[2019] UKFTT 542 (TC)

TC07336

CORPORATION TAX – penalty for late filing of company tax returns – late appeal to HMRC – taxpayer relied on agent to deal with tax affairs – whether to give permission for late appeals to be made – Martland and Katib considered – permission refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02132

BETWEEN

PJD AV SERVICES LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the appeal on 13 August 2019 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 8 April 2019 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 14 May 2019 and the Appellant's Reply dated 29 May 2019 (with enclosures).

DECISION

INTRODUCTION

1. PJD AV Services Ltd ("PJD") is appealing against penalties that HMRC have imposed under Schedule 18 of the Finance Act 1998 ("Schedule 18") for a failure to submit company tax returns on time.

2. The flat-rate penalties that have been charged are as follows:

   (1) a £200 flat-rate late filing penalty under paragraph 17 of Schedule 18 in respect of the accounting period ending 28 February 2015, issued on 16 June 2016;

   (2) a £200 flat-rate late filing penalty under paragraph 17 of Schedule 18 in respect of the accounting period ending 29 February 2016, issued on 16 June 2017; and

   (3) a £1,000 flat-rate late filing penalty under paragraph 17 of Schedule 18 in respect of the accounting period ending 28 February 2017, issued on 18 June 2018.

3. PJD's grounds for appealing against the penalties can be summarised as being that there was a "reasonable excuse" for the failure to submit the returns on time. PJD had been relying on the company's agent, Richard Aitkinson Cromwell Accounting Ltd, to file its company tax returns. The agent had sole access to PJD's account with HMRC and it was only in February 2019 that Mr Darby, the director of PJD, discovered that the agent had not been filing returns. Mr Darby gained control of PJD's account with HMRC on 13 February 2019. It was only then that he became aware of the late filing penalties. The appeal to HMRC was made shortly thereafter.

PRELIMINARY ISSUE

4. PJD's appeal to HMRC under s31A Taxes Management Act 1970 ("TMA 1970") was made outside the statutory deadline for appealing against any of the penalty notices as it was made on 19 February 2019 and the notices were issued between June 2016 and June 2018. On 20 March 2019 HMRC rejected that appeal as late, refusing consent under s49(2)(a) of TMA 1970.

5. In their Statement of Case, HMRC maintain their opposition to the late appeals, referring to the decision of the Upper Tribunal in *Data Select v HMRC* [2012] UKUK 187 (TCC), in which Morgan J stated:

> "34… As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."

6. HMRC argue that the delay (of between six months and 30 months) is serious and significant and HMRC have a legitimate expectation of finality.

7. I must decide whether to give permission for late notice of the appeals to be given to HMRC. If I do not give permission, then (subject to the appeal rights set out at the end of my Decision) I cannot consider PJD's appeal against the penalties themselves.

RELEVANT LEGISLATION

8. Section 31A TMA 1970 requires that notice of an appeal is given in writing to the relevant officer of the Board within 30 days of the date on which the notice of amendment was given.

9. Section 49 TMA 1970 then applies where a notice of appeal is given late. This provides:

> "**49 Late notice of appeal**
> (1) This section applies in a case where—
> (a) notice of appeal may be given to HMRC, but
> (b) no notice is given before the relevant time limit.
> (2) Notice may be given after the relevant time limit if—
> (a) HMRC agree, or
> (b) where HMRC do not agree, the tribunal gives permission.
> (3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.
> (4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.
> (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
> (6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
> (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.
> (8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section)."

DISCUSSION ON WHETHER TO GIVE PERMISSION FOR LATE APPEAL

10. HMRC based their position as to why this Tribunal should not give PJD permission to notify its appeals late around the approach taken by the Upper Tribunal in *Data Select*. That approach was recently considered by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC).

11. *Data Select* and *Martland* were dealing with a different situation to that in the present appeal, namely an application by the taxpayer in each case to make a late appeal to the Tribunal (rather than HMRC). In *Martland*, the Upper Tribunal described the statutory provisions for these different appeal rights as being very similar. Accordingly, I have concluded that I should apply the principles explained in those decisions when deciding whether it is appropriate for me to give permission in the present appeal.

12. In *Martland* the Upper Tribunal gave guidance as to how this Tribunal should approach an application to allow the notification of a late appeal. It said:

> "44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in Denton:
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
> (2) The reason (or reasons) why the default occurred should be established.
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in Aberdeen and Data Select will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.
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> 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal."

13. In addition, the Upper Tribunal in *HMRC v Katib* [2019] UKUT 0189 (TCC), which concerned an appeal by HMRC against a decision of the Tribunal to give permission for the taxpayer to make late appeals, emphasised the importance of adhering to statutory time limits at [17]:

> "We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion. We accept Mr Magee's point that the FTT referred to both *BPP Holdings* and *McCarthy & Stone* in the Decision. Paragraph 27 (1) of the decision (cited above) shows that the FTT seemed to have the point in mind. However, instead of acknowledging the position, the tribunal went on to distinguish the *BPP Holdings* case on its facts. Differences in fact do not negate the principle, and it is not possible to detect that the tribunal thereafter gave proper weight to it in parts of the decision which followed."

14. The conduct of the taxpayer's adviser in *Katib* was somewhat striking. The Tribunal described it as "extraordinary" and, having considered the findings of fact made by that Tribunal, I can only agree. An example of that conduct, referred to by the Upper Tribunal, was that Mr Bridger's advice included that Mr Katib should cease to be a man by making a declaration to that effect to enable Mr Bridger to communicate to the world that Mr Katib was dead. Nevertheless, having set aside the decision of the Tribunal on the basis that an error of law had been made, the Upper Tribunal re-made the decision as follows:

> "53. The first stage of the Martland examination can be addressed briefly. Mr Katib's delay in appealing against the PLNs was, at the very least, 13½ months. That was "serious and significant". The real question is how the second and third stages of the evaluation should be performed, having regard to the particular importance of statutory time limits being respected.
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> 54. It is precisely because of the importance of complying with statutory time limits that, when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant. In *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666 , when considering the analogous question of whether a litigant's case should be struck out for breach of an "unless" order that was said to be the fault of counsel rather than the litigant itself, Ward LJ said, at 1675:
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> Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if

anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. *The basis of the rule is that orders of the court must be observed* and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself. [emphasis added]

55. We do not accept Mr Magee's general argument that this approach simply involves attributing the actions of legal representatives to their clients and has no bearing on the question whether incorrect advice provided to a client can be a good reason for the client's default. Given the importance of adhering to statutory time limits, we see no reason why a litigant who says that a representative failed to file an appeal on time should necessarily be in a different position from a litigant who says that a representative failed to advise adequately of the time limits within which an appeal should be brought. In any event, it seems from [7] of the Decision that the FTT found that Mr Bridger had been instructed to appeal against the PLNs on Mr Katib's behalf but failed to do so and, therefore, Mr Katib is not simply complaining that Mr Bridger provided defective advice.

56. Nor do we accept Mr Magee's submission that the decision of the High Court in *Boreh v Republic of Djibouti and others* [2015] EWHC 769 establishes an "exception" to the principle where a representative misleads the client. Rather, we consider that the correct approach in this case is to start with the general rule that the failure of Mr Bridger to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib's behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland* . However, when considering the third stage of the evaluation required by *Martland*, we should recognise that exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration.

57. The FTT concluded at [27(3)] of the Decision that the general rule set out in *Coventry City Council* should not apply because Mr Bridger was "on a frolic of his own acting outside the scope of any possible brief that [Mr Katib] could have given". That conclusion, however, was reached without having regard to the particular importance of statutory time limits being respected and is thus vitiated by the error of law that has led to us setting aside the Decision. More significantly, we do not consider that the FTT's departure from the general principle is justified by that fact in this case (which we think is probably an additional error of law, though not one relied on in the grounds of appeal).

58. It is clear from the Decision that Mr Bridger did not provide competent advice to Mr Katib, misled him as to what steps were being taken, and needed to be taken, to appeal against the PLNs and failed to appeal against the PLNs on Mr Katib's behalf (see [7] and [16]). But extraordinary though some of Mr Bridger's correspondence was, the core of Mr Katib's complaint is that Mr Bridger was incompetent, did not give proper advice, failed to appeal on time and told Mr Katib that matters were in hand when they were not. In other words, he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be. It may be that the nature of the incompetence is rather more striking, if not spectacular, than one normally sees, but that makes

no difference in these circumstances. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal, either by enabling the client to distance himself from the activity or otherwise.

59. Mr Magee urged us to give particular weight to the FTT's finding, at [15], that Mr Katib did not have the expertise to deal with the dispute with HMRC himself, but that does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena. We do not consider that, given the particular importance of respecting statutory time limits, Mr Katib's complaints against Mr Bridger or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the consequences of Mr Bridger's failings and, if he wishes, pursue a claim in damages against him or Sovereign Associates for any loss he suffers as a result. This conclusion is fortified by the fact that the FTT's findings demonstrate that there were some warning signs that should have alerted Mr Katib to the fact that Mr Bridger was not equal to the task. Despite Mr Bridger assuring Mr Katib that his appeals were in hand, he was still receiving threats of enforcement action ([9]). Mr Bridger's advice to "cease to be a man by making a declaration to this effect" should have alerted Mr Katib to the warning signs. Mr Katib is not without responsibility in this story.

60. For the same reasons we do not consider that Mr Bridger's conduct has any real weight when considering the factors relevant to the final stage of the three-stage approach outlined in *Martland* . Turning to other factors relevant to that third stage, the FTT concluded that the financial consequences of Mr Katib not being able to appeal were very serious because his means were limited such that he would lose his home. That, the FTT concluded, was too unjust to be allowed to stand. We have considered this factor anxiously for ourselves. However, again, when properly analysed, we do not think that this factor is as weighty as the FTT said it was. The core point is that (on the evidence available to the FTT) Mr Katib would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them.

61. Therefore, we have concluded that, in all the circumstances of the case, Mr Katib has not given a sufficiently good reason for a serious and significant delay in appealing against the PLNs. HMRC's appeal is allowed and we remake the Decision so as to refuse Mr Katib permission to make late appeals."

15. In the present case, PJD appealed to HMRC on 19 February 2019; the appeals were thus between six and 30 months late. HMRC submit that this delay is serious and significant and I agree.

16. I have set out below the submissions of the parties which are relevant to stages two and three of the consideration of whether to give permission for the late appeal and then revert to applying the guidance given in *Martland* and *Katib*.

17. By way of explanation for this delay, PJD has submitted as follows:

(1) Until 11 February 2019, an agent had dealt with HMRC on its behalf, this agent being the accountant for the whole business. The agent was the only person with access to PJD's online account with HMRC. The agent had always confirmed to Mr Darby that the filings were all done correctly and on time. Mr Darby decided to close down the

company, and it was at this time that he discovered that the agent had not been doing his job correctly. There are these late filing penalties in respect of late filing of company tax returns, the accountant had not closed down the VAT account as requested and he had been failing to account properly for PAYE. The agent is now uncontactable.

(2) Mr Darby included evidence of payments being made to HMRC in December 2017. He states that such payments were for his corporation tax bill, which was paid in full before the due date.

(3) He stated that the position is unfair and will leave him in financial difficulties if he is forced to pay for a penalty that he did not know was given to the company, and is currently pursuing a complaint with the ACCA.

(4) The explanation accompanying the Notice of appeal to the Tribunal notes that one reason the original appeal to HMRC was turned down was that HMRC stated they had no record of PJD ever having an accountant.

18. HMRC have stated that they issued notices to file for the accounting periods in issue, and subsequently late filing penalty notices, to PJD's registered office of 114 Alderminster Road, Coventry, CV5 7LZ, and that no correspondence was returned to it as undelivered by the Post Office. They submit that PJD does not have a reasonable excuse for the late appeal and, in the context of their submissions on the appeal against the penalties, the filing of returns remains the responsibility of PJD and Mr Darby should have made a conscious effort to ensure PJD's tax affairs were up to date.

19. Considering these submissions, I note the following:

(1) Mr Darby states that HMRC have denied that PJD ever had an accountant, even though HMRC had assisted Mr Darby with gaining access to PJD's online account and removing the access held by the agent. I do not have any other evidence of this having been HMRC's position – their decision letter of 20 March 2019 acknowledges that PJD had an agent acting on its behalf and HMRC's Statement of Case proceeds on the basis that PJD did have an agent acting throughout. I can only infer that this information may have been wrongly given to Mr Darby in response to a telephone enquiry, or was set out in earlier correspondence which is not included in the papers before me. In any event, whilst this confusion must be frustrating for Mr Darby, it is now clear that PJD and HMRC are proceeding on the common basis that PJD had an agent who (for reasons which are unclear to everyone) failed to file returns on time.

(2) The penalties imposed by HMRC are for late filing of returns, not late payment, and HMRC are objecting to the late appeal against these penalties. I do not therefore believe that it is relevant whether any underlying tax obligations were paid on time. In any event, the evidence referred to at [17(3)] simply confirms a bank transfer was made of a particular amount on a particular date to a payee labelled "Bill Payment to HMRC Corporation". I do not have any information as to the amount due or deadline for payment.

(3) Mr Darby has not commented on the address to which correspondence was sent by HMRC, but I note that in PJD's Notice of appeal to the Tribunal dated 8 April 2019 the taxpayer details are recorded as "Phillip Darby, PJD AV Services, 114 Alderminster, Coventry, CV5 7LZ". But for the absence of the word "Road", this is the address which was used by HMRC. Further, in the extract of information held by Companies House, covering the period from 17 February 2014 to 18 March 2019, there is no reference to the registered office of PJD having been changed at any time. I infer from this that PJD's registered office is not maintained at the address of the erstwhile agent (as if that had

been the case then I would have expected Mr Darby to have changed the registered office of the company since discovering the problems, and that has not been done) and that the penalty notices were received by PJD at this address, to which Mr Darby or someone else properly authorised by PJD would have had access.

20. I have included the lengthy extract from *Katib* above as it addresses the Upper Tribunal's approach to stages two and three set out in *Martland* (considering the reasons for the delay and evaluating all the circumstances of the case, which includes weighing up the length of the delay, the reasons for the delay, the extent of the detriment to PJD which would be caused by my not giving permission and the extent of the detriment to HMRC which would be caused by my giving permission). I also note, as set out in the Upper Tribunal decision in *Martland*, that the starting point is that permission should not be granted unless this Tribunal is satisfied on balance that it should be. *Katib* emphasises that a taxpayer who is dealing with the consequences of an incompetent adviser faces a high hurdle – I would say that this approach is very harsh. However, that decision is binding upon me and I have followed it below.

21. The reasoning of the Upper Tribunal in *Katib* may be summarised as follows:

(1) failures by the taxpayer's adviser should generally be treated as failures by the taxpayer;

(2) the general rule that the failure of an adviser to advise the taxpayer of the deadlines for making appeals, or to submit timely appeals on his behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland;*

(3) when considering the third stage of the evaluation required by *Martland*, exceptions to the general rule are possible and, if a taxpayer was misled by his advisers, that is a relevant consideration;

(4) the core of the taxpayer's complaint is that the adviser was incompetent, did not give proper advice, failed to appeal on time and told the taxpayer that matters were in hand when they were not. That core complaint is not as uncommon as it should be. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal;

(5) the fact that the taxpayer did not have the expertise to deal with the dispute with HMRC himself does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena;

(6) given the particular importance of respecting statutory time limits, neither the taxpayer's complaints against his adviser nor his own lack of experience are sufficient to displace the general rule that a taxpayer should bear the consequences of his adviser's failings;

(7) this conclusion is fortified by the fact that there were some warning signs that should have alerted the taxpayer to the fact that the adviser was not equal to the task – the taxpayer was still receiving threats of enforcement action, and the advice to "cease to be a man by making a declaration to this effect" should have alerted the taxpayer to the warning signs;

(8) the adviser's conduct does not have any real weight when considering the factors relevant to the final stage of the three-stage approach outlined in *Martland;* and

(9) whilst the financial consequences of the taxpayer not being able to appeal were very serious because his means were limited such that he would lose his home, this factor

was not as weighty as the Tribunal said it was. The core point is that the taxpayer would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that could be propounded by large numbers of taxpayers, and it does not have sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them.

22. In the light of the above, I now apply the second and third stages of the process as set out in *Martland*.

23. The reasons given for the late appeal are based on PJD's reliance on its agent, who was the only person with access to the company's online account with HMRC and had assured Mr Darby that the filings were made correctly and on time. I do not have any information as to whether Mr Darby ever sought to check the correct position with HMRC or how Mr Darby reacted to the penalty notices received at the company's registered office.

24. The reasoning in *Katib* referred to at [21(1)] to [21(6)] is thus apt in the present case. When assessing the reasons for PJD's delay, this falls squarely within the general rule that the failure of the agent to submit timely appeals on PJD's behalf is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland.*

25. When considering "all the circumstances" for the purposes of stage three, and balancing the merits of the reason for the delay and the prejudice that would be caused to the parties by granting or refusing permission, I start with acknowledging the importance of adhering to statutory time limits. Legislation has prescribed the appropriate time limits for appeals to be made and the starting point is that these should be respected and adhered to.

26. The other matters that are potentially relevant are whether Mr Darby was misled by the agent, and the unfairness to PJD of not being able to appeal against the penalties:

(1) Mr Darby, and thus PJD, was misled by the accountant, as he was informed that the returns had been filed on time. One of the "warning signs" that was identified in *Katib* is not evident here – the advice received was that returns had been filed, and there is nothing striking about this statement. However, I have referred above to the registered office of PJD, concluding that HMRC were sending notices to an address which was not that of the agent and, therefore, to which PJD had access. Mr Darby should have been alerted by the penalty notices to the fact that returns had not been filed on time. I observe in any event that the Upper Tribunal were only "fortified" by the presence of warning signs: this is not to say that, without them, they would have reached a different conclusion. Indeed, the tenor of their approach is that they would not have done so.

(2) If permission to appeal is refused, PJD will not be able to pursue its argument that there was a reasonable excuse for the failure to file returns on time (namely the reliance on the agent). There is undoubtedly some merit in this argument, although I am not convinced that, in the light of penalty notices being received and little evidence of Mr Darby seeking to check the position with HMRC, PJD's reliance was objectively reasonable. It is certainly not the case that PJD would be almost certain to succeed.

(3) PJD have stated that needing to pay these penalties will cause financial difficulties. This would also be the case if I were to give permission and the appeal was then unsuccessful. This factor was present in *Katib*, where the amount at stake was £490,000 and the taxpayer faced losing his home. That hardship did not sway the Upper Tribunal.

27. Having considered all the above, I have concluded that PJD has not given a sufficiently good reason for the delay which outweighs the importance of adhering to the statutory time

limits and refuse permission for the appeal to be made late. In the light of this conclusion, I have not gone on to address the substantive appeals against the penalties.

CONCLUSION

28. For the reasons given above, I refuse permission for the late appeals to be made.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 20 AUGUST 2019