Neutral Citation: [2024] UKUT 00021 (TCC)

Case Number: UT/2022/000120

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

*INCOME TAX – Penalty under s208 Finance Act 2014 issued after issue of follower notice in relation to arrangements said to give rise to loss on "relevant discounted securities" (Schedule 13 Finance Act 1996) – whether FTT erred in its approach to holding judicial ruling (**Audley v HMRC**) was "relevant" to taxpayer's arrangements because it had regard to "post-Ramsay analysis" facts rather than primary facts – no – appeal dismissed*

Heard on: 11 December 2023
Judgment date: 22 January 2024

Before

JUDGE SWAMI RAGHAVAN
JUDGE JENNIFER DEAN

Between

KEVIN JOHN PITT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Avient, Counsel, instructed by Price Bailey LLP

For the Respondents: Nicholas Macklam, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This appeal concerns a penalty imposed by HMRC on Mr Pitt, the appellant, pursuant to the follower notice regime in the Finance Act 2014 ("**FA 2014**").

2. In broad terms that works as follows. Where a taxpayer has filed their tax return on the basis they get a tax advantage as a result of tax arrangements they used, but where HMRC consider the arrangements do not have that effect in the light of a "relevant" judicial ruling, HMRC can issue a "follower notice" specifying that judicial ruling. A judicial ruling is defined as "relevant" if the "principles laid down, or reasons given" in it would, if applied to the arrangements, deny the tax advantage asserted by the taxpayer. The taxpayer then has the chance to amend their return to counteract the tax advantage, but if they do not, they become liable to a penalty (which they can appeal to the First-tier Tribunal (Tax Chamber) ("**FTT**"). As is the case here, the grounds of appeal against the penalty may dispute the judicial ruling is "relevant" (in the sense described above) to the arrangements.

3. In *R (on the application of Haworth) v Revenue and Customs Commissioners* [2021] UKSC 25, the Supreme Court accepted the purpose of the follower notice regime and penalty was:

> "…to deter further litigation on points already decided by a court or tribunal and to reduce the administrative and judicial resources needed to deal with such unmeritorious claims."

4. Mr Pitt entered into arrangements involving the acquisition and disposal of loan notes which were "relevant discounted securities" for the purposes of Schedule 13 Finance Act 1996 ("**FA 1996**"). HMRC disputed Mr Pitt's view that those transactions were effective in generating a loss of £694,684 (and therefore tax relief of £278,557.60 arising from that loss in relation to Mr Pitt's other income) under paragraph 2 of Schedule 13 FA 1996 in their closure notice of 3 October 2018 for the tax year 1998/1999. In its decision of 19 July 2022, the FTT dismissed Mr Pitt's appeal against the closure notice.

5. The appeal before us relates to Mr Pitt's appeal to the FTT against the penalty of £83,547 HMRC imposed on Mr Pitt on 2 July 2018 after he failed to take corrective action in response to a follower notice HMRC issued on him on 16 June 2016. The FTT heard that appeal alongside the closure notice and dealt with it in the same decision, (*Kevin John Pitt v HMRC* UKFTT [2022] UKFTT 222 "**the FTT Decision**"). HMRC's follower notice had specified the case of *Audley v HMRC* [2011] UKFTT 219 as a judicial ruling that was "relevant". The FTT agreed with HMRC that *Audley* was "relevant", in other words that the principles and reasoning in *Audley* would, if applied to Mr Pitt's arrangements, deny the tax advantage (the tax relief) Mr Pitt sought. Rejecting Mr Pitt's arguments to the contrary, the FTT found there were no material differences between Mr Pitt's case and the taxpayer's case in *Audley.*

6. With the permission of the Upper Tribunal, Mr Pitt appeals against the FTT's rejection of his penalty appeal. He argues the FTT erred in its legal approach, in particular, on the basis that the FTT ought to have compared only the *primary* facts of each case as opposed to the evaluative conclusions and inferences that the FTT had found once it had, in accordance with the approach commonly referred to as the *Ramsay* approach, construed the legislation purposively and, in particular, viewed the facts "realistically".

LAW

7. The relevant provisions in FA 2014 of the follower notice and penalty regime of relevance are as follows.

8. Section 204 provides for the circumstances in which HMRC may give a follower notice to a taxpayer. Various conditions must be met, including (at s204(4)) Condition C that "HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements". Section 204(3) explains such arrangements arise where a return is made by the taxpayer "on the basis that a particular tax advantage ("the asserted advantage") results from the particular arrangements. Under s201(2)(a) "tax advantage" includes relief or increased relief from tax.

9. Section 205 defines a judicial ruling (there is no dispute here that *Audley* is such a ruling) and when such a ruling is "relevant" to the chosen arrangements, including, crucially, at s205(3)(b) if:

> 'the principles laid down, or the reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage or a part of that advantage…'

10. Section 208 provides for a penalty if corrective action (here amending the return) is not taken at the relevant time in the amount (under s209) of 50% (as the legislation stood at the time) of the value of the denied advantage, which amount may, under s 210 be reduced to a minimum of 10% where the taxpayer co-operates with HMRC.

11. Section 214 enables the taxpayer to appeal HMRC's decision that a penalty is payable to the FTT. Section 214(3)(b) mentions the grounds may include "that the judicial ruling specified in the notice is not one which is relevant to the chosen arrangements".

12. The interpretation of the provisions on when a judicial ruling specified in a follower notice is "relevant" was considered by the Supreme Court in *Haworth*. That was an appeal in relation to the taxpayer's judicial review challenge against a follower notice on a number of grounds including whether HMRC's opinion that it was *likely* that the application of the ruling was enough to establish that Condition C (at [8] above) was satisfied. That issue turned on the degree of certainty HMRC had to arrive at before they could show that they had formed such an opinion and the meaning of the term "would" in s205(3)(b). Lady Rose noted the threat of penalty was intended to discourage a taxpayer from pursuing their appeal. Applying the principle that where a statutory power "authorises an intrusion upon the right of access to the courts, it must be interpreted as authorising only such degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question", the Court held (at [61]) that the provision required that HMRC had to have formed the opinion:

> "…that there is no scope for a reasonable person to disagree that the earlier ruling denies the taxpayer the advantage."

13. Lady Rose went on to say that an opinion that the relevant ruling was likely to deny the advantage was not sufficient. That did not gloss the wording but gave "full weight to the use of the word "would" as opposed, for example, to "might"" ([62]).

14. At [64] to [68] Lady Rose explained that whether HMRC could reasonably form the opinion that the earlier decision was relevant would depend on a number of factors: 1) fact sensitivity (whether a small difference in the fact pattern of the taxpayer's arrangements or circumstances as compared with the fact pattern described in the earlier ruling would prevent the principles or reasoning applying, 2) whether the relevance turned on HMRC's rejection of the taxpayer's evidence as untruthful, 3) whether there were legal arguments put forward by the taxpayer that were not raised in the earlier ruling or whether a concession was made in one

but not the other, 4) the nature of the earlier ruling, whether taxpayer was represented, and whether the decision was brief or unclear.

15. Lady Rose also made clear (at [63]) that in a follower notice penalty appeal the FTT "determines for itself whether the earlier case is a relevant ruling or not applying the same "high threshold of certainty" under s205(3)(b) as applies to HMRC's opinion.

16. *Haworth* also rejected the taxpayer's argument there that factual findings in a judgment could not form part of the principles laid down or reasoning given in a ruling for the purposes of Condition C. Lady Rose gave the example of the finding of fact in *Clark (HMIT) v Perks* [2001] EWCA Civ 1228 that the oil rig there was a ship with the consequence the taxpayer, a worker on board it, was a "seafarer" and entitled to an income tax exemption for work performed abroad. Despite turning on a finding of fact, the conclusion would still give rise to questions of whether the *principles and reasoning* in the case applied to other oil rigs, and whether those were distinguishable (in the legal sense of that word) ([77] to [80]).

BACKGROUND – THE FTT DECISION AND AUDLEY

17. Turning then to the FTT Decision and that in *Audley,* it is helpful to first outline how the arrangements in both those cases were, from the taxpayer's point of view, said to give rise to a loss under paragraph 2 of the Schedule 13 FA 1996 provisions on relevant discounted securities (a loss which then entitled the taxpayer to relief from income tax on an amount equal to the amount of the loss).

18. Under Paragraph 2(2):

> "a person sustains a loss from the discount on a relevant discounted security where a) he transfers such security…and b) the amount paid by [the] person in respect of his acquisition of the security exceeds the amount payable on the transfer…".

19. Paragraph 2(3) provides the:

> "loss shall be taken – a) to be equal to the amount of excess…"

20. Thus, the two key figures to determine the loss are the amount the taxpayer "paid in respect of his acquisition" of the security and "the amount payable on transfer" by the person to whom the transfer is made. Where that person is a connected person (as defined in s839 of the Taxes Act 1988) Paragraph 8 becomes relevant. That provides, in respect of transfers between connected persons (as defined in s839 of the Taxes Acts 1988) at Paragraph 8(2)(b) that for the purposes of Schedule 13 "the person to whom the transfer is made shall be treated as paying in respect of his acquisition of the security an amount equal of that market value [*which as set out in Paragraph 8(2)(a) is the market value of the security at the time of the transfer*]".

21. In broad outline the scheme was intended to give rise to a loss as follows. Mr Pitt transferred assets to two wholly owned companies in return for the issue of Loan Notes issued by those companies. (He had earlier derived those assets by withdrawing funds from director's loan accounts of those companies.) He paid £1m for the issue of those Loan Notes (accepted to fall within the definition of relevant discounted securities) whose principal amount was stated to be limited to a total of £1m carrying interest at 0.5% per annum. Because of the Loan Notes' particular terms (the low amount of redemption price (£1.20 per £1 par value) coupled with a long duration of 30 years and taking account of the time value of money) their market value was significantly lower.

22. Mr Pitt then assigned £750,000 in total in principal amount of the Loan Notes to connected parties (two trusts: the Kevin John Pit Settlement 1999 and the Kevin John Pitt Children's Settlement 1999). That triggered the operation of Paragraph 8(2)(a) Schedule 13 FA 1996 to deem him to have received an amount equal to the market value of the securities transferred (£55,316).

23. Mr Pitt's case was that a loss (£694,684) was generated because of the difference between the amount paid in respect of the acquisition of the securities he transferred (£750,000) minus the deemed amount he received (the market value of £55,316).

24. It was common ground (FTT [40]) that the Loan Notes were "relevant discounted securities" and each settlement was connected with the appellant for legislative purposes. It was also common ground their market value on the date the transfers were made was £55,316.

25. As already mentioned, the FTT dismissed Mr Pitt's appeal against HMRC's closure notice which had disputed the above loss. Although, following the withdrawal of part of Mr Pitt's case prior to the hearing, no appeal is now pursued in relation to that before the Upper Tribunal, it is necessary, in order to understand the FTT's reasoning on the penalty appeal to outline the FTT's reasoning in dismissing the closure notice appeal. That was in essence that, purposively construed, the inputs to the loss calculation (acquisition on the one hand and amount payable on transfer on the other) (paragraph 2(2) and 2(3) of Schedule 13) should properly reflect commercial reality and that paragraph 2 sought to give relief for "real commercial losses" (FTT [132]).

26. The FTT had found (at FTT [65(8)]) that the issue of the Loan Notes and transfer of those to the trustees of the settlements "had no commercial or business purpose apart from the tax advantage which [Mr Pitt] hoped to obtain by taking those steps". One of the reasons for that was the "total artificiality of the transactions" when viewed in the light of both the actual commercial position at the time when it took place and Mr Pitt's stated commercial purpose (benefitting his children, making provision for his retirement, and preventing accessibility of funds to potential creditors, including his wife who he had been thinking about divorcing). The companies were wholly-owned by Mr Pitt which meant all he needed to do to ensure money was left in them for his retirement was to leave the director's loans outstanding and simply resolve not to demand repayment by the companies. The entire value in the debt and equity in the companies was held by Mr Pitt and accessible to his potential creditors. The FTT explained "In the light of those realities, replacing £750,000 of the amounts outstanding on his director's loan accounts with relevant discounted securities with a market value of £55,316 made no commercial sense". The FTT noted Mr Pitt's concession in his evidence that he did not care what the market value of the Loan Notes was on issue and that he would not have paid the amount he had done if he had not wholly owned the companies.

27. Even assuming Mr Pitt had acquired the loan notes the FTT considered only £55,316 was paid in respect of loan notes – the remainder was simply a capital contribution to the companies in which Mr Pitt was the sole shareholder. There was accordingly no loss (because there was no difference between the amount paid in respect of the acquisition of the Loan Notes and the amount Mr Pitt was deemed to receive in respect of the transfer of the Loan Notes to the trustees of the settlements) (FTT [126] – [131]).

28. As regards Mr Pitt's penalty appeal, the issue which is the focus of the appeal before us concerned whether "…the decision in *Audley* [was] a "relevant" judicial ruling in relation to the arrangements described in the follower notice." Mr Pitt (represented by Mr Avient who also appeared before us) argued it was not.

29. The FTT summarised the analysis in *Haworth* (FTT [147] to [149]) and set out the various factors we have mentioned (see [14] above). Mr Pitt's case was first that HMRC had

not shown Mr Pitt had participated in a mass-marketed scheme – he had received advice on his specific circumstances and had his own commercial purposes in relation to retirement and dealing with creditors, including his wife. Second, he argued *Audley* was extremely fact-sensitive and its facts differed in numerous ways from facts in Mr Pitt's case. It did not lay down any general principles. The FTT recorded HMRC's submission that *Audley* was relevant and addressed each of the various *Haworth* factors.

The judicial ruling HMRC's follower notice relied on - Audley v HMRC

30. Before describing what the FTT took away from *Audley* in terms of "principles laid down, and reasoning given" in that case, it is convenient at this point to outline the case's background facts and issues.

31. *Audley* concerned the same legislative provisions, Schedule 13 FA 1996, but for the tax year 2001/2002, in respect of which the taxpayer claimed a £2,014,300 loss sustained on a relevant discounted security. Mr Audley argued the relevant amount in respect of his acquisition of the loan note was £2.05m. HMRC argued it was £35,700; the market value.

32. The facts, in high level summary, were that Mr Audley transferred £250,000 cash and his principal residence, valued at £1.8m, to a settlement trust (Trust One) in relation to which he was the settlor, trustee along with other family members, and life tenant. His wife and children were beneficiaries. Trust One resolved to create and issue the loan note. Shortly afterwards the loan note was gifted to the trustee of Trust Two, a new settlement that had been established by Mr Audley, the trustees of which included Mr Audley and other family members and the beneficiaries of which were close family members.

33. The FTT (at [85]) noted the huge discrepancy between the actual terms of the note and normal commercial terms and that the loan note had no commercial reality. The promise to pay £2.45m in 60 years' time with a zero coupon had a present value of £35,700. For the security to have had a present value of £2.05m (the assets transferred by Mr Audley), the value (using the same discount rate) would have had to have been in excess of £140m. The FTT explained that that "did not concern Mr Audley because his true intention was to gift the house to Trust One as part of his estate planning".

34. The FTT's stated approach (at [76]), having examined the case-law, involved the two analyses mentioned in Ribeiro PJ's well-known dicta in *Collector of Stamp Revenue v Arrowtown Assets Ltd* 6 ITLR 454 (at [35]) regarding taking a purposive interpretation of the legislation and considering whether that applied to the transactions "viewed realistically".

35. It considered the purpose of paragraph 2 Schedule 13 was "to grant relief for realised losses on [relevant discounted securities] where "the amount paid…in respect of his acquisition of the security exceeds the amount payable on the transfer or redemption"". The FTT noted that such reliefs were generally (though not universally) "to be taken to refer to transactions undertaken for a commercial purpose and not solely for the purpose of complying with the statutory requirements for tax relief."

36. As for the realistic view of the facts ([88]) the FTT held the transaction was "not a subscription of £2.05m for a loan note issued by the trustees…rather it was a gift of the House and a significant amount of cash to the trustees". The only thing obtained in return was the loan note which had a market value of £35,700. The FTT concluded (at [89]) that "the only purpose in the trustees issuing the loan note was to seek to "sustain a loss" that would be eligible for income tax relief" under paragraph 2 of Sch 13. The amount paid for the loan note acquisition was "limited to the true value of the loan note when issued: £35,700". The extra value of the assets transferred to Trust One was a gift. The calculation of loss under paragraph 2 of Schedule 13 was accordingly nil.

FTT's treatment of whether <u>Audley</u> "relevant"

37. The FTT gave its reasoning on why it rejected Mr Pitt's case on the penalty appeal at (FTT [163] – [165]) (having earlier recorded the detail of the parties' competing submissions on *Audley*, Mr Pitt's arguments on the material points of distinction and HMRC's submission regarding the substantial parallels between the facts (at FTT [91] to [98])).

38. The FTT rejected Mr Pitt's argument that *Audley* was "acutely fact-sensitive" holding that the principles and reasoning were (FTT [164]):

> "…to the effect that a taxpayer is not entitled to a loss under paragraph 2 of Schedule 13 if:
>
> (a) he deliberately purports to subscribe at an over-value for a relevant discounted security in circumstances where he is indifferent to the fact that he is paying substantially more for the security than it is worth because he is content to make a gift of the excess to the issuer of the security; and
>
> (b) then disposes of the security to a connected party shortly afterwards."

39. The FTT continued: "those were the material facts in *Audley* and they are also the material facts in this case". The FTT considered the structure in Mr Pitt's case was a mass-marketed scheme, the arguments were the same (including that "because the subscription purported to be for a specified amount, that amount should be accepted as the amount paid in respect of the acquisition of the relevant discounted security notwithstanding the over-value payment") (FTT [164(3)]). The conclusion in *Audley* was also consistent with that in Mr Pitt's, case to the effect that only part of the amount paid for the loan notes (equal to the market value) represented the amount paid in respect of acquisition, with the balance as capital contribution. The FTT also explained (at FTT 164(7)]) why none of the factual differences Mr Pitt had advanced were material:

> (1) Nothing turned on the specific identity of the issuer (and the fact it was a newly formed trust in *Audley* and long-standing companies in Mr Pitt's case). The relevant feature was that the entity needed to be one to which the taxpayer was prepared to make a gift whether that was settlement of an amount into a family trust as in *Audley* or capital contribution (as in Mr Pitt's case).
>
> (2) In both, there was a single composite transaction (it was irrelevant that the precise nature of the connected person who was going to receive the gifts of loan notes had not yet been determined when the loan notes were issued).
>
> (3) It did not matter that some of the amount in *Audley* took the form of property rather than cash – the principle derived from *Audley* in relation to the treatment of the cash element applied equally to the cash here. The relevant reasoning in *Audley* had, contrary to Mr Pitt's submission, ultimately, despite identifying various concerns, accepted the property had been transferred.
>
> (4) The commercial consequences of the transaction, even if the property transfer in *Audley* was discounted as illusory, that £250,000 less £35,700 had been settled on trust and the transferee held a long-term loan note, were no less enduring than the consequences in Mr Pitt's case.

GROUND OF APPEAL AND DISCUSSION

40. The single ground upon which Mr Pitt was granted permission to appeal by the Upper Tribunal was that the FTT erred in law in its approach to deciding whether *Audley* was a "relevant judicial ruling". In essence that was because it:

> "failed to distinguish primary facts from the evaluative conclusions or inferences from the facts which it drew…therefore arguably err[ing] in finding no material differences of fact in the Appellant's case from those in *Audley*."

41. As further explained in Mr Avient's written and oral submission on behalf of Mr Pitt, the key distinction between the primary facts and evaluative conclusions/inferences arose through the application of the *Ramsay* approach. The ultimate question, as summarised by Ribeiro PJ in *Arrowtown* (and as referred to by the FTTs in this case and in *Audley*) was whether:

> "…the relevant statutory provisions construed purposively, were intended to apply to the transaction viewed realistically".

42. Mr Pitt's case focusses on that second element of the transaction "viewed realistically". In particular his case emphasises a distinction between primary facts on the one hand and "reconstituted" facts on the other.

43. The term "reconstituted" is taken from the speech of Carnwath LJ, as he then was, in *Barclays Mercantile Business Finance Ltd v Mawson (HMIT)* [2002] EWCA Civ 1853. As Mr Macklem's submissions for HMRC pointed out, "reconstituted" facts (and the various other ways which Mr Avient expressed this – as recharacterized or reconstructed facts, or facts found before "purposeful interpretation") do not involve the tribunal having changed the facts. As the Supreme Court in *UBS AG v HMRC* [2016] UKSC 13 explained at [68]:

> "…The point is that the facts must be analysed in the light of the statutory provision being applied. If a fact is of no relevance to the application of the statute, then it can be disregarded for that purpose…"

44. Mr Avient, quite rightly, did not, it appeared to us, take issue with that. His fundamental point as we see it is that the exercise of determining such findings or evaluative inference can only take place *after* some form of judicial processing. As he put it they are the result of primary facts which have been "pushed into the funnel of *Ramsey*". By way of illustration, the kinds of findings he means are: that the structure was a single composite transaction (FTT [65(3)]), that the commercial effects of the transactions were merely consequences of the transactions and not part of their purpose, that the issue of the loan notes to Mr Pitt had no commercial or business purpose whatsoever, that Mr Pitt had "simply converted £694,684 of the balance on his director's loan accounts in the companies into equity in the companies and £55,316 of the balance in his director's loan accounts into the Loan Notes' (FTT [65(8)]), and that the terms on which the loan notes were issued were highly artificial and not commercial (FTT [65(10]).

45. The FTT, Mr Avient submits, erred in failing to restrict its analysis to a straightforward comparison of whether the primary facts in *Audley* were the same as the primary facts in Mr Pitt's case. He relies on *Haworth* in support. There the test was put in terms of what a "reasonable person" thought. In his submission that reflected that the comparison ought to be capable of being straightforwardly undertaken by a person in receipt of the follower notice. That was also in line with the policy expressed in *Haworth* that the regime was to deter unmeritorious claims (in other words claims that could be struck out), and in accordance with reading the provision as restrictively as possible to ensure access to justice. A reasonable person could not be expected to "purposefully" interpret the facts. They would not know what findings would be made post the *Ramsay* analysis as that would depend on the judicial process and a

question of law. The follower notice regime and associated penalty was meant to cover situations where the taxpayer persisted in their tax treatment despite it being "blindingly obvious" to them (without having to see a tax adviser) that they would lose in the light of the previous judicial ruling. It was targeted at situations where the taxpayer had used the same mass marketed scheme with the same standardised documents. Mr Avient accepts the regime might still apply where the promoters of the scheme were different but suggests that if, as here, different documents are used then the facts cannot be the same and the earlier judicial ruling cannot be a relevant one.

46. Thus, Mr Avient argues, once the post-*Ramsay* facts are disregarded, the fact patterns are sufficiently different that principles and reasons in *Audley* would not apply to Mr Pitt. As made clear in *Haworth* there is a high bar for showing relevance and even if the conclusion was that *Audley* would be likely to deny the tax advantage, that would be insufficient. Mr Pitt's case accordingly rests on a single thesis; that it was wrong in law to consider post-*Ramsay* findings in the purportedly relevant decision and certainly in the taxpayer's decision when making a comparison between the ruling relied on and the taxpayer's case.

47. We accept the ground, going as it does to the FTT's correct approach, raises a point of legal principle. However, it is in our judgment a ground that is simply not borne out by the words of the relevant provisions of FA 2014 and must be rejected.

48. Those provisions, specifically s205(3)(b), refer to "principles laid down, and reasoning given". There is nothing to suggest in those words or in the Supreme Court's reasoning in *Haworth* that consideration of evaluative findings or realistically appraised facts, or however such findings are described, are to be carved out from the analysis of whether the principles laid down and the reasoning given in the judicial ruling deny the asserted tax advantage when applied to the taxpayer's arrangements.

49. Mr Macklam is right to point out the lack of any real distinction between facts and facts found realistically. As already mentioned, the Supreme Court in *UBS* explained that realistic facts are just the facts adjudged to be of particular relevance given the purpose of the statute – they are no less findings of fact. (In other words, while one can argue about whether they *are* relevant facts in the light of the statutory provision's purpose there can be no argument that they are facts.)

50. We also mentioned earlier how the Supreme Court had held in *Haworth* that "principles laid down, and reasoning given" may include factual findings. At a very basic conceptual level, it seems to us that if the evaluative facts the Supreme Court mentioned in giving the example of *Clark v Perks* (whether the oil rig was a ship), which will have derived from various findings of primary facts having been made as to the features of the structure, are capable of forming the principles or reasoning of a case, it is difficult to see why facts which were evaluated in the light of the purpose of particular statutory provisions should not similarly be part of the principles and reasoning of a ruling.

51. The above point is of course relevant to explain why recourse to "post-*Ramsay*" facts in the putative relevant judicial ruling should not be ruled out. But we also consider Mr Avient's reliance on *Haworth* in respect of recourse to "post-*Ramsay*" facts to be misplaced in relation to the other side of the comparison – the taxpayer's arrangements. The objection is that the *Ramsay* facts require judicial analysis and will not readily be apparent from the face of the facts. In support Mr Avient placed emphasis on the Supreme Court's reference to a "reasonable person". Mr Avient also put his submission from the angle of access to justice concerns. He argues it is not in line with access to justice that a person faced with a follower notice would have to guess what facts would be found realistically as a result of a judicial process *before* that process had been undertaken when all they would know were the primary facts.

52. However, these points overlook the task the legislation requires. That is to extract the principles and reasoning of the judicial ruling and see whether it would, if it applied to the taxpayer's own arrangements, similarly deny the hoped-for tax advantage. That is not to say that a factual comparison will not be required but such comparison follows from the application of the *principles and reasoning* in the ruling relied on in the follower notice to the facts of the taxpayer's case. Such comparison will inevitably require some judgment to be made as to what facts are *material* in the light of the principles and reasoning in the ruling advanced by HMRC. So, even on Mr Pitt's own case an exercise of simple fact matching will be insufficient.

53. A taxpayer faced with a follower notice will, in assessing their position, of course have to take a view on what they consider the principles and reasoning in the judicial ruling in the follower notice are and how those would apply to the facts of their own case. That analysis will ultimately be informed by considering where a court or tribunal would land on the issue if it had to decide whether the ruling was a judicial ruling which was "relevant" as defined in the legislation. It may well be that if the taxpayer has used the same mass marketed scheme and implemented it in the same way, that task will be more straightforward but there is nothing to indicate the legislation is only confined to those sorts of situations, or that it is to be assumed the taxpayer will undertake the analysis of their position without the benefit of specialist advice.

54. We agree with Mr Macklam that the reference to a reasonable person in *Haworth* is simply the means by which the Supreme Court chose to convey the standard of certainty entailed by the word "would" in s205(3)(b). It was not meant in our view to signal an enquiry into the attributes of such "reasonable person" or a focus on that person being the taxpayer, standing them in contrast to the tribunal or others. The statutory words are clear. Whoever's perspective is looked at, the task is ultimately one of considering whether the principles or reasoning in the ruling referred to in the follower notice would (with all the certainty that entails) deny the tax advantage.

55. Mr Avient sought to address the concern that his approach, of a simple primary fact by primary fact comparison, would mean the follower notice regime would have little to bite on, by arguing that the regime would still serve a purpose beyond identical schemes where the ruling relied on had been expressed to apply more widely to other variants of schemes (referring to these sorts of cases as "route-map" cases). However, the legislative words simply focus on the "principles laid down, and reasoning" and envisage no such distinction which is dependent on the ruling expressly recognising its wider application. The principles and reasoning in a ruling can clearly have a wider effect even if that wider effect is not expressly recognised in the ruling. Also, as Mr Macklam pointed out there is no support for such singling out of "route map" cases in the Supreme Court's guidance in *Haworth* on the factors that would be relevant to consider. If the point had merit, it might have been expected that the Court would have raised it when considering for instance the issue of the fact sensitivity of the ruling or its nature.

56. In conclusion we thus consider the whole premise of the appellant's ground to be flawed. There was no error of approach, as alleged, in the FTT failing to rule out of its consideration a distinction between pre- and post-*Ramsey* facts. The FTT's approach was correct. It extracted the principles and reasoning in *Audley* (see [38] above) and then considered what the result would be when those were applied to the facts of Mr Pitt. It would have made no sense for the FTT to apply that reasoning only to the primary facts (that Mr Pitt paid the stated subscription price) because it was inherent in the *reasoning* that one should look at the facts realistically in the light of the purpose of the relevant provisions in Schedule 13 FA 1996. Given the centrality of examining the facts that were adjudged relevant in the light of the statutory purpose of the loss provisions in Schedule 13, there would, on the contrary, likely have been an error of law if the FTT had adopted Mr Pitt's approach and ignored such evaluative facts. We thus agree with Mr Macklam that even if it were correct as a matter of principle that the FTT was to ignore

the "post-*Ramsay*" facts, then that would, in the end, contravene the legislation because on the facts here one of *principles* key to *Audley* was to take account of various facts viewed realistically in the light of the purpose of particular provisions in Schedule 13 FA 1996.

57. Mr Avient also sought to question the FTT's conclusion on *Audley* by reference to the way in which the FTT had disposed of the closure notice appeal. The FTT had not, as might be expected if *Audley* was relevant to the requisite degree of certainty, straightforwardly dismissed the closure notice appeal simply on the basis of the principles and reasoning in *Audley* (which although FTT level, was persuasive). We reject this argument. There is no inconsistency between the FTT's conclusion on the penalty appeal that *Audley* was "relevant" and the fact it did not dispose of the closure notice appeal purely by reference to that case. In the closure notice appeal the FTT had to address the applicability of the relevant legal principles derived in accordance with any precedent that was binding in the normal way. It accordingly dealt (in addition to *Audley*) with the whole breadth of wider and higher (Upper Tribunal and Court of Appeal) authority applicable to Mr Pitt's facts in the light of the parties' respective submissions on such cases. In that appeal it was not, as it was in the penalty appeal, subject to the specific statutorily imposed question of the "relevance" of *Audley* to the taxpayer's arrangements. In other words, the fact the FTT expressed its reasoning in the closure notice appeal by reference to other authorities it considered relevant (one of which *Berry v HMRC* [2011] UKUT 81 (TCC) post-dated *Audley*) did not undermine the status of *Audley* as "relevant".

58. For the sake of completeness, we also note there is also nothing to suggest that the FTT erred in its evaluation that none of distinctions advanced by appellant were material distinctions. None of Mr Avient's submissions persuaded us that the FTT's analysis was wrong. For instance, the fact the FTT described the excess over market value in the payments to his wholly-owned companies as "capital contributions" on the one hand but the analogous excess in *Audley* was described as gifts plainly did not affect the ultimate analysis. The FTT did consider the factual differences advanced by Mr Pitt but concluded they were not material to the reasoning (see [39] above). That also disposes of Mr Avient's oral submission that the FTT Decision was inadequately reasoned (a ground on which permission to appeal had not been granted anyway).

59. For all the reasons above, we dismiss Mr Pitt's appeal.

JUDGE SWAMI RAGHAVAN
JUDGE JENNIFER DEAN

Release date: 22 January 2024