. Paragraph 5 of Schedule 1A requires a person to notify their liability to be registered in the following terms:

Notification of liability and registration

5—

(1) A person who becomes liable to be registered by virtue of paragraph 1(2)(a) or 2(2) must notify the Commissioners of the liability before the end of the period of 30 days beginning with the day on which the liability arises.

(2) The Commissioners must register any such person (whether or not the person so notifies them) with effect from the beginning of the day on which the liability arises.

9. If a person fails to comply with the requirement imposed by paragraph 5 of Schedule 1A, a penalty becomes payable under paragraph 1 of Schedule 41. By virtue of paragraph 6 of Schedule 41, the amount of any penalty is linked to the “potential lost revenue” which, applying the definition in paragraph 7(6) of Schedule 41 means, in this case, the amount of VAT (if any) for which Mr Gardarsson would have been liable if registered for VAT throughout the “relevant period”.

10. Therefore, if Mr Gardarsson’s supplies were of zero-rated books, it was common ground that no penalty would actually be due under paragraph 1 of Schedule 41 (as Mr Gardarsson would have no actual VAT liability on which a penalty could bite). By contrast, if Mr Gardarsson’s supplies were standard-rated, he could be subjected to a penalty determined by applying a percentage to an amount of VAT payable. However, pursuant to paragraph 20 of Schedule 41, no penalty would be payable if Mr Gardarsson could show a “reasonable excuse” for any failure to notify¹.

11. If, as HMRC argue, there was an “inaccuracy” for Mr Gardarsson’s VAT return for 08/17, then he could be made liable for a penalty under paragraph 1 of Schedule 24 if the inaccuracy was brought about by either “careless” or “deliberate” behaviour.

The Decision and the grounds of appeal against it

The Decision

12. In this section, references to numbers in square brackets are to paragraphs of the Decision unless we state otherwise.

13. At [10], the FTT set out its findings of fact on the nature of the ADP. Those findings are uncontroversial and we set them out in full:

¹ The defence of “reasonable excuse” is potentially available because HMRC are not seeking to argue that Mr Gardarsson’s failure to notify HMRC was “deliberate”.

10. The Tribunal were shown an example of the ADP and find the following facts in relation to it:

(1) The external appearance of the ADP is that of a black leather/leather substitute covered book larger than A5 but smaller than A4 (its dimensions are 20.3 x 15.2 x 1.3cm). It has an elastic strap attached to the inside of the back cover that can be wrapped around the front to hold it closed. The Tribunal understands the ADP cover is available in different colours and a larger version is also available.

(2) Inside it has 115, 100gsm, slightly off white, pages.

(3) The ADP is described as a time management tool developed to “help people to grow; to teach and instruct people time management skills”. It is an interactive tool intended to facilitate the discipline of time management, step by step building habitual behaviour.

(4) The first 16 pages of the ADP contain text setting out a narrative of the ethos articulated by the Appellant for effective time management following themes of “attitude”, “goals” and “actions” together with the “discipline of rituals”.

(5) The remainder of the ADP is taken up with 52 double page planners. The layout follows the methodology advocated in the first 16 pages with space to set out “tasks to execute” “delegation and teamwork” a column for each day of a week and “goals/projects I am going to work on this week”. The columns for each day represent a little over one quarter of each double page.

(6) The 52 double pages are dated and the ADP is produced for a calendar or academic year.

(7) At the back is a cardboard slip pocket.

(8) The ADP retails for approximately £20.

14. At [14] and [15], after quoting extracts of applicable statute law, the FTT quoted a lengthy extract from HMRC’s VAT Notice 701/10 which set out HMRC’s view as to the scope of zero-rating for “books” together with an indication of items that they accepted did (or did not) fall to be treated as “books”. Significantly for the purposes of the FTT’s later analysis, in VAT Notice 701/10, HMRC expressed the view that collections of blank crossword puzzles are “books” for VAT purposes as are “school books and other educational tests in question and answer format” even though neither item is mentioned specifically in the relevant statutory provisions.

15. At [16] to [18], the FTT considered the case of *Customs and Excise Commissioners v Colour Offset Ltd* [1995] STC 85. That decision concerned the interpretation of the word “books” for the purposes of provisions identical to paragraph 1 of Group 3 of Schedule 8 VATA in the predecessor legislation (Group 3 of Schedule 5 to the Value Added Tax Act 1983). *Colour Offset* was, as the FTT acknowledged, binding on it. At [18], the FTT quoted an extract from the judgment of May J in that case.

16. The core of the FTT’s reasoning is found in paragraphs [30] to [34] which come after a section summarising the respective submissions of the parties. At [30], the FTT

concluded that the focus should be on the “ordinary meaning” of the word “book” and summarised the effect of the High Court’s decision in *Colour Offset* at as follows:

30. Though an old case the judgment of the High Court in *Colour Offset* is binding on this Tribunal and the approach we must adopt in determining the liability to VAT of the ADP is to apply the ordinary meaning of the word ‘books’ and assess the qualities of the ADP against that meaning.

17. The FTT then applied that approach to the ADP in the following paragraphs:

32. The starting point is the ordinary meaning of the word book. It is unquestionably the case that many books have the main function of being read whether for the purposes of obtaining information, being educated or simply for recreational purposes. However, the Tribunal takes the view that the inclusion [of] crossword books, exam study guides etc.² appears to accord with a view that such books are generally accepted as falling within the ordinary meaning of the word ‘book’ and that position is accepted by HMRC and, as such, illustrates that ‘books’ are not only to be read.

33. The Tribunal considers that within the ordinary meaning of the word book is any item with the physical characteristic of a book (i.e. as a minimum covers, pages, text and/or illustration) which has as its main function informing/educating or recreational enjoyment. So defined every item listed in section 8 Notice 701/10 would pretty consistently be rated as per the Notice. It is not a question as to whether the item is to be written in or on it is the interaction between the space for writing and the text/illustration of which that writing space forms part which determines whether the item is a book, as distinct from stationery.

34. When applying that lens the Tribunal has, after much debate, taken the view that the section at the start of the book is educational and sets out both the theory and a guide for the practical application of effective time management and prioritisation skills. Had there been a single example of the weekly page inviting readers to photocopy and complete the template the Tribunal anticipates that HMRC would not have even questioned the liability of the ADP. On balance the Tribunal considered the fact there were 52 copies of the template was not enough to shift the main function or purpose of the ADP from being the means by which the ethos and approach for advocated for effective time management is delivered. The Tribunal considers that the main function of the ADP is to teach the user how to better or more effectively manage time. The writing space being, in substance, no different from a GCSE student filling out answers to practice papers or someone completing a crossword puzzle.

35. For these reasons the Tribunal concludes that the ADP is a book and should therefore be subject to VAT at the zero-rate.

² Books of blank crossword puzzles and exam study guides with space for the reader to write in answers to questions are not referred to in the statutory provisions, but rather were mentioned in HMRC’s VAT Notice 701/10, extracts from which the FTT had quoted earlier in the Decision.

18. That conclusion meant that Mr Gardarsson owed no VAT, so HMRC's assessments fell to be cancelled. Moreover, in the absence of a VAT liability, Mr Gardarsson could not be liable for a penalty under Schedule 41 (for reasons we have explained at [10]) and, since the FTT concluded that Mr Gardarsson had correctly reported his VAT liability for 08/17, there was no "inaccuracy" in the return for that quarter that could attract a penalty. Accordingly, at [43] to [44], the FTT set aside all of the relevant HMRC decisions and allowed Mr Gardarsson's appeals.

The Grounds of Appeal against the Decision

19. The essence of all of HMRC's grounds of appeal is that *Colour Offset* was binding on the FTT but the FTT failed either (i) to identify the correct test set out in *Colour Offset* or (ii) to apply the test correctly to the facts it had found.

20. In his written and oral submissions, Mr Donmall advanced a further reason why the ADP could not be a "book". He pointed out that VAT, as a harmonised tax, was introduced by the Second Council Directive 67/228/EEC (the "Directive"), the predecessor to other directives dealing with VAT. Article 17 of the Directive permitted Member States to permit exemption with refund of VAT (i.e. zero-rating) only:

...where the incidence of such measures does not exceed that of the reliefs applied under the present system.

21. Mr Donmall submitted that, in the context of this appeal, the "present system" should be treated as the previous unharmonised system of turnover taxes applied by Member States individually. Before the introduction of VAT in 1972, the UK's system of turnover taxes was set out in the Purchase Tax Act 1963 which provided specifically in Group 26 of Schedule 1 that "diaries, calendars and similar articles" were subject to purchase tax. Therefore, in Mr Donmall's submission, because the ADP would not have attracted any relief from purchase tax, it followed that the UK simply lacked any power to provide for products such as the ADP to be zero-rated for VAT purposes.

22. Mr Donmall acknowledged that he did not have permission to appeal on the basis of this argument and that the point had been raised for the first time in his skeleton argument. He did not apply to amend HMRC's grounds of appeal. Therefore, Mr Donmall asked us to approach HMRC's appeal on the basis set out at [19] above. However, Mr Donmall accepted that *Colour Offset* is not binding on this Tribunal and therefore, if we found an error of law in the Decision, it would be open to us to remake the Decision either (i) by determining that a correct application of *Colour Offset* still resulted in the conclusion that the ADP was a book or (ii) by determining that a different test from that set out in *Colour Offset* should be applied with that different test also resulting in the ADP being a "book". Mr Donmall asked us to consider the implications of his additional argument on purchase tax before reaching such a conclusion.

Discussion

The decision in Colour Offset

23. HMRC's core argument is that the FTT failed properly to analyse or apply the decision of the High Court in *Colour Offset*. We start, therefore, with that decision and the principles that emerge from it. Since paragraphs of the judgment are not individually numbered, we will identify quotes by reference to page numbers in the report at [1995] STC 85.

24. In *Colour Offset*, the court was considering what May J described as a "conventional pocket diary" which had spaces for recording events, tasks and engagements but also had, "at the front and back a dozen or so pages mainly of advertisements, but also including the kind of information often found in pocket diaries" (see page 87 of the report). Therefore, the product in issue contained both information that could be read and blank spaces in which a person could write.

25. Also on page 87 of the report, May J summarised submissions that counsel for HMRC (Mr Stephen Richards, who later became Richards LJ) had made in the following terms:

Mr Richards accepts that, if the words 'book' or 'booklet' are to be taken in their widest sense, they (or one of them) might comprehend these diaries and address books. But he submits that the words are not to be taken in isolation but read in their context. He accordingly submits that Group 3 should be construed in accordance with its apparent legislative policy and purpose so that the words are not to be read in their widest sense. He submits that the essential characteristic of articles falling within item 1 of Group 3 is that they are reading material conveying information. The legislative intention is to be seen as avoiding a tax on reading, but as not avoiding the imposition of tax on stationery and like products including those whose main function is to be written in or on. Where an article contains some reading material and some space for writing, Mr Richards submits that it is necessary to consider whether the main function of the supply is to provide reading material or writing material. He submits that the main function of these articles is that they are supplied to be written in. I have already indicated that I agree with this last point.

26. On the face of it, May J's agreement in this passage to counsel's last point could be seen as an acceptance of the submission that, where an item can both be read and written in, its status as a book or otherwise is to be determined by reference to its "main function". However, as Mr Donmall pointed out in his submissions which admirably discharged his professional duties when acting against an unrepresented party, in this passage, viewed in isolation, May J is only accepting "this last point" made in counsel's submissions, namely that the particular diary under consideration had a "main function" of being written in. Therefore, at this stage, May J is simply expressing a factual conclusion on the nature of the item under consideration.

27. In the last paragraph of the judgment, May J stated that the correct approach to the construction of the word "book" for the purposes of zero-rating was to be found in the

three immediately preceding paragraphs. We would summarise the conclusions resulting from those paragraphs as follows:

- (1) In ordinary conversation, the meaning of the word “book” can have a different meaning depending on context. In some contexts, it can include an item designed to be written in (such as a notebook). In other contexts, it would only include items which are to be read or looked at.
- (2) However, absent a context that suggests a broader meaning, the ordinary meaning of the word “book” connotes an item with particular characteristics (a significant number of leaves held together front and back by covers usually more substantial than the leaves) which is to be read or looked at.
- (3) The meaning of “book” for the purposes of the VAT zero-rating provisions is the context-free ordinary meaning outlined at [(2)].

28. The three paragraphs to which May J referred as setting out his conclusions on the meaning of the term “book” do not expressly deal with items, such as the diary under consideration in *Colour Offset* or the ADP, that can be both “read or looked at” and written in. However, we consider that the clear effect of the judgment is that, in such a case, the question should be whether the main function of the item is to be “read or looked at”. As we have noted, in the earlier passage we have quoted, May J did not expressly accept counsel’s submissions that a “main function” approach should be adopted. However, he certainly did not reject those submissions and indeed attached significance to the fact that the “main function” of the diary under consideration was to be written in since he made a finding of fact to that effect. Moreover, having made that finding of fact, May J concluded that the diary under consideration (which had a function both of being read and of being written in) was not a book. Apart from the section dealing with counsel’s submissions regarding “main function”, there is no other passage of the judgment which deals with the fact that the diary could be both read and written in. The clear inference, therefore, when the judgment is read as a whole, is that May J determined that, although that diary could both be “read or looked at” and written in, it was not a “book” because its main function was to be written in rather than to be read or looked at.

29. Even if *Colour Offset* did not state expressly how an item that can both be read or looked at and written in should be classified, clearly some sort of “tie breaker” is needed in order to determine whether such an item is, or is not, a book. We consider that, in such a case, general principles of VAT law would require the classification to be determined by reference to the “main function” of the item. Mr Donmall was right to accept that *Customs and Excise Commissioners v Ferrero UK Limited* [1997] STC 881 is not binding authority for this proposition. However, the reasoning of the Court of Appeal in the analogous situation of that case is instructive.

30. *Ferrero* concerned a situation where a product had some characteristics of biscuits (which would be zero-rated for VAT purposes) and some characteristics of food other than biscuits that would be standard-rated. The Court of Appeal held, at p885 of the reported decision, that where the product had sufficient characteristics to be placed in either of two categories, it should be placed in the category to which it is “more akin”. Reasoning by analogy, if the ADP has a function of being read or looked at (which is

the function of a “book”) and a function of being written in (which, given the decision in *Colour Offset*, is not a function of a “book”), its categorisation as a book or otherwise should be determined by reference to its main function.

The approach that the FTT applied

31. As we have observed, the FTT quoted a significant extract from VAT Notice 701/10. That was understandable since Mr Gardarsson evidently based many of his submissions on that VAT Notice, as he did before us. However, the focus on VAT Notice 701/10 brought about by Mr Gardarsson’s submissions led the FTT into error.

32. The first significant indication of the error is to be found in paragraph [32] of the Decision. In that paragraph, the FTT, as a stepping-stone in its analysis sets out the proposition that “crossword books, exam study guides etc.” are books. That proposition may well be correct and we should not be taken as doubting it. However, the applicable statutory provisions do not mention crossword books or exam study guides at all. It is only HMRC’s practice (set out in VAT Notice 701/10) to treat such items as “books”. That practice does not have the force of law. Accordingly, no conclusion of law is capable of being drawn from the undoubted fact that HMRC’s practice is to treat supplies of crossword books or exam study guides as zero-rated.

33. Nevertheless, at [33] of the Decision the FTT concludes that because crossword books and exam study guides are “books”, it follows that any item with the necessary physical characteristics “which has as its main function informing/educating or recreational enjoyment” is also a book. The test articulated in *Colour Offset* does not refer at all to whether the main function of an item is to inform or educate; nor does it refer to recreational enjoyment. This is not simply a difference in terminology. We agree with Mr Donmall that the FTT’s approach would treat as a “book” something that falls outside the scope of that concept as set out in *Colour Offset*. For example, one can imagine a publication that consists of lined pages which are blank except for a single letter of the alphabet at the top of each page. The function of such a publication might be to help children to learn how to write by using the space provided to make multiple copies of the letter at the top of the page. Clearly, the main function of such a publication would be to educate and so it would fall within the FTT’s version of the test. However, since the “main function” of the publication is to be written in (rather than to be read or looked at), it would fall outside the test set out in *Colour Offset*.

34. The FTT, therefore, approached its task by applying a test that was different from that articulated in *Colour Offset* and, moreover, had the ability to produce a different outcome from the correct test. In doing so, it made an error of law.

35. At [34], the FTT applied the test it had formulated concluding that the ADP was a book because “the main function of the ADP is to teach the user how to better or more effectively manage time”. That conclusion was, therefore, reached by applying the incorrect test (based on the ADP’s function of “educating” or “informing”). Moreover, the FTT went on to say that the blank writing space in the ADP was not determinative because it was “in substance, no different from a GCSE student filling out answers to practice papers or someone completing a crossword puzzle”, thereby wrongly seeking

to draw a conclusion of law from HMRC’s articulation of their practice in VAT Notice 701/10.

36. In his oral and written submissions, Mr Gardarsson sought to defend the FTT’s approach arguing that the purpose of the ADP was to teach better time management. However, his arguments were undermined by the fact that they were based entirely on VAT Notice 701/10. Despite prompting from us, Mr Gardarsson did not refer at all either to the statutory provisions or to *Colour Offset* when making his submissions. Rather, the essence of his argument was that the amount of “educational” content in a publication was a determining factor in whether that publication is a “book” or not. Those submissions sought to provide a coherent explanation of the various aspects of HMRC’s practice set out in VAT Notice 701/10. However, they were of almost no relevance to the question of how a book should be defined as a matter of law³.

37. Overall, for the reasons we have given, the Decision contains one or more errors of law.

Our approach to the Decision in the light of the errors of law contained in it

38. Given that we have identified errors of law in the Decision, our powers under s12 of the Tribunals, Courts and Enforcement Act 2007 are as follows:

12 Proceedings on appeal to Upper Tribunal

(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal—

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either—

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision.

39. As regards s12(2)(a), we have decided that the Decision must be set aside as the errors of law contained in it are material to the FTT’s overall conclusion.

40. We initially entertained some doubt as to whether we should remake the Decision as we were conscious that we had heard no live evidence and Mr Donmall, in his oral submissions had not taken us to any of the witness evidence that was before the FTT. However, Mr Donmall has persuaded us that the central question of whether the ADP is a “book” or not depends almost exclusively on the objective characteristics of the ADP. Moreover, as Mr Donmall correctly observed, this Tribunal has all the evidence of the objective characteristics of the ADP that was before the FTT (consisting

³ We acknowledge that VAT Notice 701/10 may be relevant to the question of “reasonable excuse” that we refer to at [53] below.

primarily of a photocopy of a blank ADP). In short, we agree with Mr Donmall that we are just as well placed as the FTT to apply the correct legal test to the objective characteristics of the ADP in order to decide whether it is a “book” and, in the section that follows, we will consider that issue.

Whether the ADP is a “book”

41. Mr Donmall was correct to accept that this tribunal is not bound by *Colour Offset*. However, Mr Gardarsson did not suggest that *Colour Offset* was wrongly decided or that some different test from that set out in *Colour Offset* should be applied. We see no reason to depart from *Colour Offset*. Therefore, in order to determine whether it is a “book” for the purposes of Item 1 of Group 3 of Schedule 8 VATA, we must determine whether its “main function” is to be read or looked at.

42. We have not found this a straightforward question to answer but for the reasons that follow, and in respectful disagreement with the FTT, we consider that the ADP is not a book as its main function is to be written in (as distinct from being read or looked at).

43. Two particular factors suggest, but do not on their own establish, that the main function of the ADP is to be written in:

(1) The space for writing in the ADP is much more significant than the text for reading. The ADP contains 52 double page spreads (one for each week of the year) which are clearly intended to be written in. We refer to this part of the ADP, which is intended specifically to be written in, as the “Action Day Planner section”. Therefore, 104 pages of the ADP clearly have the overwhelming function of being written in. In addition, three pages at the back are designed to hold contact details which are to be written in by the ADP’s owner. By contrast, the instructive text at the beginning of the ADP (which is designed to be read) runs to just 14 pages, excluding the front and inside cover⁴.

(2) As the FTT found at [10(6)] an ADP is produced for a calendar or academic year. That tends to suggest that the main function of the ADP is to hold written entries (in the Action Day Planner section) relating to a particular calendar or academic year, with a new ADP being purchased once that year has expired.

44. Despite the presence of those factors, it is possible that the main function of the ADP is for the 16 introductory pages to be read and we have, therefore, examined the content of those 16 pages in some detail. We would summarise their content as follows:

(1) Pages 1 and 2 are simply the front and inside cover.

⁴ Six pages of the ADP are also devoted to a calendar. It seemed to us that these could be both read (for example to see what day of a week a particular date falls on, or to see the dates of public holidays). They could also be written in. Therefore, we do not consider that the six pages devoted to the calendar shed much light on the question of “main function”.

(2) Page 3 sets out a central proposition that, in order to be a “man or woman of action”, someone needs to keep three things in mind:

(a) Attitude – It is important to form the right attitude about oneself, one’s work and communication.

(b) Goals – it is important to set and record goals.

(c) Actions – it is important to have an execution process to get things done.

(3) Pages 4 to 7 deal with “Attitude”. Using a story of an African farmer who looks for diamonds the length and breadth of Africa, neglecting to look on his own land, the ADP suggests that positive values are to be found within a person’s own character and personality. It invites the reader to identify (and write down in a space provided) three to five attitudes they wish to adopt divided into the categories “Me”, “Work” and “Communications”. Once the reader has identified the attitudes they wish to adopt, they are invited to identify behaviours they can adopt to reinforce their attachment to those attitudes.

(4) Pages 8 to 10 deal with “Goals”. The reader is invited to consider and write down in a space provided goals they want to achieve, why they want to do so, and how they propose to achieve them. The reader is told that these goals should be broken down into weekly goals and recorded in the Action Day Planner section itself.

(5) Pages 11 to 15 deal with “Actions”. This section gives some specific guidance on time management. For example, it sets out the “do-it-now” principle to the effect that, if a task can be done immediately, it should be, with the result that it is not necessary to record that task in the Action Day Planner section. It also explains, by reference to a story of filling a bucket with rocks, sand and water, the importance of recording ongoing important tasks such as major goals and projects (referred to as the “big rocks”) first with other tasks in hand being recorded in the gaps allowed for by those “big rocks”. This section contains some guidance on how the Action Day Planner section can be used most effectively.

(6) Page 16 contains a “Discipline of Rituals” – rituals that, if adopted throughout a working day, will increase efficiency.

45. In our judgment, the treatment of the topics in pages 3 to 10 and page 16 is highly general in nature. Therefore, of the 14 pages that are designed to be read 8 pages contain highly general insights. Of course, the question whether the ADP is a “book” is not to be determined by reference to a value judgement as to the perceived worth of the content that is designed to be read and we quite accept that the general insights Mr Gardarsson offers will be valuable to many readers. Our point is simply that we consider that the 104 pages devoted to the Action Day Planner section offer a more reliable indication of the ADP’s “main function” than just 8 pages of general insight.

46. Pages 11 to 15 contain more specific guidance as to how a person can manage time effectively. However, much of this guidance is focuses on how the Action Day Planner

section can be used most effectively. These aspects of pages 11 to 15 effectively serve as a user's guide to the Action Day Planner section, reinforcing the impression that the "main function" of the ADP is to be found in that section. To the extent that pages 11 to 15 contain separate insights unconnected with the act of filling in the Action Day Planner section, those insights are similarly general to those discussed above.

47. Pausing there, standing back to take into account the extent and nature of the parts of the ADP that are to be read and the parts that are to be written in, and considering these in the context of the ADP as whole, we are of the view that the main function of the ADP is to be written in. We note, however, that the FTT reached a conclusion (at [34]) that the main function of the ADP is to "teach the user how to better or more effectively manage time". We do not consider that we are bound by that finding since, as we have noted, it set out the FTT's conclusions on the application of an incorrect test (namely whether the "main function" of the ADP is to inform or educate). However, recognising the respect accorded to a primary fact-finding tribunal, and recognising that HMRC have not specifically sought to challenge this finding by the FTT, we have considered carefully whether our preliminary conclusion is inconsistent with the FTT's views on the "main function" of the ADP.

48. In our judgment, there is no inconsistency. We quite accept that a user of the ADP will, as part of the discipline of filling in the Action Day Planner section, be managing his or her time more effectively. Therefore, such a person will learn better time management simply by filling in the Action Day Planner section. That is entirely consistent with a conclusion that the main function of the ADP is to be written in, rather than to be read or looked at.

49. In addition, at [34], the FTT somewhat downplayed the significance of filling in the Action Day Planner section by saying that this is "in substance, no different from a GCSE student filling out answers to practice papers or someone completing a crossword puzzle". We do not consider that we are in any respect bound by this finding. As we have observed, any analogy between the ADP and a book of crossword puzzles or a GCSE revision guide could shed no light on the question whether, applying the statutory provisions, the ADP is a "book".

50. We are therefore entitled to find, and have found, that the main function of the ADP is to be written in, rather than to be read or looked at. It follows that the ADP is not a book for the purposes of Item 1 of Group 3 of Schedule 8 VATA.

51. Having reached that conclusion, we do not need to consider HMRC's additional argument arising from the Directive which we have summarised at [20] and [21] above and we will not do so.

Whether to remake the Decision

52. The FTT's conclusion, that the ADP was a "book", necessarily meant that both of HMRC's assessments and both penalties imposed under Schedule 41 and Schedule 24 fell away. Given the FTT's conclusion, no further findings were needed to deal with the assessments or the penalties.

53. However, given that we conclude that the ADP is not a book, additional findings are now necessary in order to determine Mr Gardarsson's appeals against HMRC's various decisions. For example, it may be necessary to consider the quantum of the assessments, whether Mr Gardarsson had a "reasonable excuse" for failing to notify his registrability to HMRC, whether the inaccuracy in his return for 08/17 was due to "carelessness" and whether the various penalties and assessments were made in time. The FTT, understandably given the decision it reached, made no findings on these issues. We were not referred to any relevant evidence on these matters and are in no position to make findings ourselves.

54. We therefore consider that the correct course is to remit Mr Gardarsson's appeals to the FTT for reconsideration in accordance with the following directions:

- (1) The remitted appeals should be heard by a differently constituted FTT.
- (2) The FTT must determine those appeals on the footing that the ADP is not a "book".

Disposition

55. HMRC's appeal is allowed. The Decision is set aside and the matter remitted to the FTT for reconsideration in accordance with the directions set out at [54].

**JUDGE SWAMI RAGHAVAN
JUDGE JONATHAN RICHARDS
RELEASE DATE: 31 March 2020**