



Neutral Citation: [2023] UKFTT 00386 (TC)

Case Number: TC08800

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Application decided on the papers

Appeal reference: TC/2022/02477

*INCOME TAX – High Income Child Benefit Charge – Section 97 Finance Act 2022 – the Appellant had appealed to HMRC before 30 June 2021 – whether, by that date, the Appellant had raised the issue that any of the assessments raised upon him were “invalid as a result of [them] not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed” – no – whether the Appellant’s appeal was against “relevant protected assessment(s)” – yes*

**Judgment date:** 26 January 2023

**Decided by:**

**TRIBUNAL JUDGE BAILEY**

**Between**

**DAVID BEALES**

**and**

**Appellant**

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

**Respondents**

## DECISION

### INTRODUCTION

1. This decision concerns an application by the Respondents (HMRC) to lift the stay of an appeal brought by Mr Beales (the Appellant).
2. This was originally referred to me in October 2022 when the parties were unable to agree whether the stay that had been imposed should be lifted. At that stage I was provided with a copy of the submissions that both parties had provided to the Tribunal on that issue, but neither party had provided a copy of the correspondence sent by the Appellant to HMRC on or before 30 June 2021.
3. HMRC subsequently provided the Tribunal with the Appellant's correspondence up to and including 3 May 2020, and this matter has been referred back to me so that I can decide whether the current stay should be lifted (as HMRC request) or remain in place (as the Appellant requests) until the ultimate resolution of *HMRC v Wilkes*. The parties were given the opportunity to make further written submissions or to request an oral hearing but neither responded to that invitation. Therefore, this application has been decided on the basis of the documents so far submitted by the parties.

### OUTCOME

4. As this is a long decision, I start by informing the parties of my conclusion, and the consequence of that decision:
  - I conclude that the Appellant did not, on or before 30 June 2021, raise the issue of any of the three remaining assessments being invalid as a result of them not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed.
  - The consequence of my decision is that the three remaining assessments raised on the Appellant are relevant protected assessments. As a result, Section 97(3)(b) FA 2022 applies, and so the amended wording of Section 29 applies to the three assessments under appeal by the Appellant. This means that HMRC's application is successful and the stay is lifted.
  - The Tribunal will issue case management Directions to the parties to enable them to prepare for the substantive hearing of this appeal. Unless either party asks for a hearing in person, the hearing will be an online hearing through the Tribunal's hearing platform.
5. I appreciate that this will not be a welcome conclusion for the Appellant. If he wishes to appeal against this Decision, he should follow the guidance in the last paragraph of this decision, including the deadline, and in the notes that will also be sent with this Decision.

### DISCUSSION AND DECISION

6. I begin by setting out some detail about what was decided in *Wilkes*, and about the new legislation amending Section 29 Taxes Management Act 1970 ("TMA 1970").

#### THE *WILKES* DECISION

7. HMRC had raised three assessments on Mr Wilkes. These assessments were raised under Section 29 TMA 1970 to collect the High Income Child Benefit Charge ("HICBC") for three successive years from Mr Wilkes. At that time, Section 29(1)(a) provided:

- (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

- (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed,

8. The First-tier Tribunal considered what “discover” means in the context of Section 29 TMA 1970 and then, applying that meaning to the facts before them, decided that in Mr Wilkes’ case HMRC had made a discovery that would enable them to raise an assessment under Section 29(1)(a) for each year under appeal. The Tribunal also decided that Mr Wilkes met the liability criteria for the HICBC in each of the three years under appeal.

9. However, the Tribunal concluded that HMRC could not use Section 29 TMA 1970 to raise a discovery assessment to collect the HICBC from Mr Wilkes. The Tribunal reached this conclusion on the basis that the wording of Section 29(1)(a) at that time permitted assessments to be raised where there is a discovery of “income” and, although a person liable to the HICBC is liable to pay income tax because of the HICBC, the Tribunal decided that the HICBC is not itself “income”. So, although Mr Wilkes was liable to the HICBC in each year, the legislative machinery which HMRC ordinarily use to collect outstanding tax from taxpayers who have not self-assessed could not be used to collect outstanding amounts of the HICBC. Therefore, the Tribunal allowed Mr Wilkes’ appeal.

10. The Upper Tribunal upheld the First-tier Tribunal’s interpretation of Section 29, and HMRC appealed to the Court of Appeal. On 7 December 2022, the Court of Appeal dismissed HMRC’s appeal against the Upper Tribunal’s decision. It is not yet known whether the Court of Appeal’s judgment finally determines the *Wilkes* proceedings or whether HMRC will ask permission to appeal to the Supreme Court.

#### THE NEW LEGISLATION

11. Subsequent to the Upper Tribunal's decision, the government introduced the Finance Act 2022 (“FA 2022”). This received Royal Assent on 24 February 2022. The relevant parts of Section 97 FA 2022 provide as follows:

#### **97 Discovery assessments for unassessed income tax or capital gains tax**

(1) In section 29 of TMA 1970 (assessment where loss of tax discovered), in subsection (1), for paragraph (a) substitute—

- “(a) that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed,”.

...

(3) The amendments made by this section—

- (a) have effect in relation to the tax year 2021–22 and subsequent tax years, and
- (b) also have effect in relation to the tax year 2020–21 and earlier tax years but only if the discovery assessment is a relevant protected assessment (see subsections (4) to (6)).

(4) A discovery assessment is a relevant protected assessment if it is in respect of an amount of tax chargeable under—

- (a) Chapter 8 of Part 10 of ITEPA 2003 (high income child benefit charge),

...

(5) But a discovery assessment is not a relevant protected assessment if it is subject to an appeal notice of which was given to HMRC on or before 30 June 2021 where—

- (a) an issue in the appeal is that the assessment is invalid as a result of its not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed, and
  - (b) the issue was raised on or before 30 June 2021 (whether by the appellant or in a decision given by the tribunal).
- (6) In addition, a discovery assessment is not a relevant protected assessment if—
- (a) it is subject to an appeal notice of which was given to HMRC on or before 30 June 2021,
  - (b) the appeal is subject to a temporary pause which occurred before 27 October 2021, and
  - (c) it is reasonable to conclude that the temporary pausing of the appeal occurred (wholly or partly) on the basis that an issue of a kind mentioned in subsection (5)(a) is, or might be, relevant to the determination of the appeal.
- (7) For the purposes of this section the cases where notice of an appeal was given to HMRC on or before 30 June 2021 include a case where—
- (a) notice of an appeal is given after that date as a result of section 49 of TMA 1970, but
  - (b) a request in writing was made to HMRC on or before that date seeking HMRC's agreement to the notice being given after the relevant time limit (within the meaning of that section).
- (8) For the purposes of this section an appeal is subject to a temporary pause which occurred before 27 October 2021 if—
- (a) the appeal has been stayed by the tribunal before that date,
  - (b) the parties to the appeal have agreed before that date to stay the appeal, or
  - (c) HMRC have notified the appellant (“A”) before that date that they are suspending work on the appeal pending the determination of another appeal the details of which have been notified to A.
- (9) In this section—

“discovery assessment” means an assessment under section 29(1)(a) of TMA 1970,

...

12. As can be seen, Sub-section 97(1) FA 2022 inserted new wording into Section 29(1) TMA 1970. HMRC intend that the new wording will permit them to raise discovery assessments to collect the HICBC from those who they believe are liable to that charge and who have not filed self-assessments.

13. The new wording of Section 29(1)(a) applies for the tax years 2021/22 and onwards. Unusually, the new wording of Section 29(1)(a) also applies for all earlier tax years where there is a “relevant protected assessment”. Whether an assessment is a relevant protected assessment depends on whether it meets the criteria in Sub-sections (4)-(8) of Section 97. In the current application, the parties are in dispute about whether the appeal made by the Appellant fulfils the criteria in Paragraph (a) of Sub-section 97(5).

## **SECTION 97(5)(A) FA 2022**

14. When construing legislation, a tribunal or court should endeavour to give words their plain meaning but it should not consider those words as if they were in a vacuum or unrelated to the context into which they have been placed. As the House of Lords set out in *BMBF v Mawson* [2004] UKHL 51, a tribunal or higher court should give a purposive construction to tax legislation. So, in construing Section 97(5)(a) FA 2022, I consider the plain words but I also take into account the context in which it was enacted, i.e., the purpose the draftsman had in mind when drafting the legislation, and also the surrounding legislation in which it appears.

15. As I have set out above, Section 97 FA 2022 was enacted to provide HMRC with a remedy for the difficulties caused for them by the Tribunal decision of *Wilkes*, and those difficulties arose from that Tribunal's conclusions about the meaning of the word "income" in Section 29 TMA 1970. The new wording to be inserted into Section 29 refers to HMRC raising an assessment where "an amount of income tax" ought to have been assessed, and this replaces the reference to "income" in the previous wording of Section 29. I consider the reason for this choice of this wording was to try to remedy the difficulties that were raised for HMRC by *Wilkes*. I bear this background in mind when considering Section 97(5)(a) but, for the avoidance of doubt, this background does not blind me to the plain meaning of the words that have been enacted. An intention to legislate to cure a perceived ill does not mean that the wording chosen by the draftsman always perfectly achieves its aim or is never wider than is strictly necessary to achieve the desired outcome.

## **HOW THE TRIBUNAL HAS PROCEEDED SINCE FA 2022**

16. As might be expected, the Tribunal receives a large number of appeals each day. Often appeals are received where the issue in dispute is one which is due to be decided by the higher courts in an earlier appeal. The Tribunal practice is to stay the later appeals until the particular issue has been decided by the higher courts, and then those later appeals can be settled by agreement or, if there are any remaining issues, those later appeals can proceed to hearing.

17. The effect of the amendments made by Section 97 FA 2022 is that a Tribunal panel hearing an appeal against a "relevant protected assessment" would construe the new and differently worded Section 29 TMA 1970, and so the precedent of *Wilkes* would not apply. However, the precedent of *Wilkes* will still apply for an appeal against an assessment for the tax year 2020–21 or earlier that is not a "relevant protected assessment".

18. Therefore, in recent months, all on-going Tribunal appeals in which it appears that the appeal is against one or more assessments that are not "relevant protected assessment(s)" have been stayed until the final outcome of the *Wilkes* litigation is known. However, where there is an appeal to the Tribunal regarding an appeal against a relevant protected assessment, then that appeal has proceeded to a hearing before the Tribunal. At those hearings, appellants have a full substantive hearing before a Tribunal panel with the opportunity to present their appeal, explain their individual circumstances and set out the merits of their arguments.

## **THE CURRENT APPLICATION BEFORE ME**

19. Having set out that background, I can now consider the application before me.

20. The Tribunal initially stayed this appeal but, on 3 October 2022, HMRC applied for the stay to be lifted because they argue that the three assessments raised on the Appellant here are relevant protected assessments. HMRC say that this is the case because, although the Appellant appealed to them prior to 30 June 2021, they say he did not, by that date, raise the issue that the assessments were invalid by reason of not relating to the discovery of income

that ought to have been assessed. The Appellant objects to the stay being lifted because he says that he did raise that issue in his correspondence to HMRC prior to 30 June 2021.

21. HMRC have provided the Tribunal with a copy of the Appellant's correspondence up to and including 3 May 2020<sup>1</sup>. This consists of three emails sent in December 2019, three emails sent in January 2020, a February 2020 email, two letters sent in March 2020, an April 2020 email and a May 2020 letter. These emails and letters were sent primarily in correspondence with HMRC, and I do not have HMRC's responses. However, that absence does not greatly matter in this case because Section 97(5)(b) FA 2022 provides that the issue must be raised by the Appellant (or the Tribunal) rather than HMRC.

22. The most relevant of these eleven communications is the Appellant's letter of 3 May 2020, in which he seeks a review of HMRC's decision to uphold the assessments for the tax years 2015/16, 2016/17 and 2017/18. The Appellant has not suggested that he raised the relevant issue in any of his ten earlier communications, and although I can see (having considered those ten emails and letters) that the Appellant raised a great many points about the information available to him and the information he believed HMRC must have held, about the statutory time limits for raising an assessment and about his personal circumstances, he did not in those ten communications raise the issue of the assessment being "invalid as a result of its not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed".

23. Prior to the Appellant's 3 May 2020 letter, HMRC had agreed to discharge assessments to tax that they had raised for 2012/13, 2013/14 and 2014/15 (on the basis that the relevant time limit for raising an assessment was the four years set out in Section 34 TMA 1970) and HMRC had also agreed to discharge the penalties that they had raised for all six years. Having summarised his understanding of the position at that time, on 3 May 2020, the Appellant wrote:

I would like to accept your offer to arrange for your decision to be reviewed by an HMRC offer not previously involved in the matter. My scope of this request is for the assessments for the tax years ending 5 April 2016, 2017, and 2018 that you state were validly made within four years of the year of assessment, and that you have informed me cannot be withdrawn as they are legally due.

I would like the opportunity to provide further information or reasons in support of my case. The basis for this support to my case I am putting forward is:

1. Validity of the discovery assessments under TMA 1970, s 29 for the assessment for the tax year ending 5 April 2016.
2. To challenge that you are unable to remit tax that is due under legislation for the reasons I have provided, and
3. That you have not upheld a duty to apply tax legislation fairly and in an even handed way for the assessments for the tax years ending 5 April 2016, 2017 and 2018.

I would respectfully like to question the validity of the assessment for the tax year ending 5 April 2016 and that this should be stale. HMRC were aware of my tax affairs in 2017 through the tax compliance / enquiry that you completed on me and any other available information. HMRC discovery in late 2019 was its own error in not advising my nil return self-assessment was

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<sup>1</sup> It appears that there was further correspondence after this date but before 1 July 2021 between the parties. I assume that the Appellant did not provide that further correspondence because he did not consider it contained any grounds of appeal and so could not assist his case.

incorrect and you did not raise as assessment in 2017. Also in regards to relevance to the prevailing environment in 2017 was the incomplete child benefit guidance documentation that I have detailed to you regarding the omissions that were not addressed until late 2017.

24. The Appellant then set out his further arguments on the basis of his second and third points set out above.

25. In September 2020, HMRC completed their review, upholding the three remaining assessments. The Appellant did not understand at that stage that, if he wished to challenge HMRC's review conclusion he was required to appeal to the Tribunal within 30 days. Further correspondence continued, with a complaint that was escalated to the Adjudicator. On 2 April 2022, the Appellant appealed to the Tribunal, explaining that he had not considered it necessary to appeal at an earlier stage as he had understood, since September 2021, that the three upheld assessments would be dealt with on the same basis as *Wilkes*. However, by the end of March 2022, the Appellant's understanding was that HMRC had changed their position so that they no longer considered *Wilkes* would apply, and therefore the Appellant appealed to the Tribunal.

26. As noted above, the Tribunal's initial response after processing the appeal was to stay it until the final outcome of *Wilkes* is known. On 3 October 2022, HMRC applied to lift this stay. In response to HMRC's application, the Appellant wrote to the Tribunal on 9 October 2022, in which he pointed out that as late as 9 February 2022, HMRC were writing to him and suggesting that his appeal was to be treated in the same way as *Wilkes*. The Tribunal wrote to both parties at that stage, explaining that the dispute would be decided by what was contained in any grounds of appeal provided on or before 30 June 2021. The Tribunal asked the Appellant to provide a copy of any document he relied on as containing his relevant grounds of appeal, and invited HMRC to supply any document they considered relevant.

27. In his submissions to the Tribunal dated 26 October 2022, the Appellant referred to a letter he had received from HMRC. I understand that letter to be the September 2020 review conclusion letter. The Appellant states:

Within that letter summarised the grounds of appeal in bulleted items. One of my grounds of appeal that "HMRC's discovery [assessments] in late 2019 was its own error in not advising [you] that your nil SA return was incorrect. On the same basis of assessment to income tax but which clearly had not been so assessed. Copy attached<sup>2</sup>.

That HMRC's decision to raise discovery assessments, knowing my liability to HICBC, and that a Self-Assessment return was relevant, and not to raise a discovery assessment, was my point, i.e., my nil SA return was incorrect and accepted as incorrect. I am also making the point that S29(1) TMA 1970 is not appropriate and that is the issue that HMRC did not agree with me on.

The conclusion from the SOLS team was that HMRC have discovered a loss of tax in those years, so are able to make assessments to bring that tax into charge. In addition, SOLS were also satisfied that HMRC was entitled to issue the discovery assessments under the provisions of Section 29(1) of TMA 1970. Making the same HMRC basis of argument in the *Wilkes* case against my appeal.

*Wilkes* FTT concluded that the "sort of income tax assessments that should have been made in respect of Mr *Wilkes*' liability to the HICBC was a Self Assessment (SA) under Section 9, TMA. Based on HMRC engagement my

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<sup>2</sup> Only the third page of that letter was provided. Nothing turns on this point given, as explained above, the legislation requires the issue to have been raised by the Appellant (or the Tribunal), not HMRC.

liability for HICBC was evident and I accepted that (however, not how HICBC was introduced, managed and assessed). I was therefore raising this issue before June 2021 from which my appeal review was being assessed. From Wilkes “Wilkes ought to have self assessed was an amount chargeable to, and payable by way of, income tax, contrasting that with the assessment power in Section 29(1)(a) which referred to income which ought to be assessed to income tax”.

There is a direct implication to S 29(1) TMA 1970 without me stating specifically in my appeal that HICBC is not income. Whilst I may not be legally competent to draft specific phrases, but as a legally competent person, HMRC with the SOLS team, who are legally competent, based and summarised my drafted points accordingly and recognised my appeal on the basis of the use of self-assessment as the correct means of assessment. My basis of complaint regarding discovery assessments as a method of recovery of HICBC are an error and the self-assessment is correct therefore implies the same anomaly, and the conclusions of Wilkes would be the same. It is not an absurd connection to make that resulted in the same conclusion to reject my appeal on the basis of S 29(1) TMA 1970 that Wilkes had (without the FTT ruling at that time) resulting in that appeal at FTT.

In addition, the following Wilkes summary is also relevant and proves alignment with my point. “HMRC’s s29 powers can be unleashed where an assessment to tax is insufficient (s29(1)(b)), and HMRC, under s8 TMA, has power to require the delivery of self-assessment returns. We appreciate that it may be difficult to deploy these s8 TMA powers if a taxpayer has not complied with his obligation to notify chargeability under s7 TMA – but it seems to us that, through the informal methods used here by HMRC to discover Mr Wilkes was liable to a HICB charge (i.e. writing to him as they did in their 30 November 2018 letter), HMRC might also have come to the realisation that he was a person to whom a s8 notice should be issued for the tax years in question.” The SOLS team provided me back the basis of the same response as that challenged in Wilkes, recognising the same grounds of appeal.

**Do the grounds raised by the Appellant no later than 30 June 2021 fall within Section 97(5)(a)?**

28. The Appellant has argued that I should interpret HMRC’s summary of his grounds of appeal as demonstrating that HMRC understood him to be making a challenge that falls within the meaning of Section 97(5)(a) in respect of the assessments raised upon him. However, as I have noted above, for an issue to fall within Section 97(5)(a), it must be an issue raised either by the Appellant or by the Tribunal. The relevant text to be considered is what appears in the Appellant’s own letters and emails, not the responses sent by HMRC.

29. Looking at the first ground of appeal put forward by the Appellant in his 3 May 2020 letter, and the three sentences that expand this challenge (all set out above) it is clear that the Appellant was not, at that date, arguing that all of the assessments were invalid. The Appellant was very clear in his numbered point and in his first sentence of expansion that he was challenging the validity of only the assessment for the year 2015/16. Therefore, whatever conclusions I reach with regard to whether the assessment for 2015/16 is a protected assessment, it must be the case that the assessments for 2016/17 and 2017/18 are both “relevant protected assessments” as there has not been shown to be any challenge to any aspect of their validity on or before 30 June 2021.

30. The Appellant’s stated basis for challenging the validity of the 2015/16 assessment was that he believed this assessment was “stale”. Although now dismissed as a basis for setting



aside an assessment, in 2020 many challenges to discovery assessments included the assertion that HMRC had not raised the assessment in question soon enough after they had made the relevant discovery, i.e., while the discovery was still “fresh” and so it was asserted that the discovery had become “stale”. It is clear from the Appellant’s reference (in his second sentence following the numbered ground) to the tax check that took place in 2017, that the argument he was making in his letter of 3 May 2020 was that any discovery made by HMRC should have come about in 2017, and so it was too late for HMRC to raise an assessment in late 2019. The Appellant’s third sentence argues that the only discovery that HMRC could have made in 2019 was to belatedly realise that they had made a mistake in 2017 when they had informed the Appellant he did not need to file tax returns and they had not raised an assessment at that time.

31. While this ground put forward on 3 May 2020 is a challenge to the validity of the 2015/16 assessment, I cannot interpret it as a challenge on the basis that the 2015/16 assessment was invalid as a result of its not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed. The Appellant does not mention income at all; instead, he is clearly arguing that he considers the 2015/16 assessment to be invalid because HMRC were, he considered, relying on an out of date and “stale” discovery, i.e., that the assessment was raised too late. Or, put another way, what the Appellant is saying is “You raised this particular assessment too long after you had found out all about my tax affairs, the discovery was too long ago”.

32. There is no suggestion by the Appellant in the letter of 3 May 2020 that his argument about staleness also applied to 2016/17 or 2017/18, presumably because he accepted that there could have been fresh information about his tax affairs for those years after the tax check had concluded. However, if the Appellant was making the point that HMRC could not raise assessments because he had no income to be discovered, then such an argument would have applied equally to all three remaining tax years, and not just 2015/16.

33. The Appellant has argued that he must have raised an argument that falls within Section 97(5)(a) FA 2022 because HMRC set out their reasons for considering the assessments to have been validly made under Section 29(1) TMA 1970. However, as the Appellant had raised an argument about validity (albeit not on the basis required by Section 97(5)(a) FA 2022) and the time that HMRC had taken to raise the 2015/16 assessment, it is not surprising that, in the response, the HMRC reviewing officer set out their reasons for considering that assessment to have been raised in time. I do not agree that HMRC’s reference to the four year time limit for raising an assessment or an assertion by HMRC that the assessment was validly raised means that the reviewing officer in this case understood the Appellant to be making a point about HMRC’s power to raise an assessment when there is no income to be discovered. If HMRC had understood the Appellant to be asserting that there was no income to be discovered, then I would expect this specific point to have been addressed by the reviewing officer but it is not addressed at all on the page supplied by the Appellant. Instead that officer sets out the ordinary time limit, the extended time limit and asserts that the assessment was raised within the Section 34 time limits – just as would be expected when the ground raised is that HMRC have left it too long to raise an assessment.

34. I have concluded that, by or on 30 June 2021, the Appellant had not raised the issue that any of the assessments were invalid as a result of its not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed.

35. The consequence of my decision is that the three remaining assessments raised on the Appellant are relevant protected assessments. As a result, Section 97(3)(b) FA 2022 applies,

and so the amended wording of Section 29 applies to the three assessments under appeal by the Appellant.

36. That being the case, there is no purpose to this appeal continuing to be stayed behind *Wilkes* as the outcome of that litigation cannot affect the outcome of this appeal. On that basis, HMRC's application for the stay to be lifted is successful. Case management directions will be issued to enable the parties to prepare this appeal for a substantive hearing.

#### **CONCLUSION**

37. HMRC's application is successful and the stay is lifted. Case management Directions will be issued to enable the parties to prepare for the substantive hearing of this appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

38. 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.

**JANE BAILEY  
TRIBUNAL JUDGE**

**Release date: 26<sup>th</sup> JANUARY 2023**