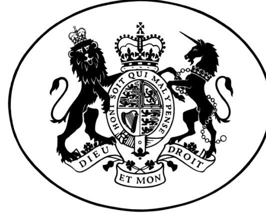
[2014] UKFTT 775 (TC)



TC03893

Appeal number: TC/2012/02765

PROCEDURE – application to set aside decision – Tribunal Rule 38 – alleged incompetence of representative at hearing – whether procedural irregularity – whether in the interests of justice to set aside– no – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

VIKAS GIROTRA **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 3 June 2014

Mr Adam Routledge of Controlled Tax Management Ltd for the Appellant

Mr John Nicholson of HM Revenue & Customs for the Respondents

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DECISION

Introduction

1. This is an application by the appellant to set aside a decision of the First-tier Tribunal (Judge David Porter and Mr Noel Barrett) ("the Decision") released on 1 March 2013. In the Decision the appellant's appeal was dismissed. The effect of the Decision was to expose the appellant to a liability for VAT in the sum of £68,443 plus interest.

2. The basis of this application is that the appellant contends he was not competently represented at the hearing which took place on 28 January 2013 ("the Hearing"). In particular it is contended that the representative then acting failed to adduce certain documentary evidence in support the appellant's case and failed to argue a certain issue.

3. For the reasons which follow I am not satisfied that the appellant's representation was incompetent or that it is in the interests of justice to set aside the Decision.

Jurisdiction

4. This application is made pursuant to Rule 38 of the Tribunal Rules which provides as follows:

> " *(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if--*
>
> > *(a) the Tribunal considers that it is in the interests of justice to do so; and*
> >
> > *(b) one or more of the conditions in paragraph (2) is satisfied.*
>
> *(2) The conditions are--*
>
> > *(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;*
> >
> > *(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;*
> >
> > *(c) there has been some other procedural irregularity in the proceedings; or*
> >
> > *(d) a party, or a party's representative, was not present at a hearing related to the proceedings.*
>
> *(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is*

received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party."

5. In order to engage the jurisdiction under Rule 38 the appellant must satisfy the tribunal that the conditions in sub-paragraph (2) are satisfied. The appellant relies on sub-paragraphs (a) and (c).

6. I do not consider that sub-paragraph (a) is in point. The relevant documents are documentary evidence which the appellant contends his representative failed to rely on at the Hearing. In the present case the documents were not sent to the respondents as the result of a conscious decision on the part of the representative. The real issue is whether there has been "*some other procedural irregularity*" in the proceedings within sub-paragraph (c).

7. In *Christian v Nursing and Midwifery Council [2010] EWHC 803 (Admin)* (not cited) the Administrative Court considered relief under CPR Part 52 Rule 11(3) in the context of an appeal where incompetent representation was alleged. Rule 11(3) provides as follows:

> "*The appeal court will allow an appeal where the decision of the lower court was –*
>
> *a) wrong; or*
>
> *b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.*"

8. HH Judge Roger Kaye QC sitting as a High Court Judge applied a test derived from a decision of Moses J in *R (Aston) v Nursing & Midwifery Council [2004] EWHC 2368*. Moses J first considered the test in criminal proceedings, namely whether the conviction was unsafe, and went on to consider the test under Part 52. He said as follows:

> " 9. *... in order to establish lack of safety in an incompetence case, the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial which themselves rendered the process unfair or unsafe'.*
>
> *10. In the context of Part 52 Rule 11 the test is not safety. The appellant need not show that the decision was wrong, but he must show that the decision was unjust. The decision will only be unjust if the incompetence led to irregularities which rendered the process of the trial unfair or the conclusion unsafe.*
>
> *11. However, in the case before me both sides agree that the court should not allow the appeal unless the incompetence was of such a degree as to be described as Wednesbury unreasonable. That concept is not easily applied to the question of the incompetence of an advocate, but I take the vice presidents reference to Wednesbury unreasonable to mean that the conduct of the advocate*

must be such that he or she took decisions and acted in a way in which no reasonable advocate might reasonably have been expected to act.

12. That, by itself, as I have said, is not enough. It must further be shown that the wholly inadequate conduct did affect the fairness of the process. Only then could the conclusion of the committee be shown to be unjust."

9. Mr Nicholson for the respondents did not suggest that alleged failures by a representative could not engage Rule 38. Notwithstanding, it is not entirely clear to me that such circumstances could amount to a procedural irregularity within Rule 38(2)(c).

10. The Tribunal Rules refer to a "procedural irregularity", whereas Part 52 refers to a "procedural or other irregularity". I am not sure that the term "procedural irregularity" is apt to include incompetent representation. In the absence of submissions on that point I do not propose to express any view. Both parties proceeded on the basis that incompetent representation could engage Rule 38.

11. If that is right, it is clear from the authorities referred to above and the requirement in Tribunal Rule 38(1)(a) that it must in any event be in the interests of justice to set aside the decision. In such circumstances therefore a decision could only be set aside if:

(1) There was incompetence to such a degree as to be described as Wednesbury unreasonable so that no reasonable representative might have been reasonably expected to act in that way.

(2) That the conduct affected the fairness of the process to such an extent that it is in the interests of justice to set aside the decision.

12. That is the approach I shall take to this application.

13. Before considering the factual background to the application I shall describe the Decision in more detail.

The Decision

14. The Decision records that the appellant provided counselling services through a company called "Liveperson". Liveperson operates a website in the United States providing an online platform for counselling services. The appellant is registered as an expert counsellor with Liveperson. An individual client based in the United States would access the website and select the appellant from a list of expert counsellors. The appellant would provide counselling services to a client either by telephone or through a chat facility, both via the website. Liveperson would record the time of the call or chat line and charge the client appropriately. They would deduct their own charges and pay 55% of the fee to the appellant.

15. The issue before the Tribunal was the place of supply of the appellant's services. The respondents had registered the appellant for VAT for the period 1

October 2008 to 27 October 2011 on the basis that he was making taxable supplies in the UK. The decision to register the appellant was the subject of the appeal.

16. The Tribunal identified that the relevant place of supply provisions had changed with effect from January 2010. The place of supply rules for VAT are not straightforward. In the context of the appellant's business and by way of a general summary the position prior to January 2010 was as follows:

> (1) The general rule was that services were supplied where the supplier belonged (Section 7(10) VAT Act 1994).
>
> (2) One exception to this general rule was supplies of services by "consultants, engineers … lawyers, accountants, and similar services" (Art 16 VAT (Place of Supply of Services Order 1992). In that case the supply was treated as made where the recipient of the services belonged.

17. In the period after January 2010 the rules were as follows:

> (1) The general rule depended on whether the supply of services was to a relevant business person (Section 7A VAT Act 1994). A relevant business person is essentially a person who independently carries on an economic activity. The general rule was:
>
> > (a) Where services were supplied to a relevant business person for the purposes of his business the place of supply was the country in which the relevant business person belonged.
> >
> > (b) Otherwise, the place of supply was the country where the supplier belonged.
>
> (2) One exception to the general rule was again supplies of services by "consultants, engineers … lawyers, accountants, and similar services" provided to a person who was not a relevant business person and who belonged outside the EU (Para 16 Schedule 4A VAT Act 1994). In that case the supply was treated as made where the recipient of the services belonged.

18. In its findings of fact the Tribunal listed numerous certificates produced to it as evidence of the appellant's qualifications and expertise. These related to the period from 2000 to 2012. The appellant obtained an MBA from Punjab Technical University in 2000. He then went on to receive various certificates from institutions in India covering relationship counselling, astrology and behavioural therapy. There were also certificates from institutions in the UK in 2012 covering various forms of counselling and spiritual healing although these were after the period relevant for the purposes of the appeal. In 2012 the appellant also became a member of the British Association for Counselling and Psychotherapy.

19. The appellant gave evidence at the Hearing and part of that evidence included questions from the Tribunal in relation to the certificates.

20. The Tribunal recorded the parties' submissions as follows.

21. HMRC's submissions were that the appellant supplied his services to individual clients and not to Liveperson. For both periods therefore the general rule was that the services were supplied in the UK. There was no exception to the general rule because there was no supply of "consultancy services". The Tribunal was referred to a decision of the VAT Tribunal in *Nasim Mohammed t/a The Indian Palmist (2003) Decision 18397* where the issue was whether the trader was a member of a "liberal profession". That term derives from the case law of the Court of Justice. To fall within the exception for consultants a trader must be a member of a liberal profession, which involves activities of a marked intellectual character requiring a high level of qualification and with strict professional regulation.

22. The Tribunal summarised the issues identified by HMRC in their submissions as follows:

> (1) is the appellant providing services to Liveperson or directly to individual clients, and
>
> (2) are they "consultancy" services.

23. I note that if the answer to (1) was Liveperson, then supplies on or after 1 January 2010 would be outside the UK and outside the scope of VAT. If the answer was that supplies were to individuals then issue (2) would arise. If the answer to issue (2) was yes, then supplies for the whole period would be outside the UK.

24. The appellant was represented by Mr Kevin Kinsella of Kinsella Tax UK Ltd ("Kinsella Tax"). His submissions are recorded as being that the services were supplied to Liveperson on a business to business basis. The case of the Indian Palmist was therefore not relevant. He conceded that the appellant was not a consultant but a counsellor.

25. It appears therefore that HMRC had made submissions both in relation to the identity of the recipient of the appellant's supplies and as to the nature of those services, in particular whether they amounted to the services of a consultant. Mr Kinsella limited his submissions to the identity of the recipient of the supplies.

26. In giving reasons for its decision the Tribunal quoted the exception to the general rule in relation to consultants and others. It then recorded Mr Kinsella's submission that the appellant was not a consultant. It did so in the following context:

> "*24. Mr Kinsella has submitted that Mr Girotra is not a consultant. We note that the only qualifications which might confirm that he was a consultant for the earlier period are those provided from India. We do not consider that qualifications in Astrology can be of a liberal profession. We have not been told what level of qualifications the 'Relationship Counselling', 'Cognitive Behavioural Therapy' and 'Rational Emotive Behaviour Therapy' are as provided by the Regional Study Centre, Chandigarth. We can only rely on Mr Kinsella's submission that Mr Girotra is not a consultant. As a result his services must be supplied in the United Kingdom and subject to VAT for the period October 2008 to 1 January 2010.*"

27. In relation to the period up to January 2010 the appeal could not have succeeded in the light of Mr Kinsella's concession. It was only if the appellant was a consultant that the place of supply could have been outside the UK.

28. For the period after 1 January 2010 the Tribunal found in favour of HMRC that the supply was to individual clients and not Liveperson. It went on to consider the exception for consultants in the following terms:

> "*... we have not been told what the certificates are for, although they all appear to be other than for a 'liberal profession'. In the circumstances Mr Girotra's position is the same as [the Indian Palmist] in relation to both the earlier and later periods ... Mr Kinsella has in any event confirmed that Mr Girotra is a counsellor ...*"

29. In the light of that analysis the Tribunal dismissed the appeal. There is no suggestion by the appellant in this application that the general approach of the Tribunal was wrong in the light of how the case was argued.

The Application to Set Aside

30. The Decision was released on 1 March 2013 when it was sent by the Tribunal to Kinsella Tax. Unfortunately, and with no explanation, they did not communicate it to the appellant. The appellant only heard about it when HMRC wrote to the appellant on 22 April 2013. Thereafter the appellant obtained a copy of the decision from the Tribunal on 2 May 2013.

31. An application to set aside must be made within 28 days of the date on which the Tribunal sent notice of the decision to the party.

32. On 22 May 2013 the appellant, acting in person, lodged an application for permission to appeal. The grounds of that application were that he was a consultant for the purposes of determining place of supply and that the tribunal had incorrectly found that the appellant provided his services to individual clients rather than Liveperson. He included within the grounds a claim that Kinsella Tax had not properly presented his case and had been unprepared for the hearing.

33. In a decision notice released on 25 July 2013 Judge Porter refused permission to appeal on the basis that there was no error of law in the Decision. He stated "*I can only consider the matter on the facts which I heard*".

34. By 13 September 2013 the appellant had instructed his present representative. On that date Mr Routledge lodged the present application to set aside the Decision.

35. There was no explanation of why it took from 25 July 2013 to 13 September 2013 in which to make the application to set aside. Mr Nicholson on behalf of HMRC however did not take any point that the application to set aside was out of time. In the particular circumstances of this appeal I am prepared to extend the time for making this application.

36. The application to set aside was supported by a witness statement from the appellant who also gave oral evidence before me. On the basis of that evidence I make the following findings of fact. I do so without the benefit of any evidence or response from Kinsella Tax and solely for present purposes.

37. Prior to instructing Kinsella Tax, the appellant had instructed another firm of tax consultants to represent him in the appeal. However the appellant could not afford their fees, which he regarded as unacceptable. The appeal had been listed for 28 January 2013. The appellant's long standing accountant, Mr Hussein, then found Kinsella Tax. On 29 November 2012 Kinsella Tax agreed to represent the appellant for a fixed fee of £3,600. £1,800 was paid immediately with £1,800 due during the course of the proceedings.

38. On 7 January 2013 Kinsella Tax notified the tribunal that they were acting. At the same time they requested a postponement of the hearing. That application was refused.

39. Kinsella Tax had been provided with some information in relation to the appeal by Mr Hussein. It was not until 16 January 2013 that they sought to arrange a meeting with the appellant to discuss the case. It was also intended that the appellant would pay the balance of their fees at the meeting.

40. There was inexplicable confusion on the part of Kinsella Tax as to the date of that meeting. It was clearly arranged for 22 January 2013, although at one stage it had been suggested it might take place on 21 January 2013. On the evening of 21 January 2013 Kinsella Tax emailed the appellant to say that because he had failed to turn up to the meeting and had not paid the balance of the fees then Kinsella Tax could no longer represent the appellant. The appellant was shocked because the meeting had clearly been arranged for 22 January.

41. The appellant at this stage had doubts about Kinsella Tax and thought confusion over the date may have been an excuse because they were not prepared for the hearing which was only a week away. Notwithstanding these doubts and because the hearing was so close the appellant did not consider terminating his instructions to Kinsella Tax.

42. In the event, the meeting did take place on 22 January 2013. It lasted about 2 hours during which time the appellant and his accountant met various representatives of Kinsella Tax. They met with Mr Kevin Kinsella for about 15-20 minutes. The appellant tried to explain the evidence as to the circumstances in which he provided services and his qualifications. He also produced a bundle of documents including documentary evidence as to his qualifications. The appellant felt rushed during this meeting.

43. Two witness statements were prepared at the meeting and signed by the appellant. Only the first of those witness statements was referred to in the evidence before me.

44. In a witness statement signed and dated 22 January 2013 the appellant set out the background to his dealings with Liveperson. The statement emphasised that it was being contended that the appellant supplied his services to Liveperson and not to individuals. It also referred to details of the appellant's qualifications having been provided to HMRC but at the same time stated "I am not a consultant but a counsellor". The appellant told me that he only signed the witness statement because he was panicking and being rushed at the meeting.

45. The witness statement was served on the Tribunal by email on 24 January 2013. There was also a second witness statement served on the Tribunal at the same time. It was also dated 22 January 2013 and signed by the appellant. I infer it was signed at the meeting on 22 January 2013. The second witness statement listed details of the appellant's qualifications.

46. Following the meeting the appellant did not feel that the meeting had been satisfactory. He was not confident that Kinsella Tax were properly prepared or that they would fully present his case.

47. On 25 January 2013 Kinsella Tax served a bundle of documents on HMRC. The appellant contends that the bundle did not include all the documents relevant to his qualifications previously provided to Kinsella Tax. In particular the bundle only included 2012 qualifications which were after the period relevant to the appeal. He attached the additional documents to emails which he sent to Kinsella Tax on Friday 25 and Saturday 26 January 2013.

48. At the Hearing on Monday 28 January 2013 Mr Kinsella did not arrive at the Tribunal Centre until 10.30am. He had a short discussion with the appellant but Mr Kinsella was not prepared to put forward an argument that the appellant was a consultant. He said that the Tribunal would not accept such an argument. He was less confident than he had previously been about winning the appeal, but said that the appellant could always appeal to the Upper Tribunal.

49. I have set out above how the Tribunal dealt with evidence as to the appellant's qualifications at the Hearing. Further documentation evidencing the appellant's qualifications in the period 2000-2012 was put before the Tribunal. This had already been referred to but not exhibited in the appellant's second witness statement.

50. Following the Hearing, and following the Decision, the appellant has not complained to Kinsella Tax nor considered reporting them to any professional body. The appellant told me he was not sure where to go to do that, and was more concerned with overturning the Decision. In re-examination he suggested that there were cultural reasons as to why he would not make a complaint against a lawyer. I do not accept that the appellant did not make a complaint because of cultural reasons. It is surprising that no formal complaint against Kinsella Tax has been pursued. It is also unfortunate, because that would have given Kinsella Tax an opportunity to put their side of the story. As it is I must deal with this application solely on the basis of the appellant's account.

51. In his evidence before me the appellant gave an indication as to the importance of his qualifications. On the basis of the evidence adduced I am not satisfied that the appellant had a strong case that his activities in the period to 27 October 2011 were of a marked intellectual character or required a high level of qualification. Further the only evidence of professional regulation was the appellant's membership of the British Association for Counselling and Psychotherapy. There was no evidence of such membership prior to 2012.

52. I was told and I accept that the appeal and the present application have significant implications for the appellant. The sum in issue is very significant to the appellant. If the Decision is not set aside the appellant's home may be at risk in enforcement proceedings.

Reasons

53. Mr Routledge on behalf of the appellant relied on a decision of the Upper Tribunal in *ATEC Associates Limited v Revenue & Customs Commissioners [2010] UKUT 176 (TCC)* to support the application to set aside. In that case the incompetence of a representative led to an appeal being dismissed for want of prosecution. There was an application to set aside that decision. Briggs J sitting in the Upper Tribunal viewed it as an application for relief from sanctions where the sanction of dismissal of the appeal had been applied because of incompetence on the part of the appellant's representative. He analysed the discretion of the tribunal on the basis that he was considering relief from sanctions. As such he held that it was relevant that the failure to comply had been caused by the representative rather than the party itself.

54. Briggs J distinguished cases in the Court of Appeal (*Mullock v Price [2009] EWCA Civ 1222* and *Training in Compliance Ltd v Dewse [2001] CP Rep 46*) where the fault of a representative was not a relevant factor. They were decisions in relation to setting aside default judgments rather than relief from sanctions. In the latter case Peter Gibson LJ stated:

> " *Of course, if there is evidence put before the court that a party was not consulted and did not give his consent to what the legal representatives had done in his name, the court may have regard to the fact, though it does not follow that this would necessarily, or even probably, lead to a limited order against the legal representatives. It seems to me that, in general, the action or inaction of a party's legal representatives must be treated under the Civil Procedure Rules as the action or inaction of the party himself. So far as the other party is concerned, it matters not what input the party himself has made into what the legal representatives have done or have not done. The other party is affected in the same way; and dealing with a case justly involves dealing with the other party justly. It would not in general be desirable that the time of the court should be taken up in*

considering separately the conduct of the legal representatives from that which the party himself must be treated as knowing, or encouraging, or permitting."

5 55. The present application is not concerned with relief from sanctions and therefore ATEC Associates is itself of limited assistance. I do however take into account what Peter Gibson LJ stated in the Court of Appeal quoted above. In the context of setting aside a default judgment the conduct of a legal representative should not be considered separately from that of a party when the party must be 10 treated as knowing, encouraging or permitting that conduct.

56. In the present case Mr Routledge invited me to consider separately the conduct of Kinsella Tax and the appellant. He submitted that the following factors were relevant to the application to set aside:

(1) There had been no history of non-compliance by the appellant,

15 (2) There was considerable prejudice to the appellant if the Decision was allowed to stand,

(3) Kinsella Tax were to blame for not fully putting forward the appellant's case.

57. I accept that there has been no history of non-compliance by the appellant in the 20 appeal. None has been suggested. Compliance with the rules does not really weigh in favour of the present application. It is to be expected.

58. I accept there would be prejudice to the appellant if the Decision is not set aside. He will lose the opportunity to argue his case that he was a consultant. The level of prejudice depends on the merits of that argument which I have already said does not 25 appear to be a strong argument.

59. It is clear that Mr Kinsella did not make any submissions to the effect that the appellant was a consultant. I infer that, other than the documentary evidence of the appellant's qualifications, Mr Kinsella did not seek to adduce oral evidence from the appellant as to the nature of his activities and qualifications and whether they were of 30 a marked intellectual character, required a high level of qualification and strict professional regulation.

60. As to whether any blame is to be attached to Kinsella Tax I must consider whether Mr Kinsella could reasonably take a view that the prospects of establishing the appellant as a consultant were remote. In other words, was it within the bounds of 35 reasonableness not to argue that case? I must consider that issue without the benefit of any reasoning or justification from Mr Kinsella.

61. It seems to me from a fair reading of the Decision that the Tribunal did not simply ignore the question of whether the appellant was a consultant, even though Mr Kinsella had not argued that he was. The Tribunal addressed the evidence that was

before it and itself asked questions of the appellant. The only reason to do so would be to test, to some extent, whether Mr Kinsella's concession was reasonable. If the Tribunal had felt that the concession was inappropriate it would no doubt have explored the position in more detail. In its final analysis however the Tribunal relied on Mr Kinsella's submission that the appellant was not a consultant.

62. I have considered my findings of fact based on the documentary evidence of the appellant's qualifications and on his oral evidence. The appellant may have had an arguable case that he was a consultant and was practising a "liberal profession". However I am not satisfied that it was unreasonable of Kinsella Tax not to run that argument. From what I have seen it was likely to be a weak argument and within the bounds of reasonable professional judgment to advise as much.

63. I am not satisfied therefore that there was incompetence to the extent that no reasonable representative would have advised not running the argument.

64. If the appellant had insisted that the argument should be run, then Kinsella Tax would have been duty bound to run it. It was not, in my view, hopeless. The appellant however did not insist that the argument should be run. If he had done, he would surely have terminated his instructions to Kinsella Tax for failing to do so.

65. Even if Kinsella Tax ought to have advised running the consultancy argument, it is notable that the appellant signed a witness statement to the effect that he was not a consultant but a counsellor. It must have been clear to the appellant and his accountant at the meeting on 22 January 2013 that Kinsella Tax were not advancing an argument that the appellant was a consultant. Mr Kinsella re-affirmed this to the appellant and his accountant at the hearing on 28 January 2014, albeit just before the hearing started.

66. In all the circumstances I do not consider that it would be in the interests of justice for the Decision to be set aside. Even if the appellant had an arguable case, he and Mr Hussein were aware of the basis on which Mr Kinsella intended to present the appeal and heard him present the appeal on that basis. There was no reason why they should not have brought their disagreement with Mr Kinsella to the attention of the Tribunal. That would at least have identified the appellant's position to the Tribunal which would no doubt have then looked more closely at the consultancy argument. If necessary the appellant could have dispensed with Mr Kinsella's services and sought an adjournment.

67. I appreciate that the appellant may not have had any previous involvement with litigation. I also take into account that Tribunal hearings can be stressful. However he is an intelligent man and had his accountant with him. In the circumstances I consider that the appellant effectively knew of and permitted the conduct of which he now complains.

68. The respondents meanwhile answered the case they were asked to meet at the Hearing. They would be prejudiced if the Decision were to be set aside. They incurred costs and time in defending the appeal at the Hearing. Even if the appellant had

suggested paying the respondents' costs of the Hearing and of this application, which he has not, I do not consider that the balance would have swung in favour of setting aside the Decision.

69. For all the reasons I refuse this application to set aside the Decision.

70. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 7 August 2014