# TC02319

**Appeal numbers: MAN/07/1137 & MAN/08/0023**

**VALUE ADDED TAX** – Zero Rating – time of supply – sale of newly constructed dwellings – restriction on use throughout the year by planning permission terms and covenant – subsequent removal – whether retrospective for purposes of supply – No – VATA 1994, Schedule 8, Group 5, Notes 2 and 13 – Appeal dismissed

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**NORTHSIDE MANAGEMENT LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE KENNETH MURE QC**
**ALAN SPIERS FCA**

**Sitting in public at North Shields on 10th January 2011 and 2nd and 3rd July 2012**

**For the Appellant: Christian Zwart Esq, Barrister**

**For the Respondents: James Puzey Esq, Barrister**

# DECISION

1. Introduction

2. This Appeal relates to an assessment to VAT at standard rate on four dwellings sold by the Appellant on 125 year leases in about October 2005 and a related penalty. The leases were subject to a restriction on use throughout the Year by virtue of Clause 10 of the Fourth Schedule which narrates –

3. "Not to use the Demised Premises for the purpose of human habitation between 9th January and 9th March in the same year" (see page 246 of Bundle of Documents).

4. This provision was required because of conditions incorporated in the grant of Planning Permission in favour of the Appellant dated 7th December 2004 which stipulated that –

5. "14 The house units shall not be used for the purpose of human habitation between 9th January and 9th March in the same year.

6. Reason: The establishment of a permanent residential unit on this site would conflict with the established policy for new dwellings in this location". (page 205).

7. This condition was relaxed subsequently and later removed. The retrospective effect of the removal is a moot point. Thereafter the covenant was removed from the Leases by Deeds of Variation.

8. These conditions are crucial to the relevance of Notes 2 and 13 as affecting Group 5 of Schedule 8, Value Added Tax Act 1994 in determining whether the grant of the leases should have been zero-rated, as the Appellant had considered. These Notes provide –

9. "(2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied –

10. (a) ---------;

11. (b) ---------;

12. (c) ---------; and

13. (d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent".

14.

15. "(13) the grant of an interest of, and in any part of –

16. (a) a building designed as a dwelling or number of dwellings; or

17. (b) the site of such a building,

18. is not within item 1 [of Group 5 of Schedule 8] if –

19. (i) the interest granted is such that the grantee is not entitled to reside in the building or part, throughout the year; or

20. (ii) residence there throughout the year, or the use of the building or part as the grantee's principal private residence, is prevented by the terms of a covenant, statutory planning consent or similar permission".

21. Initial Hearing

22. It emerged at the Initial Hearing on 10th January 2011 that there were two letters of the same date, viz 20th April 2009, purporting to be in respect of planning permission affecting the four subjects sold on lease. These are produced as pages 297 and 297A of the Bundle. It was accepted that for the Appellant to succeed 297A had to be the operative document – and that apart from all other considerations. The initial hearing had to be adjourned to clarify the provenance of both letters. This is explained in the correspondence at Supplementary pages 34 et seq of the Bundle. It was established that 297A was the intended version, and that while it is dated 20th April 2009, it was not issued until 5th May 2009. (Its effect is considered later).

23. Evidence

24. The only witness was Mr Neil Forsyth who, with his wife, are the directors of the Appellant company. He read out and confirmed the terms of his Witness Statement (set out at Section 5 of the Bundle) and was then cross-examined by Mr Puzey.

25. In cross-examination Mr Forsyth acknowledged that both the final grant of Planning Permission of 2009 and the Deeds of Variation removing the restriction on habitation from the leases were consciously concluded before the date of the Initial Hearing. He confirmed that the Appellant company owned also the hotel subjects, adjoining the dwellings. Mr Forsyth questioned the description of the dwellings leased as "holiday houses". He explained that once the restriction on occupation had been reduced to one month, particularly a winter month, that did not affect their use for practical purposes as a principal residence. Many retired people, for example, take an extended winter holiday, he claimed. However, he had to admit that in correspondence relating to Planning Permission and also in advertising, the dwellings were described as holiday accommodation. Here, in fact, the dwellings were not the tenants' main addresses, and they were used for leisure and investment purposes. Mr Forsyth confirmed that both the Notice of Appeal against the assessment and the 2007 Planning Application bore the same date, viz 13th

September 2007. That Application while not referring to Section 73A of the Town and Country Planning Act 1990 ("TCPA") sought in terms "retrospective" permission. (It should be noted that Section 73A specifically provides for planning permission to be awarded retrospectively). Mr Forsyth agreed that over a year later in 2009 a further Application for Planning Permission under Section 73A was made, which referred to the removal of three clauses, numbers 5, 7 and 10, affecting trees and landscaping, but not to the restriction in use. Mr Forsyth conceded that Clauses 5, 7 and 10 had not been enforced by the Planning Authority.

26. Thereafter, in the course of their arguments and submissions both Counsel referred generally to the correspondence and documents produced in the Bundle.

27. The factual aspects were to a great extent not contentious and on the basis of Mr Forsyth's evidence and the documents in the Bundle as referred to we make the Findings in Fact.

28. Findings in Fact

29. (1) The Appellant, Northside Management Limited, is a limited company. Its two directors are Mr Neil Forsyth and his wife. In about 2004 it acquired the freehold interest in Beadnell House Hotel. This extended to a hotel building and various outbuildings. As an initial development the Appellant decided to reconstruct and sell on 125 year leases four dwelling houses within the subjects. These sales took place in about October 2005.

30. (2) The leases were subject to a restriction on occupation during a two month period from 9th January to 9th March annually (Clause 10 of Schedule 4). That reflected the grant of Planning Permission made in respect of the development in December 2004. Reference is made to Condition 14 thereof.

31. (3) In August 2005 the terms of the Planning Permission were relaxed. A one month prohibition on occupation, viz from 9th January to 10th February annually, was substituted. The covenants in the Leases affecting the four dwelling houses were restricted correspondingly.

32. (4) Early in 2007 officers of the Respondents examined the Appellant's business records and discovered that the four leases sold had been zero-rated. They decided that they fell to be standard rated and made an assessment accordingly for £128,756.dated 14th May 2007, which (together with the related Penalty) is the subject of this Appeal.

33. (5) On 13th September 2007 the Appellant lodged a Notice of Appeal against the assessment (p 2 – 5 of the Bundle). On the same date it made a third planning application in respect of the dwellinghouses, viz for retrospective residential use (p 214 – 218). Permission was granted on 14th December 2007 (p 219 – 220) for a change to permanent residential use, but notwithstanding the terms of the application the grant was not retrospective. The Planning Authority confirmed that it took effect only on 14th December 2007 by letter dated 21st February 2008 (p 84).

34.

35. (6) On 24th February 2009 the Appellant made a fourth application for Planning Permission. This was expressly in terms of Section 73A TCPA and sought with retrospective effect to remove conditions 5, 7 and 10 of the original grant. These relate to landscaping aspects. No reference was made to the restriction on occupation (p 290 – 292). This was granted on 20th April 2009 (p 297 and 297A).

36. (7) Thereafter, the covenants in the Leases restricting occupation were removed by four Deeds of Variation dated 31st December 2010 (Supplementary pages 1 – 33).

37. The Law

38. The nub of this Appeal is whether by virtue of Notes 2 and 13 relative to Item No 1 of Group 5, the Leases were excluded from the zero-rating applying to the first grant by a person constructing a building designed as a dwelling house and certain other categories of building works. The terms of both Notes are set out supra.

39. Also, extensive reference was made to case law, in particular:

40. Keith Lamming –v- HMRC (2009)

41. Michael James Watson –v- HMRC (2010)

42. R –v- Ashford BC ex parte Shepway DC [1998] EWHC Admin 488

43. Livingstone Homes Limited (2000) no 16649

44. Loch Tay Highland Lodges Limited (2004) no 18785

45. Alan Roper & Sons Limited (MAN/96/1169)

46. Dr D T Haigh –v- HMRC (2008)

47. Mr and Mrs Harris –v- HMRC [2004] UK VAT V18822 and

48. Carter Commercial Developments Limited (In admin) –v- S of S for Transport [2002] EWCA Civ 1994.

49. Submissions for the Appellant company

50. Mr Zwart on behalf of the Appellant company presented a lengthy and detailed argument to the effect that the time at which the supply should be considered was not necessarily the date when the leases were granted. Rather, he urged us to review the supply at the present date. Crucially, he submitted, removal of the residential restriction in 2009 was *retrospective* in terms of the particular provisions

of Section 73A TCPA. Also, the covenant in the Leases had been removed by the Deeds of Variation.

51.

52. Mr Zwart provided skeleton summaries of his argument in advance and these are referred to. In respects these appear to have been revised, and given its technical nature his argument was not an easy one to present. At its core it adopted *obiter* comments of Judge Gort in *Watson.* There retrospective planning permission had been granted under Section 73A in respect of a house built by the taxpayer beside his father's bungalow. A VAT repayment would be due if it were an independent dwelling rather than an extension. However, planning permission had not been backdated to a time before the work began. The Judge noted –

53. "35…. For Mr Watson to have succeeded he would have needed the Council to have used its powers under s73A at the time it issued the retrospective planning consent to backdate the consent to 25 August 2005, so that he would have a valid planning permission at a time before the work began, this was not done by the Council for the reasons set out above. That they might have done it unfortunately does not avail Mr Watson in this appeal".

54. Mr Zwart sought to distinguish three other cases which related to listed and protected buildings, *viz Haigh, Roper* and *Nicholls*. This was a distinct category where the relative legislation did not provide for retrospective consent. Further, absence of the necessary consents in relation to listed buildings could result in criminal infringements.

55. By contrast the decisions in *Harris, Lamming*, and *Watson* had all related to planning legislation, where there is in terms of Section 73A TCPA a specific provision allowing retrospective permission. From *Watson* it emerged, in Mr Zwart's submission, that retrospective permission enabled a Tribunal to review circumstances at the hearing date, and take account of supervening developments. The germ of this argument emerged, as we understand, from *obiter* comments at para 33(b) –

56. "(b) the Second Permission is irrelevant to the Appellant's claim because its grant post-dated his claim and the Council did not in January 2008 exercise their discretion to identify the Second Permission as operative from a date before the currency of the construction works (by back date under section 73(3) of the Planning Act 1990 its currency to a date on or before the Appellant's commencement of the construction work".

57. Note (2) as appended to Group 5 incorporated the phrase "statutory planning consent". It was not further defined in VAT legislation but it embraced, Mr Zwart argued, surely all forms of planning consent including retrospective permission in terms of Section 73A. This interpretation apparently was adopted in *Watson.* In relation to the construction of para (d) of Note (2) Mr Zwart focused on a

submission (made by himself) noted in para 32 in *Watson.* This was crucial to his argument. It narrates –

58.

59. "(iii) Criterion (d) requires in respect of that same building and in chronological sequence –

60. (1) the existence of a statutory planning consent;

61. (2) that that statutory consent may be in respect of `that dwelling' to which criterion (a), (b) and (c) refer;

62. (3) by use of the phrase `and has been' that that consent subsists *before* commencement of the works of construction or can by the terms of a subsequent consent by reference to a date on the face of that subsequent consent be objectively related, objectively back to a date also before that commencement;

63. (4) that those works have been carried out after and also `in accordance with that consent', thereby ensuring that those particular physical works are permitted;"

64. Mr Zwart submitted that the gap in time between the completion of works and the date of permission may be bridged backwards by the exercise of the planning authority of its discretion under Section 73A (3) to grant planning permission so as to have effect from the date on which the development was carried out.

65. Mr Zwart acknowledged that for his argument to succeed there must be express wording relating back to a time during the currency of the construction works. That date must at least precede the completion of the work. Unlike *Watson*, in the present case there was the necessary backdating of planning permission and that enabled his argument in this appeal to succeed. He did acknowledge that while *Lamming* in para 24 referred to "completion" of the works, *Watson* at para 33(b) made reference to the "commencement" of the work as being the date to which retrospective planning permission should be granted. Mr Zwart encouraged us to infer that retrospective permission to any date within the currency of the works was sufficient.

66. Mr Zwart noted the terms of Section 75(1) TCPA. The benefit of retrospective planning permission under Section 73A should enure from the earlier date for the benefit of all parties interested, here both the lessees and the Appellant as freeholder.

67. Mr Zwart then referred to the decisions in *Livingstone Homes UK Limited* and *Loch Tay Highland Lodges Limited*, both of which related to the application of Note (13): that excludes zero-rating where the dwelling cannot be used as a residence throughout the year. Note (13), he submitted, assumed antecedent satisfaction of Note (2), and it was written in the present tense. Note (13) should be applied in the present time, while Note (2) looked back to the time of construction. Note (13) could embrace changes in planning circumstances, he submitted.

68. Mr Zwart then addressed the chronology of the relevant events. The construction period dated from November 2004 to October 2005. The restriction on occupation was shortened to one month before completion of the development. The grant of Planning Permission in December 2007 did not incorporate an earlier date and so it could not "bridge backwards" to the construction period. However, the Notice no 297A should be read in conjunction with the planning statement at p287 – 9. *Ex facie* that has effect from the carrying out of the development, unlike *Watson*, in which the later planning permission had no "bridging back in time". In the present case permission had been backdated to the works being carried out. Accordingly the terms of Note (2) were satisfied.

69. The next matter to be addressed by Mr Zwart was whether Note (13) was triggered, which independently would exclude zero-rating. There was, of course, a restriction on "human habitation" in Clause 10 of Schedule 4 of the Leases. On the basis of *Carter Commercial Developments Limited* Mr Zwart urged us to distinguish the task of interpreting planning permission from interpreting a contract. He referred us to the views of Arden LJ at para 27 – 28. Planning permission as a public document ought to be interpreted objectively, whereas as a contract could be construed subjectively. Here, the demised premises were a "house" not a "holiday home". Mr Zwart sought to distinguish *Livingstone Homes* and *Loch Tay Highland Lodges Limited* in that neither involved retrospective planning permission. Here, the restriction on "human habitation", reduced to one month, did not preclude entitlement to reside in Mr Zwart's view. Rather it conditions the activities which could be conducted for a brief period. For instance clause 10 would not in his view preclude refurbishment, redecoration, having lunch, but might preclude sleeping overnight. Residence was difference from use.

70. In any event Note (13) assumes the antecedent satisfaction of Note (2), according to Mr Zwart. Note (13) falls to be applied at the present date, and the current planning permission grant does not prevent residence throughout the Year. Note (13) was phrased in the present tense and it did not require the terms of the interest granted to match the initial grant. Note (13) refers to "the interests granted" *simpliciter*,

71. In essence, as in *Livingstone Homes* and *Loch Tay Highland Lodges Limited*, Mr Zwart submitted that the question was what the subsisting provision is at the present date. The interest granted was not now subject to Clause 10. This approach, he argued, was common sense. It was clear from case-law that "statutory planning consent" embraced a wide range of consents. Section 73A could have been excluded had Parliament so intended: it had not. Note (13) could extend to a varied grant so long as there had not been an alienation. The terms of the initial grant did not have to match its later form for purposes of Note (13). It was consistent with *Livingstone Homes* and *Loch Tay Highland Lodges Limited* to apply Note (13) in the present tense and not looking back historically.

72. Accordingly, Note (13) was not triggered either and the Appeal should succeed, Mr Zwart submitted.

73. Respondent's Submissions

74. In reply Mr Puzey invited us first to consider the incongruities of the Appellant's approach. If the Appellant were correct, the concept of supply as a tax point became meaningless: according to Mr Zwart liability to VAT on the supply could be changed if the taxpayer wished, and years later. This conflicted with the fundamental principles of VAT in Mr Puzey's submission. Curiously, he observed, the original assessment made in 2007 had not been faulted. In fact and in law it was indeed correct when made. It was wrong, Mr Puzey continued, to review the matter by reference to supervening circumstances in 2012 as the tax supply had been made in 2005.

75. Mr Puzey submitted that if his approach were correct, i.e. considering the matter as at the date of supply, then there was no need to resolve the consequences of Section 73A TCPA. Quite simply Clause 14 of each Lease corresponded with the terms of Note (13)(i): persons were not allowed to live in the dwellinghouses all the year round, and accordingly the supplies were not eligible for zero-rating.

76. The short and sufficient answer to the Appeal, Mr Puzey submitted, was that note (13)(i) and the charging provisions fell to be interpreted according to circumstances prevailing when the Leases were granted. Moreover, the Covenant in Clause number 14 was unaffected by any retrospective planning determination in terms of Section 73 A.

77. Mr Puzey then turned to the chronology of events, which seemed in his view to be a tortuous attempt to justify the original zero-rating applied by the Appellant. Mr Forsyth had acknowledged that there was a "holiday letting" purpose and that the houses had been marketed as suitable for that. (He noted the advertising at page 309). It was a curious coincidence, Mr Puzey observed, that an application was made to remove the residential restriction on the same date as the Appeal was lodged, viz 13th September 2007. (He noted Mr Forsyth's Witness Statement at paras 22 – 25).

78. Mr Puzey questioned whether the grant of Planning Permission in 2007 was in fact retrospective. The relative application bore to be in terms of Section 73, as contrasted with a Section 73A application, formulated for retrospective effect, which was not lodged until 2009. The planning authority did not consider that it had effect before the date of the application on 14th December 2007. (He noted its letter to HMRC at p 84). The 2009 application sought expressly, perhaps curiously, to remove three other unrelated conditions affecting landscaping (numbers 5, 7 and 10 – see p 288). Mr Puzey questioned the Appellant's stance that the grant of Planning Permission in terms of Section 73A in 2009 resulted in a blank slate *ab initio*. Rather, Mr Puzey submitted, it was arguable that the restriction on occupation continued until 2007. The Planning Permission in 2007 was not retrospective. Also, and in any event, the Deeds of Variation removed the covenant only in 2010, and that prospectively.

79. Further, the inconsistencies between the terms of the letters at page numbers 297 and 297A had not been satisfactorily resolved, Mr Puzey continued, in spite of the Procedural Directions issued by the Tribunal after the initial hearing in January 2011. One bore to remove conditions: the other permitted a development. Neither document recorded a date from which retrospective Planning Permission had been granted. Reference to the terms of the Application was insufficient to establish a date satisfactorily. How could a specific date in 2004, as Mr Zwart had suggested, be implied, he wondered. This, of course, did not matter from the Respondent's view-point: the supply fell to be identified for VAT purposes as at 2005 when the Leases were granted. It was crucial to establish a tax point when the supply was known and fixed, having regard to the basic charging provisions contained in Sections 1, 5 and 6 VATA.

80. Mr Puzey then addressed us on the effect of Sections 73A TCPA in the context of the VAT provisions under discussion. There was in his view an illogicality and unfairness in Mr Zwart's approach. If years later zero-rating became applicable, a refund could not necessarily be made to the party entitled and an undeserved windfall could result. Limitation provisions could preclude a repayment. The past tense used in Note number (2)(d) pointed to the time of construction, unaffected by later events.

81. Finally, Mr Puzey reviewed the authorities cited. He founded particularly on *Harris*, the circumstances of which bore to be similar to those of the present appeal. There in relation to a property conversion a VAT repayment was due if it could be used as a separate dwelling. That condition had to be satisfied at completion not some later date –

82. "[24] Our decision …. is that the condition (that the separate use is not prohibited by the term of any planning consent) has to be satisfied at the time of completion of the building and not at any later time".

83. The illogicality of relying on a later date was commented on –

84. [23] …… (a) any relevant conditions have to be satisfied at the time of the design of the building (that is, at the date of the planning consent) and not later. We are confirmed in our view by the fact that, if a later planning consent could fulfil the condition, then in theory a claim for a refund could be made many years after the completion of the building, which could not have been intended".

85. While *Roper* related to the somewhat distinct context of a Listed Building it affirmed the same principle in Mr Puzey's view –

86. "… VAT is concerned with the making of a supply – in this case, the carrying out of the works – and it seems to me that authority for carrying out the works must be in existence at the time the supply is made if the benefit of zero-rating is to be available. One must consider the circumstances which pertained when the supply was made. At that time the Appellant did not have written listed building consent: ….. Later developments cannot alter the circumstances at the time of supply".

87. So too, in Lamming the Judge concluded –

88. "It comes down to the fact that a new dwelling requires specific planning permission and in this case there was no such specific planning permission. Even were there to be a retrospective planning permission granted, the relevant time for HMRC to consider whether a building is to be zero-rated is at the time of completion. There was at no time planning permission for an independent dwelling, and the new building does not fall within the exemption provided by Group 5 of Schedule 8 of the VATA".

89. While the comments by the same Judge in *Watson* at paras 33(b) and 35 might seem to add support to Mr Zwart's argument, these were made *obiter* and bore to conflict with her reasoning in Lamming. Mr Puzey urged us to disregard them as being in conflict with basic principles of VAT.

90. Ultimately none of these decisions was binding and there was no higher court authority. Only HMRC had been represented (coincidentally by Mr Zwart) in *Lamming*, *Haigh* and *Watson*. There seemed to be a conflicting decision in principle between *Lamming* and *Watson*. The appropriate course for this Tribunal, Mr Puzey submitted, was to be guided by fundamental principles. Liability to the tax should not be subject to changes of principle once liability was established. So far as Section 73A TCPA was concerned, planning law principles should not be conclusive for VAT, *esto* there had been a backdating of Planning Permission (which Mr Puzey did not concede). The 2009 consent did not bear to remove retrospectively the residential restriction. Neither did it specify a particular earlier date (Mr Zwart could only suggest alternative dates of November 2004 or October 2005). The significance of time of supply became meaningless if it could be changed years later by the taxpayer unilaterally, Mr Puzey argued. There had been no supervening enactment or emerging evidence which rendered the decision to assess in 2007 wrong.

91. DECISION

92. We consider that the approach of Mr Puzey is correct.

93. This dispute involves the basic structural pattern of VAT. Put simply, the charge to VAT arises in the event of a taxable supply being made, and the date of that supply is the date when liability is determined. Here, in our view, the supply was made in about October 2005 when the Leases were granted. It would follow that that is the date when liability arises, and critically that is when the categorisation of the supply for tax purposes should be made. It is in our view strained and fanciful to suggest, as Mr Zwart does, that that date can be varied and the nature of the supply changed subsequently by the unilateral act of the taxpayer. Mr Zwart seeks to show that the wording of Notes 2 and 13 of Item no 1 contemplates the categorisation of the supply now and by reference to the current circumstances prevailing. That argument must, in our view, be flawed: it would enable (as here) a tax planning exercise to be pursued ex post facto, to the substantial benefit of the taxpayer. While supervening legal developments can

affect a tax liability, supervening factual changes such as a retrospective variation of planning permission should not. If the assessment cannot be challenged as at the date when it is made, that must surely be resolutive of the matter. Retrospective changes of facts and circumstances would not alter that, we consider.

94. We were addressed briefly on the interpretation of the correspondence from the various planning authorities involved. For the Appellant to succeed Mr Zwart accepted that he had to establish that the planning aspects were determined by the letter 297A. (Mr Puzey's submission was, of course, that irrespective of whichever of 297 and 297A prevailed, the Respondent should succeed). Although in our Procedural Note of January 2011 we indicated (item 6) that –

95. Clarification of the deliberations of the Planning Authority is required. Did it contemplate simply the removal of the conditions not relating to residence retrospectively, or did it intend to delete *ab initio* in the grant of planning permission the requirement of a non-residential period of a month or two.

96. While there is included in the Bundle correspondence pursuing this at pages 34 et seq of the Supplementary Papers we are still not satisfied that retrospective permission has been granted to a particular date (see Answer 10 at p 39 – Northumberland County Council's letter of 3rd May 2011). The onus of proving that the letter 297A regulates the matter rests on the Appellant, of course.

97. We consider that there is a restriction on occupation triggering the application of Note 13. That restriction arises not simply from the planning permission conditions but also and independently from the covenant in Clause 10 of Schedule 4 of the individual Leases. As at the grant of the Leases the planning condition was in force. Even if it were later removed retrospectively (and that remains a moot point in view of our observations in the preceding paragraph), it was valid as at 2005, when in our view the supply falls to be categorised for VAT purposes. We are not persuaded that the possible impact of a future Section 73A TCPA grant need be considered in that context particularly in the absence of authority as to its impact on other areas of the law. Moreover and in any event there was from the date of grant of the Lease until the Deed of Variation in December 2010 a covenant subsisting. That in itself prohibits "human habitation" or residence throughout the Year and hence precludes zero-rating under reference to Note (13).

98. For these reasons we consider that the Appeal falls to be dismissed and the assessments upheld.

99. **Costs**

100.. Neither Party addressed us on the matter of costs at the conclusion of the hearing, and accordingly we make no award meantime. Costs in respect of the Preliminary Hearing in January 2011 were reserved. If Parties wish, we can be addressed further on this aspect, or for convenience we could deal with this aspect by way of short written submissions.

101. 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.

**KENNETH MURE QC**

**TRIBUNAL JUDGE**

**RELEASE DATE: 28 September 2012**