Procedure – SDLT – earlier interlocutory decision - application for own appeals to be struck out on basis that no reasonable prospect of success and/or abuse of process – application for Tribunal to exercise discretion under Rule 5 to bring proceedings to an end – applications refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2015/07309
TC/2016/06307
TC/2016/06309

BETWEEN

ALBERT HOUSE PROPERTY FINANCE PCC LTD
(IN LIQUIDATION)
VALE PROPERTY FINANCE PCC LTD
(IN LIQUIDATION)

Appellants

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

Decided on the papers having considered the written submissions of Mr Julian Hickey of Counsel, instructed by Cornerstone Tax, for the Appellants, and of Mr Ben Elliott of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. On 16 October 2019 there was an oral hearing of a case management issue involving the Appellants, Albert House Property Finance Protected Cell Company Limited ("Albert House") and Vale Property Finance Protected Cell Company Limited ("Vale") ("the First Hearing"). The decision was issued on 3 December 2019 under reference [2019] UKFTT 0732 ("the First Decision").

Background

2. The Appellants participated in tax planning arrangements ("the Arrangements") marketed by Cornerstone Tax ("Cornerstone") with the aim of avoiding Stamp Duty Land Tax ("SDLT"). The relevant SDLT legislation is in Finance Act 2003. In this Decision Notice, all references to legislation are to that Act, unless otherwise specified

3. The Arrangements were substantially similar to those litigated in *Project Blue v HMRC* [2018] UKSC 30 ("*Project Blue*"). Each Arrangement involved one of the Appellants and a purchaser who was seeking to avoid SDLT. In the Arrangements relating to Albert House the purchaser was Milltown Limited. In the Arrangements relating to Vale, the purchaser was Ms Sophie Fitzgerald. HM Revenue & Customs ("HMRC") decided that the Arrangements did not succeed, and assessed the Appellants and the purchasers in the alternative to the SDLT that would have been due had they not entered into the Arrangements.

4. On 22 December 2015, Albert House notified an appeal to the Tribunal against an assessment issued under Sch 10, para 28 (a "discovery" assessment), and on 15 November 2016, Vale notified two appeals to the Tribunal, one against a closure notice issued under Sch 10, para 23, and one against a discovery assessment. Appeals were also made by Milltown and Ms Fitzgerald.

5. The Appellants subsequently sought to withdraw their appeals. Sch 10, para 37(4) states that a withdrawal of an appeal is treated as if the parties have agreed that the decision appealed against should be upheld without variation, if HMRC "do not, within 30 days after that notification, give the appellant notice in writing indicating that they are unwilling that the appeal should be withdrawn". HMRC objected to the withdrawals by writing to the Tribunal, which informed the Appellants of the objections within the 30 day period.

6. The Appellants' case at the First Hearing was that HMRC had failed to give them the requisite notice within 30 days, because they had not written directly to the Appellants. HMRC's case was that the legislation did not require an objection to be delivered directly to the Appellants and indirect communication via the Tribunal was sufficient. By the First Decision, I agreed with HMRC.

The applications

7. The Appellants subsequently made the following applications, each in the alternative:

   (1) for their appeals to be struck out under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") on the basis that there was "no reasonable prospect" of them succeeding;

   (2) for their appeals to be struck out on the basis that it would be an abuse of process if they remained live before the Tribunal; or

(3) for the Tribunal to exercise its discretion to direct that the appeals be withdrawn and the proceedings come to an end.

8. HMRC objected to each of those applications for the reasons explained in the main body of this decision. I decided to refuse the applications because:

(1) the "no reasonable prospect of success" requirement was not satisfied;

(2) there was no abuse of process in the appeals remaining live before the Tribunal; and

(3) it was not in the interests of justice to bring the proceedings to an end.

9. As a result, the Appellants' appeals remain to be determined by the Tribunal at a substantive hearing.

THE RELEVANT PROVISIONS

10. Rule 17 is headed "withdrawal" and reads:

> "(1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case—
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> (a) at any time before a hearing to consider the disposal of the proceedings (or, if the Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) The Tribunal must notify each other party in writing of a withdrawal under this rule.
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> (3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.
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> (4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—
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> (a) the date that the Tribunal received the notice under paragraph (1)(a); or
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> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

11. Rule 17 is therefore expressly "subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings". The relevant provision in the context of SDLT is Sch 10, para 37, which is headed "settling appeals by agreement" and reads:

> "(1) If, before an appeal under paragraph 35 is determined, the appellant and the Inland Revenue agree that the decision appealed against
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> (a) should be upheld without variation,
>
> (b) should be varied in a particular manner, or
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> (c) should be discharged or cancelled,
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> the same consequences shall follow, for all purposes, as would have followed if, at the time the agreement was come to, the tribunal had

determined the appeal and had upheld the decision without variation, varied it in that manner or discharged or cancelled it, as the case may be.

(2) Sub-paragraph (1) does not apply if, within 30 days from the date when the agreement was come to, the appellant gives notice in writing to the Inland Revenue that he wishes to withdraw from the agreement.

(3) Where the agreement is not in writing

(a) sub-paragraphs (1) and (2) do not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by the Inland Revenue to the appellant or by the appellant to the Inland Revenue, and

(b) the references in those provisions to the time when the agreement was come to shall be read as references to the time when the notice of confirmation was given.

(4) Where

(a) the appellant notifies the Inland Revenue, orally or in writing, that he does not wish to proceed with the appeal, and

(b) the Inland Revenue do not, within 30 days after that notification, give the appellant notice in writing indicating that they are unwilling that the appeal should be withdrawn,

the provisions of sub-paragraphs (1) to (3) have effect as if, at the date of the appellant's notification, the appellant and the Inland Revenue had come to an agreement (orally or in writing, as the case may be) that the decision under appeal should be upheld without variation.

(5) References in this paragraph to an agreement being come to with an appellant, and to the giving of notice or notification by or to the appellant, include references to an agreement being come to, or notice or notification being given by or to, a person acting on behalf of the appellant in relation to the appeal."

12. Schedule 10 para 42 sets out the statutory requirements on the Tribunal when deciding an appeal. It is headed "assessments and self-assessments" and reads:

"(1) In this paragraph any reference to an appeal means an appeal under paragraphs 33(4) or 35(1).

(2) If, on an appeal notified to the tribunal, the tribunal decides

(a) that the appellant is overcharged by a self-assessment; or

(b) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment shall be reduced accordingly, but otherwise the assessment shall stand good.

(3) If, on appeal it appears to the tribunal

(a) that the appellant is undercharged to stamp duty land tax by a self-assessment; or

(b) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment shall be increased accordingly.

> (4) Where, on an appeal against an assessment other than a self-assessment which
>
> (a) assesses an amount which is chargeable to stamp duty land tax, and
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> (b) charges stamp duty land tax on the amount assessed,
>
> it appears to the tribunal as mentioned in sub-paragraphs (2) or (3), it may, unless the circumstances of the case otherwise require, reduce or increase only the amount assessed; and where an appeal is so determined the stamp duty land tax charged by that assessment shall be taken to have been reduced or increased accordingly."

13. Rule 5 is also relevant. It begins:

> "(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time…"

What happens when HMRC do not object to withdrawal

14. If an appellant writes to the Tribunal to withdraw its appeal under Rule 17, and HMRC do not "within 30 days after that notification, give the appellant notice in writing indicating that they are unwilling that the appeal should be withdrawn", Sch 10 para 37 provides that:

> (1) the parties are deemed to have agreed that the assessment under appeal "should be upheld without variation"; and
>
> (2) the position is the same for all purposes as if the tribunal had determined the appeal and had upheld the decision without variation.

15. In other words, the proceedings come to an end on the basis that HMRC's assessment is final and binding on both parties.

What happens when HMRC do object to withdrawal

16. When HMRC do object to the withdrawal within the 30 day period, there is no deemed agreement under para 37. However, that provision does not go on to state what happens next. Rule 17 states that the appellant has withdrawn "the case made by it in the Tribunal proceedings", but does not say that the proceedings come to an end.

17. Helpful guidance is provided by *HMRC v CM Utilities Ltd* [2017] UKUT 305 (TCC) (Arnold J and Judge Berner), where HMRC had objected to the appellant's withdrawal within the statutory time limit provided by Taxes Management Act 1970 ("TMA"), s 54 because they considered the assessment under appeal should be increased by the Tribunal under TMA s 50(7). Although not strictly binding on me because *CM Utilities* does not concern SDLT, the provisions considered by the UT are essentially identical to those in issue here: Sch 10, para 37 mirrors TMA s 54 and Sch 10, para 42 is the same as TMA s 50.

18. In *CM Utilities* the UT said:

> "[35] In our judgment, the effect of statutory provisions of the TMA (and by extension those relating to NICs) is clear and supported by authority. In a case where HMRC give notice of objection to the appeal being treated as withdrawn, and puts the case for an increase, the FTT retains its jurisdiction, and it continues to have a duty, to increase the assessment or determination in accordance with s 50(7) (and analogous provisions) to the extent that it

> decides that the appellant has been undercharged by the original assessment or determination.
>
> [36] Rule 17 is entirely compatible with that analysis. Not only is it expressly subject to statutory provisions relating to withdrawal or settlement (of which s 54 is plainly one), and says nothing itself about the consequences of withdrawal, it is also drafted in terms that it is the case of the party seeking to withdraw that is the subject of the withdrawal. Where it is the appellant who withdraws, that does not necessarily mean that the whole of the proceedings must be regarded as having come to an end. The proceedings remain to be determined, whether as a matter of statute, as for example, where HMRC do not object, by a combination of s 54(4) and s 54(1), or by a decision by the tribunal, which in relevant circumstances will include consideration of whether the appellant has been undercharged and the assessment should be increased accordingly."

19. Thus, where an in-time objection is received, so that there is no deemed agreement between the parties, the Tribunal may decide to continue with the proceedings in order to exercise its statutory duty under Sch 10, para 42 to reduce assessments if it considers they are too high, and to increase them if it considers they are too low.

20. The appellant in *CM Utilities* had withdrawn his case under Rule 17 and took no further part in the proceedings. However, that is not always the position:

> (1) Rule 17 also allows an appellant to apply to reinstate its case. Where HMRC have objected to the withdrawal and the Tribunal decides that the proceedings will continue, an appellant may wish to re-engage with the proceedings. Such an application will often be outside the time limit prescribed by Rule 7(4), but the Tribunal may decide that it is in the interests of justice to allow a late application.
>
> (2) A withdrawal notification under Rule 17 may be conditional on the assessment becoming final under the relevant statutory provision, in other words, expressed to take effect only if the appellant's liability is determined in accordance with the assessment.

THE APPELLANTS' POSITION

21. The Rule 17 notifications made by the Appellants were headed "Notification that Appeal [reference] is to be withdrawn on behalf of [Appellant]", and said:

> "We wish to inform you of our intention to withdraw the above appeal on behalf of [Appellant] on the below terms and to concede liability for the SDLT HMRC assert to be due."

22. The withdrawals were thus conditional on the liabilities set out in the assessments being determined. Since by the First Decision I decided that HMRC had made an in-time objection to the withdrawal, the condition was not met and the withdrawal did not take effect. Neither party has sought to argue that the Appellants had put themselves in a position where they were unable to participate in the ongoing appeals unless they made a successful application for reinstatement.

23. At the end of the First Hearing I therefore gave directions for the ongoing progress of the Appellants' appeals, joining them to the appeals of the purchasers, Milltown and Ms Fitzgerald. Thus, the starting point for the Applications is that the Appellants have live appeals before the Tribunal in which they remain active participants, along with Milltown and Ms Fitzgerald.

STRIKE OUT APPLICATIONS

24. The Appellants applied for their appeals to be struck out under Rule 8(3), which reads:

> "The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a)-(b) …
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

The effect of a strike out application

25. In Mr Hickey's submission, if Appellants' appeals were struck out, HMRC's decisions under appeal would become final. He relied on *Shiner v HMRC* [2018] EWCA Civ 31 ("*Shiner*"), where Patten LJ gave the only judgment with which Sales LJ agreed. In *Shiner* HMRC had applied to strike out part of Mr Shiner's grounds of appeal, and Patten LJ said at [21]:

> "The result therefore of an appeal being struck out is that the assessment will govern the tax payable."

26. However, it is important to consider the citation above in its context (italics in original, the phrase cited above underlined):

> "[20]…The determination of an individual's tax liability is achieved through a process of assessment…If the return is amended by HMRC the taxpayer can exercise his right of appeal under TMA s.31 and also request a review under s.49A. Once the First-tier Tribunal is notified of the appeal it must decide the matter in question: see s.49D(3) and, as mentioned earlier, it may reduce the amended assessment if it concludes that the taxpayer has been overcharged. But "*otherwise the assessment ... shall stand good*": see s.50(6).
>
> [21]. <u>The result therefore of an appeal being struck out is that the assessment will govern the tax payable</u>. I do not accept Mr McDonnell's submission [on behalf of the Appellants] that the First-tier Tribunal is obliged to determine whether or not any amendments to the original assessment should stand regardless of the circumstances. The taxpayers' ability to set aside the amendments made to their self-assessments in this case was entirely dependent on their being able to prosecute a successful appeal. There is nothing inimical to that process in the First-tier Tribunal being able to control the appeal procedure by excluding grounds of appeal with no reasonable prospect of success. The Rules are there to enable appeals to be handled quickly and efficiently in accordance with the objectives spelt out in TCEA 2007 s.22(4).

27. All the Court is saying in *Shiner* is that the Tribunal is not required by TMA s 50 to consider all the grounds put forward by an appellant; it can strike out some (or all) of them. If it does so, the Tribunal cannot then rely on those grounds to reduce the assessment. Where HMRC are not arguing for a higher liability, it must follow that "the assessment will govern the tax payable". That was the position in *Shiner*.

28. Striking out the appeal therefore does not <u>always</u> have the effect of crystallising the tax payable as being the figure stated in the assessment under appeal. The Tribunal cannot ignore its statutory obligation to determine the appeals in accordance with TMA s 50 (or Sch 10, para 42).

No reasonable prospect of success

29. Mr Hickey submitted that as the Appellants have accepted that they must pay the liabilities assessed on them, there is no reasonable prospect that they will succeed in their appeals. Mr Elliott said this was not the case because:

(1) HMRC had assessed the Appellants and Milltown/Ms Fitzgerald in the alternative, because there had been a lack of clarity as to the legal position as to liability. However, the Arrangements were substantially similar to those litigated in *Project Blue*, where the Supreme Court had decided that the purchasers were liable for the SDLT. If the same analysis applied, the Appellants would not be liable for the SDLT; it would instead be the responsibility of Milltown/Ms Fitzgerald. There was thus a reasonable prospect that the Appellants' appeals would succeed.

(2) Even if the Appellants decided not to put forward any arguments at the hearing, they still had a reasonable prospect of success, because the Tribunal would apply the law (including *Project Blue*) to the facts.

30. I agree with Mr Elliott for the reasons he gives. Given the Supreme Court decision in *Project Blue*, it is clear that the Appellants' appeals do have a reasonable prospect of success,. The Tribunal deciding the joined appeals would have to have regard to that judgment, even if the Appellants put forward no case at the hearing.

Abuse of process

31. In *Shiner* at [19] the Court of Appeal held that the Tribunal's power under Rule 8(3) was wide enough to encompass a power to strike out an appeal for abuse of process. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, Lord Diplock said that abuse of process:

> "…concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right- thinking people."

Submissions

32. Mr Hickey said that it would be an abuse of process for the Tribunal not to strike out the Appellants' appeals because:

(1) they had accepted liability;

(2) if the Appellants' appeals were determined, the Tribunal could still decide that the purchasers were liable for the SDLT; but

(3) if the appeals continued, the Appellants would be in the invidious position of having to decide whether to:

(a) incur the costs of continuing with the appeals; or

(b) risk sanctions, including wasted costs, for failing to comply with Tribunal directions.

33. Mr Elliott submitted that there is no abuse of process where an unwilling party is required to continue with an appeal. That had been the position in *CM Utilities* where HMRC were of the view that the appellant had been undercharged to tax by the assessments. There is an

arguable case, given the outcome of *Project Blue*, that the Appellants have been overcharged to SDLT.

34. However, he went on to say that the position may not be identical with *Project Blue*. In particular, the Arrangements depend on the Appellants being financial institutions. In *Project Blue* it was common ground that the equivalent company was a financial institution, but HMRC have not made the same concession in relation to the Appellants. If Vale and/or Albert House was not a financial institution, the Appellants and the purchasers may both have a liability to SDLT. This is a further reason why the Appellants' true liability is not clear. The Tribunal should therefore carry out its statutory duty of deciding whether or not the assessments under appeal should be reduced, upheld or increased. This remained the position, even though he accepted that, if the Appellants' appeals were brought to an end on the basis of the assessments, the Tribunal could nevertheless decide that the purchasers were liable for the SDLT.

35. In relation to costs, Mr Elliott submitted it is a matter for the Appellants whether they continue to participate in the proceedings, but:

(1) there is no risk of an adverse costs order in a standard case such as this, unless the Appellants act unreasonably. This is very unlikely as they have made their position plain; and

(2) there is no risk of wasted costs where legal representatives have been instructed not to participate.

36. Mr Elliott also put forward another argument ("HMRC's further submission"). This was that the Appellants' purpose in accepting the liabilities was to "found an argument" that the purchasers should not be liable or obliged to pay the SDLT, because it has been determined to be the Appellants' liability. However, the Appellants are in liquidation and unable to pay. He said:

> "Accordingly, it is the Appellants who are seeking to use the withdrawal procedure to produce an unjust outcome that is contrary to the relevant charging legislation and that could bring the administration of justice into disrepute - and there is therefore a compelling case that it is the Appellants' conduct that is an abuse of process."

37. Mr Hickey responded to HMRC's further submission by saying that HMRC had not provided any evidence that the Appellants would be unable to pay the tax due, and in any event, neither ability to pay nor the Appellants' motive for making its applications were relevant to the issues the Tribunal has to decide.

Discussion

38. I agree with Mr Elliott that it cannot be "manifestly unfair to a party to litigation" to require an appeal to continue simply because that party has admitted liability. Where HMRC have made an in-time objection to withdrawal on the basis that the assessments may be incorrect, the Tribunal has a statutory obligation to determine the appeal by reducing, increasing or confirming the assessments; this is clear from *CM Utilities.*

39. As to the Appellants' costs, these are a matter for them. If they now decide not to participate further in the proceedings, they can inform the Tribunal. That alone is unlikely to constitute unreasonable behaviour, such as to support a costs award in favour of HMRC. And, as Mr Elliott says, where the legal team are de-instructed, there is no risk of wasted costs.

40. I therefore find there is no abuse of process if proceedings continue, and that the Appellants' appeals cannot be struck out for that reason. I have considered HMRC's further submission in the context of the next application.

EXERCISE OF DISCRETION

41. Mr Hickey also asked the Tribunal to exercise its discretion under Rule 5 to "give a direction in relation to…the disposal" of these proceedings. His arguments were essentially the same as those set out under the previous headings, and Mr Elliott's responses likewise.

42. The Tribunal must exercise its discretionary powers in accordance with the overriding objective to deal with cases fairly and justly, see Rule 2. The Rule 5 discretion is additionally "subject to the provisions of the 2007 Act and any other enactment".

43. HMRC objected to the Appellants' withdrawal because the assessments may be incorrect, and they have put forward a reasonable basis for those concerns. The Tribunal cannot exercise its discretion in a way which would conflict with its statutory obligation under Sch 10, para 42 to decide whether the assessments appealed against are too high, too low, or correct. That is sufficient for me to refuse this application.

HMRC's further submission

44. However, I also considered Mr Elliott's submission that, if the proceedings are brought to an end on the basis that the Appellants have accepted liability, this may "found an argument" that the purchasers cannot also be required to pay the SDLT. I note in particular the following:

(1) As recorded at [39] of the First Decision, on 25 June 2018, HMRC received a judicial review pre-action protocol letter on behalf of Milltown, on the basis that HMRC's refusal to withdraw the closure notices and discovery assessments issued to that purchaser was "irrational and/or an abuse of law" and "conspicuously unfair" because Albert House had accepted the relevant SDLT.

(2) Although no judicial review claim was in fact issued following that pre-action letter, in making his submissions on the applications, Mr Hickey did not rule out a future judicial review claim if:

(a) the Appellants' liabilities were to be determined in accordance with their assessments; and

(b) the Tribunal were subsequently to find that the purchasers were liable.

(3) However, Mr Hickey said this was "irrelevant" to the applications being made to the Tribunal; it was instead a matter for the High Court, which might refuse permission for judicial review on the basis that the claim was "totally without merit".

(4) The Appellants are in liquidation. Mr Elliott has said that they are unable to pay the SDLT for which they seek to accept liability; Mr Hickey responded by saying that HMRC had not put forward any evidence to that effect. While that is true, the Appellants have also not shown that they have the funds to pay the tax. If HMRC are correct, this may strengthen their position in the High Court.

45. I accept that no judicial review claim may ever be made, and that the High Court might also refuse permission on the basis that it was "totally without merit", or for other reasons (including delay). And of course, if permission were granted, HMRC might succeed. But if the Appellants' appeals remain live before the Tribunal, there can be no legal basis for any such claims, because the Tribunal will have decided the correct SDLT liability for both the

Appellants and the purchasers. In other words, if the Tribunal carries out its statutory duty of deciding whether the Appellants and/or the purchasers have been over or under-charged to tax, there will be no satellite litigation in the High Court. That too is in the interests of justice, and it provides a further reason why I should not exercise my discretion to allow this application.

DECISION AND APPEAL RIGHTS

46. For the reasons set out above, the Appellants' applications are refused.

47. This document contains full findings of fact and reasons for that decision. If the Appellants are dissatisfied with this decision they have the right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to those parties.

48. The parties are to note that this time limit is not extended by the Further General Stay issued by the Tribunal President on 21 April 2020. They are also 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: 26 JUNE 2020