Trinity Term
[2021] UKSC 25
On appeal from: [2019] EWCA Civ 747

JUDGMENT

R (on the application of Haworth) (Respondent) *v* Commissioners for Her Majesty's Revenue and Customs (Appellant)

before

Lord Briggs
Lady Arden
Lord Leggatt
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON

2 July 2021

Heard on 21 April 2021

Appellant	*Respondent*
Christopher Stone (Instructed by HMRC Solicitors Office (Bush House))	Giles Goodfellow QC Ben Elliott (Instructed by Levy & Levy)

LADY ROSE: (with whom Lord Briggs, Lady Arden, Lord Leggatt and Lord Stephens agree)

Introduction

1. The follower notice regime established by Part 4 of the Finance Act 2014 has been described as raising the stakes on tax avoidance. It has also been described as draconian. The provisions apply where a taxpayer has completed his tax return or brought an appeal against his assessment on the basis that he is entitled to a tax advantage because of arrangements that he has entered into. The advantage might be an entitlement to a particular relief from tax or the avoidance of a tax charge. HMRC may form the opinion that the taxpayer is not entitled to that tax advantage because a previous court or tribunal ruling has already decided that arrangements like his are not effective and do not confer that advantage on taxpayers. If certain conditions are met, HMRC may serve a follower notice, informing the taxpayer that his situation follows that in the earlier case, denying him the tax advantage he asserts.

2. The taxpayer who receives a follower notice must decide whether to respond by taking the "corrective action" specified in Part 4. If he takes corrective action, he concedes that he is not entitled to the tax advantage and he then becomes liable to pay the tax he had initially sought to avoid. If the taxpayer decides not to take corrective action and maintains that he is entitled to the advantage claimed then, if he ultimately loses his case before the tribunal and HMRC are proved right, not only will he have to pay the additional tax, but he will also be subject to a substantial penalty.

3. In his tax return for the year 2000/2001, the respondent, Mr Haworth, disclosed that he had entered into arrangements whereby, he asserted, he avoided any charge to tax on a substantial capital gain arising from the disposal of shares by a trust of which he was the settlor. His avoidance of the charge to tax depended on a combination of the provisions of the Taxation of Chargeable Gains Act 1992 ("the TCGA") and the operation of the UK/Mauritius double taxation convention as appended to the Double Taxation Relief (Taxes on Income) (Mauritius) Order 1981 (SI 1981/1121) ("the Convention").

4. HMRC opened an enquiry into Mr Haworth's tax return and issued a follower notice to Mr Haworth contending that the Court of Appeal has already decided in *Smallwood v Revenue and Customs Comrs* [2010] EWCA Civ 778; [2010] STC 2045 ("*Smallwood*") that on the true construction of the Convention, the provisions

he relies on do not relieve him of liability under the TCGA. In that case, HMRC say, arrangements which were the same in all material respects to those of Mr Haworth were held not to remove the charge to tax in the way that Mr Haworth asserts.

5. Mr Haworth brought judicial review proceedings in the Administrative Court to challenge the issue of the follower notice. Mr Haworth's challenge was dismissed at first instance by Sir Ross Cranston: see [2018] EWHC 1271 (Admin); [2018] STC 1326 handed down on 23 May 2018. Mr Haworth's appeal was allowed by the Court of Appeal. The Court held unanimously that the conditions required for the giving of a follower notice had not been satisfied in Mr Haworth's case [2019] EWCA Civ 747; [2019] 1 WLR 4708. The main judgment was given by Newey LJ with Gross LJ giving a short concurring judgment. Sir Timothy Lloyd agreed with both judgments.

The legislation

6. The conditions that must be satisfied before HMRC can give a follower notice are set out in section 204 of the Finance Act 2014 ("FA 2014") as follows:

> "**204. Circumstances in which a follower notice may be given**
>
> (1) HMRC may give a notice (a 'follower notice') to a person ('P') if Conditions A to D are met.
>
> (2) Condition A is that -
>
> (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
>
> (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax, but that appeal has not yet been -
>
> (i) determined by the tribunal or court to which it is addressed, or
>
> (ii) abandoned or otherwise disposed of.

(3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ('the asserted advantage') results from particular tax arrangements ('the chosen arrangements').

(4) Condition C is that HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements.

(5) Condition D is that no previous follower notice has been given to the same person (and not withdrawn) by reference to the same tax advantage, tax arrangements, judicial ruling and tax period.

(6) A follower notice may not be given after the end of the period of 12 months beginning with the later of -

(a) the day on which the judicial ruling mentioned in Condition C is made, and

(b) the day the return or claim to which subsection (2)(a) refers was received by HMRC or (as the case may be) the day the tax appeal to which subsection (2)(b) refers was made."

7. Capital gains tax is a relevant tax for the purposes of Condition A: see section 200(b) FA 2014. For our purposes, the time limit in section 204(6) was substituted by a transitional provision in section 217 FA 2014. That provides that in the case of a judicial ruling made before the day on which the FA 2014 was passed, the provisions have effect as if the deadline set in section 204(6) was the end of the period of 24 months beginning with the day on which the Act was passed. The effect of this was that the deadline for giving follower notices which relied on *Smallwood* as the relevant ruling was 17 July 2016.

8. The key provision for the purposes of this appeal is the provision that sets out when a previous judicial ruling is "relevant" to the taxpayer's chosen arrangements for the purposes of Condition C. Section 205 elaborates on the meaning of that term and other terms used in Condition C:

"**205. 'Judicial ruling' and circumstances in which a ruling is 'relevant'**

(1) This section applies for the purposes of this Chapter.

(2) ‘Judicial ruling’ means a ruling of a court or tribunal on one or more issues.

(3) A judicial ruling is ‘relevant’ to the chosen arrangements if -

(a) it relates to tax arrangements,

(b) the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage or a part of that advantage, and

(c) it is a final ruling.

(4) A judicial ruling is a ‘final ruling’ if it is -

(a) a ruling of the Supreme Court, or

(b) a ruling of any other court or tribunal in circumstances where -

(i) no appeal may be made against the ruling,

(ii) if an appeal may be made against the ruling with permission, the time limit for applications has expired and either no application has been made or permission has been refused,

(iii) if such permission to appeal against the ruling has been granted or is not required, no appeal has been made within the time limit for appeals, or

(iv) if an appeal was made, it was abandoned or otherwise disposed of before it was

determined by the court or tribunal to which it was addressed.

(5) Where a judicial ruling is final by virtue of sub-paragraph (ii), (iii) or (iv) of subsection (4)(b), the ruling is treated as made at the time when the sub-paragraph in question is first satisfied."

9. Section 206 specifies what must be included in a follower notice:

"**206. Content of a follower notice**

A follower notice must -

(a) identify the judicial ruling in respect of which Condition C in section 204 is met,

(b) explain why HMRC considers that the ruling meets the requirements of section 205(3), and

(c) explain the effects of sections 207 to 210."

10. There are provisions in section 207 entitling the taxpayer to make written representations to HMRC objecting to the follower notice on the ground, amongst others, that the judicial ruling specified in the notice is not one which is relevant to the chosen arrangements. HMRC must consider any representations and determine whether to confirm or withdraw the notice.

11. The consequences for the taxpayer of being given a follower notice are set out in section 208. This provides that P is liable to pay a penalty if the necessary corrective action is not taken in respect of the denied advantage before the deadline specified in section 208(8) FA 2014. Where, as in Mr Haworth's case, the follower notice has been given after the opening of an enquiry into his tax return, P takes corrective action if he amends his return to counteract the denied advantage. If the follower notice has been given in the course of a tax appeal, then the corrective action required is for P to take all the action necessary to enter into an agreement with HMRC to relinquish the denied advantage. In either case, P must also notify HMRC both that he has taken the first step and of the amount of tax he is now liable to pay.

12. The penalty which P is liable to pay if he does not take the necessary corrective action is quantified in accordance with section 209 and is, broadly, 50% of the tax advantage. This penalty can be reduced if the taxpayer co-operates with HMRC but cannot be less than 10% of the denied tax advantage: see section 210. If the taxpayer becomes liable for a penalty under section 208, HMRC may assess the penalty and notify him of the amount: see section 211. Section 211(5) sets a deadline by which HMRC must notify the taxpayer of the penalty.

13. There is no right of appeal as such against the issue of a follower notice. However, section 214 provides a right of appeal against a section 208 penalty and that the taxpayer may challenge the notice on the ground that the judicial ruling relied on by HMRC was not relevant:

> "**214. Appeal against a section 208 penalty**
>
> (1) P may appeal against a decision of HMRC that a penalty is payable by P under section 208.
>
> (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P under section 208.
>
> (3) The grounds on which an appeal under subsection (1) may be made include in particular -
>
> > (a) that Condition A, B or D in section 204 was not met in relation to the follower notice,
> >
> > (b) that the judicial ruling specified in the notice is not one which is relevant to the chosen arrangements,
> >
> > (c) that the notice was not given within the period specified in subsection (6) of that section, or
> >
> > (d) that it was reasonable in all the circumstances for P not to have taken the necessary corrective action (see section 208(4)) in respect of the denied advantage."

14. The giving of a follower notice does not of itself require the taxpayer to pay any tax earlier than he would have to if he appealed against a closure notice and lost

that appeal. But in addition to creating the contingent liability to the penalty, the giving of a follower notice is important because it forms one of the bases on which HMRC can also give an accelerated payment notice under the provisions of Chapter 3 of Part 4 of the FA 2014. The effect of the accelerated payment notice is, broadly, that the taxpayer must pay an amount stated in the notice and that amount is then treated as paid on account of the disputed tax. Again, the provisions do not stop the taxpayer from later bringing a challenge before the tribunal to establish whether the tax advantage applies. But he must pay the disputed tax up front as well as take the risk that he will have to pay the penalty resulting from the follower notice if he is wrong about his tax position.

The ruling in *Smallwood*

15. The relevant provisions of the TCGA and of the Convention are set out in the judgment of Mann J who decided *Smallwood* on appeal from the Special Commissioners ([2009] EWHC 777 (Ch); [2009] STC 1222) and the judgment of Patten LJ in the Court of Appeal in that case. What follows is a summary of how the arrangements in *Smallwood* were supposed to work and what the Court of Appeal decided.

16. Liability for capital gains tax depends upon residence in the United Kingdom and applies to chargeable gains accruing to the taxpayer in a year of assessment during any part of which he is resident here. Where the trustees of a settlement are non-resident throughout the fiscal year, but the settlor himself retains an interest in the settlement and is himself UK resident in the fiscal year, any gains made by the trust are attributed to the settlor by section 86 TCGA and he is chargeable to tax on them. Where the trustees of the settlement are resident in the UK at any time during the fiscal year, then any gains which are chargeable to tax in the trustees' hands in the UK are also attributed to the settlor by section 77 TCGA.

17. The arrangements entered into by Mr Smallwood were aimed at avoiding a charge to capital gains tax on the disposal of shares held by a settlement of which he was a trustee at the time he completed his tax returns and in which he retained an interest. He hoped to avoid the application of a charge under either of those sections of the TCGA by relying on the application of a double taxation treaty between the UK and a state which would not impose a tax on the gain made on the disposal under its own taxing provisions. Mauritius is such a state. Mauritius only imposes capital gains tax on disposals in very limited circumstances which do not apply here. The efficacy of the arrangements depended on the Convention having the effect that the trust was not liable to capital gains tax because the only Contracting State entitled under the Convention to tax the gain was Mauritius and not the UK.

18. The Smallwoods' arrangements were devised by KPMG. Pursuant to the arrangements, the Jersey trustee was replaced by a trustee company which was tax resident in Mauritius, the shares were then disposed of and the Mauritian trustee was then promptly replaced by the Smallwoods who were domiciled and resident in the UK. The appointment of the Smallwoods meant that the trust was not non-UK resident for the whole fiscal year so section 86 did not attribute the gain made by the trust to Mr Smallwood. Mr Smallwood claimed that under the terms of the Convention, there was also no capital gains tax payable by the trustees under the TCGA and so nothing to attribute to the Smallwoods under section 77.

19. HMRC did not accept that the Convention had that effect and they amended Mr Smallwood's tax return to include chargeable gains of over £6m. He appealed to the Special Commissioners. The Special Commissioners set out detailed findings of fact in relation to the way the scheme had been devised and implemented. On their view of how the Convention should be interpreted, the identity of the Contracting State which was entitled to tax the capital gain depended on the place of effective management, or POEM, of the trust. That, they decided on the facts that they had found, was the UK not Mauritius. The trustees were therefore liable to tax on the gain in the UK and that tax charge was attributed to Mr Smallwood under section 77 TCGA.

20. The Smallwoods appealed against the decision of the Special Commissioners and Mann J allowed their appeal. He disagreed with the Special Commissioners' construction of the relevant provisions of the Convention and held that the Contracting State entitled to tax the gain was the State in which the trust was resident as at the time of the disposal of the shares. That was clearly Mauritius. Thus, there was no gain chargeable in the UK, no tax liability accruing to the trust, and nothing to be paid by Mr Smallwood. HMRC appealed Mann J's construction of the Convention to the Court of Appeal. The Smallwoods cross-appealed on the ground that the Special Commissioners erred in law on the issue of the POEM (a point which had not been decided by Mann J).

21. The main judgment in the Court of Appeal was given by Patten LJ. The other members of the Court, Hughes and Ward LJJ, agreed with his analysis of how the provisions of the Convention should be applied. The Court held that both Contracting States would, under their domestic legislation, appear to be entitled to apply their capital gains tax regimes to the disposal by the trust. This triggered a "tie-breaker" provision in article 4(3) of the Convention, designed to prevent double taxation. That tie-breaker provided that where a trust was a resident of both Contracting States, "then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated". Having decided that the Smallwoods' trust was indeed resident in both the UK and Mauritius within the meaning of article 4(3), the Court of Appeal went on to consider where the trust's place of effective management or POEM was situated.

22. Patten LJ noted that POEM was not defined in the Convention but that both parties accepted that the test was that set out in the relevant Commentary on article 4(3) of the 1977 OECD Model Convention on the double taxation of income and capital. That Commentary describes the POEM in these terms:

> "As a result of these considerations, the 'place of effective management' has been adopted as the preference criterion for persons other than individuals. The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made. The place of effective management will ordinarily be the place where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined; however, no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can have only one place of effective management at any one time."

23. Patten LJ then set out in full the findings of the Special Commissioners as to the manner in which the Smallwood arrangements had been devised and implemented. He prefaced this discussion with the following comment:

> "50. It goes almost without saying that, to succeed on the cross-appeal, the taxpayers must establish that the decision of the Special Commissioners on this point contained an error of law of the kind recognised by the House of Lords in *Edwards v Bairstow* [1956] AC 12. Mr Prosser [*counsel for the Smallwoods*] therefore contends that it was not open to the Special Commissioners to find that the POEM of the trustee (PMIL) was anywhere but in Mauritius at the relevant time and, to have reached the conclusion which they did on the evidence, the Special Commissioners must therefore have applied the wrong test."

24. Patten LJ held that the Special Commissioners' findings did not support a conclusion that effective management of the trust took place in the UK. He adopted the test set out in *Wood v Holden* [2006] EWCA Civ 26; [2006] 1 WLR 1393 so that the POEM of the trust turned on whether the critical decisions of the Mauritian trustee company were taken by its board of directors, albeit on the advice and at the request of KPMG, or whether that board had ceded any discretion in the matter to KPMG by agreeing to act in accordance with their instructions: para 61.

25. Patten LJ did not accept, applying that test, that the Special Commissioners could properly have concluded that the POEM of the corporate trustee lay in the UK rather than in Mauritius. The trustee's functions had not been "usurped" in the sense described in *Wood v Holden*. The Special Commissioners' conclusions were not ones which were open to them on the evidence or on the findings of fact which they made. He would have dismissed the appeal.

26. Patten LJ was however in the minority on the POEM issue. Hughes LJ also prefaced his conclusions by reiterating that the Special Commissioners' finding on the issue of the POEM was one of fact so that the Smallwoods could only succeed on *Edwards v Bairstow* grounds. He agreed that the Special Commissioners' findings did not go so far as to establish that the functions of the corporate trustee had been wholly usurped in the sense described in *Wood v Holden*. If that were the test, then there may well have been an *Edwards v Bairstow* error. But he held that the test was the POEM of the trustees as a single and continuous body of persons as distinct from any particular corporate trustee at any particular time. On that basis, he said:

> "70. On the primary facts which the Special Commissioners found at paras 136-145, which are set out in the judgment of Patten LJ, I do not think that it is possible to say that they were not entitled to find that the POEM of the trust was in the United Kingdom in the fiscal year in question. The scheme was devised in the United Kingdom by Mr Smallwood on the advice of KPMG Bristol. The steps taken in the scheme were carefully orchestrated throughout from the United Kingdom, both by KPMG and by Quilter *[the nominee shareholder]*. And it was integral to the scheme that the trust should be exported to Mauritius for a brief temporary period only and then be returned, within the fiscal year, to the United Kingdom, which occurred. Mr Smallwood remained throughout in the UK. There was a scheme of management of this trust which went above and beyond the day to day management exercised by the trustees for the time being, and the control of it was located in the United Kingdom."

27. Ward LJ agreed with Patten LJ on the construction of the provisions but with Hughes LJ on the issue of the POEM. The Smallwoods' cross-appeal was therefore dismissed because their scheme did not succeed in avoiding the charge to tax.

HMRC's decision to give Mr Haworth a follower notice

28. Mr Haworth's chosen arrangements were also aimed at taking advantage of the combination of sections 86 and 77 of the TCGA and the application of the Convention to avoid any charge to capital gains tax on shares disposed of by a trust in which he held an interest. The arrangements were described by the judge at paras 8 to 31 of his judgment. Like the arrangements in *Smallwood*, the arrangements included the resignation of Jersey trustees in favour of trustees resident in Mauritius. The trust then disposed of shares realising a substantial gain and those Mauritian trustees were then replaced by UK resident trustees within the same fiscal year.

29. Mr Haworth disclosed the transactions on his tax return for the year ended 5 April 2001. His tax return was completed on the assumption that his chosen arrangements were effective to avoid any liability for capital gains tax on the disposal of the shares. HMRC opened an enquiry into that return on 20 January 2003. The enquiry was still going on when the judgment in *Smallwood* was handed down and when the follower notice regime in the FA 2014 came into effect. HMRC then turned their mind to whether *Smallwood* was a relevant ruling for the purposes of Mr Haworth's chosen arrangements as well as the arrangements of many other taxpayers who had used similar schemes.

30. The internal procedure adopted by HMRC to arrive at the decision whether to issue a follower notice to Mr Haworth was described in the witness statement of Julie Elsey. She had been the Senior Responsible Officer at HMRC for the implementation of the follower notice regime. When the follower notice regime came into operation, HMRC set up a panel of officers called the Workflow Governance Group ("WFGG") to take the decisions as to whether to issue a notice in each case. The panel was made up of officers of senior grades representing technical, operational and policy teams within HMRC including HMRC's Solicitors Office. The WFGG would not take a decision unless someone of senior civil service grade was present. It operated by considering submissions initially prepared by the compliance team responsible for the relevant enquiry working together with officers in counter avoidance, the relevant technical specialists and HMRC's Solicitor's Office, as appropriate.

31. The first group of taxpayers who were possible followers from *Smallwood* were presented in a submission considered by the WFGG at a meeting on 27 August 2014. By this time HMRC had identified what became known as "the *Smallwood* pointers". These were the indicators which HMRC considered had been highlighted by Hughes LJ in *Smallwood* and which, if present in the case of a later taxpayer, would be likely to defeat an appeal in his case. The pointers were taken from para 70 of Hughes LJ's judgment in *Smallwood* and provided a template for comparing the circumstances of the taxpayer subject to the enquiry with the circumstances of the taxpayer in *Smallwood*. The seven pointers were:

a. the wording of the "place of management" test in the double taxation treaty relied on by the taxpayer was the same as the wording in the Convention;

b. the taxpayer was a UK resident;

c. the scheme or relevant arrangements had been devised in the UK;

d. the steps taken in the scheme were carefully orchestrated throughout from the UK;

e. it was integral to the scheme that the trust should be exported to the overseas territory for a brief temporary period only;

f. it was integral to the scheme that the trust would then be returned within the fiscal year to the United Kingdom; and

g. the arrangements were implemented in a way which integrated these features.

32. The submission to the WFGG considered on 27 August 2014 described the aim of the tax arrangements and said:

> "The Smallwood reasoning applies to those who have used the same methodology to escape CGT on disposals. Under the [Double Taxation Convention] article the 'place of effective management' [POEM] of the trust determined if for the period of the disposal(s) the trust was resident in Mauritius (which has no CGT) or in the UK which has. The Court of Appeal upheld the tribunal's purposive approach in deciding that the POEM remained in the UK because the POEM was the inevitable consequence of the tax scheme."

33. The submission then summarised the view of the Solicitor's Office that there was "a high factual content" in the *Smallwood* decision which did not fit as neatly into the follower notice regime as some. The advice was "In another case, a Tribunal on balance is likely to find similarly" if the seven pointers were present. The advice was taken to mean that if those factors were present in the chosen arrangements of a given taxpayer, then the Solicitors supported the issue of a follower notice to that taxpayer.

34. Ms Elsey's evidence was that having read the submission with respect to the first tranche of *Smallwood* follower notices in August 2014, and having read *Smallwood* herself, she saw no reason to disagree with the analysis that if the seven features derived from para 70 of Hughes LJ's judgment were present, the ruling "would be likely to defeat an appeal in a corresponding case".

35. In fact, no follower notices were issued relying on *Smallwood* until May 2015. At a meeting on 8 May 2015, approval was given by the WFGG to issue follower notices in 11 cases, not including Mr Haworth.

36. Two further cases were considered by the WFGG at a meeting on 6 November 2015. At that meeting a detailed submission was put forward giving a legal and technical analysis of the *Smallwood* case ("the November Submission"). The November Submission went through the different conditions in section 204, as they applied to the two taxpayers under consideration at that meeting. It stated that the majority in the Court of Appeal had agreed that the conclusion of the POEM in the UK was a finding of fact:

> "6.18 Hughes LJ put the POEM as the inevitable consequence of the tax scheme, the decisions for and direction of which was orchestrated from the UK [CoA decision para 70].
>
> *[para 70 of Smallwood then set out]*
>
> 6.19 Smallwood failed as a scheme as the Court of Appeal were content that the Tribunal was entitled on the facts to reach their conclusion that the '*place of effective management*' of the trust in the test in the UK/Mauritius DTA was in the UK as a result of the planned operation of the tax scheme.
>
> 6.20 Advice from Solicitor's Office is that in another case a Tribunal is likely to find similarly, if the following facts were present: …"

37. The November Submission then set out the seven pointers and stated that the cases before the WFGG satisfied all those conditions.

38. The WFGG approved the issue of the two follower notices. The WFGG also agreed a simplified process for further submissions concerning the issue of follower notices relying on *Smallwood* whereby the later submissions to the WFGG could

incorporate the terms of the November Submission rather than repeating its explanation and analysis.

39. A further tranche of 11 *Smallwood* follower notices, including that of Mr Haworth was considered and approved by the WFGG on 13 May 2016 using the simplified process. The submission made to the WFGG at that meeting referred to and incorporated the analysis in the November Submission and confirmed that all the cases recommended for the issue of follower notices satisfied the terms of that submission. The submission was accompanied by a spreadsheet for each taxpayer under consideration, listing the documents on file as regards his tax arrangements and noting which of them demonstrated that a particular pointer was present. The WFGG accepted the submission that Mr Haworth's case included all the seven *Smallwood* pointers. A number of other taxpayers were also considered at that meeting but it was decided not to issue follower notices in their case.

40. A follower notice was issued to Mr Haworth on 24 June 2016. The notice set out the four conditions from section 204 FA 2014 and stated that the trust of which Mr Haworth was settlor used a similar scheme to that used in *Smallwood*. The notice described the decision in *Smallwood*, setting out the seven pointers and then stated:

> "Corresponding reasoning applies to the circumstances and implementation of the tax arrangements used by you or on your behalf."

41. An accelerated payment notice was also issued to Mr Haworth on 24 June 2016, stating the amount due to be £8,786,288.40. Mr Haworth made representations pursuant to section 207 FA 2014 in September 2016, but the follower notice was upheld by HMRC on review on 12 December 2016. Mr Haworth did not take the corrective action required by the follower notice and did not make the accelerated payment.

42. A closure notice was issued to Mr Haworth on 31 October 2016 bringing the enquiry into his tax return to an end and amending it to include capital gains of £21,965,721 on which there was an additional charge to capital gains tax of £8,786,288.40. Mr Haworth has appealed to the First-tier Tribunal against that notice, asserting that in his case the POEM of the trust was Mauritius. We were told that the hearing took place over ten days and that the decision of the tribunal is awaited.

43. HMRC did not in fact impose a penalty on Mr Haworth within the time limit prescribed by the FA 2014. He did not therefore have the opportunity to challenge the follower notice using the procedure set out in section 214.

The issues in the appeal

44. It has been common ground between Mr Haworth and HMRC from the start of the proceedings that Conditions A, B and D in section 204 FA 2014 are satisfied here. It is also agreed, as regards Condition C, that the *Smallwood* ruling relates to tax arrangements within the meaning of section 201(3) and that it is a final ruling for the purposes of section 205(3)(c).

45. The issues raised in HMRC's notice of appeal and Mr Haworth's respondent's form can be summarised as follows.

46. The first issue is raised by Ground 1 of HMRC's notice of appeal. It concerns the degree of certainty that HMRC must arrive at before they can show that they have formed the opinion required by Condition C, namely that the principles laid down or reasoning given in the *Smallwood* ruling if applied to Mr Haworth's tax arrangements would deny the tax advantage asserted by Mr Haworth. HMRC accept that the submissions put to the WFGG and the evidence of Julie Elsey show no more than that HMRC concluded that it was "likely" that the application of the *Smallwood* ruling would deny that advantage to Mr Haworth. The issue is whether that opinion satisfies Condition C.

47. The second issue raised by Grounds 2 and 3 of HMRC's notice of appeal concerns whether HMRC misdirected themselves about what was actually decided in *Smallwood* by overstating the conclusions reached by the Court of Appeal in that case. HMRC say that the judge found that there had been no misdirections. Even if there were, HMRC say they made no difference because their decision as regards Mr Haworth would have been the same if they had properly directed themselves.

48. Allied to Grounds 2 and 3 of HMRC's appeal is the third issue which is a point raised by Mr Haworth in his respondent's form. He argues that the finding in *Smallwood* about the POEM of the trust was a finding of fact only. As such, it does not form part of the "principles laid down or reasoning given" in the case and so cannot form the basis of the opinion required by Condition C.

49. The fourth issue is raised by Mr Haworth and concerns whether the follower notice failed to give an adequate explanation as required by section 206(b) and whether that failure invalidated the notice.

Issue 1: Did HMRC form the opinion required by Condition C?

50. Before the judge, Mr Haworth submitted that the threshold set by Condition C for a ruling to be "relevant" was only satisfied if the earlier ruling clearly determined the issue in the taxpayer's case. The regime was intended to apply only in cases where the taxpayer was spinning out his dispute with HMRC unreasonably because his claim to the tax advantage had no reasonable prospect of success and was hopeless in light of the earlier ruling. The judge rejected this argument at para 90 of his judgment. He held that if Parliament had wanted to set the threshold as high as Mr Haworth claimed, Parliament could have incorporated phrases such as "no reasonable prospect of success" or "hopeless" in the provisions. The legislation makes no reference to them.

51. The Court of Appeal disagreed with the judge. Newey LJ rejected HMRC's contention that Condition C required no more than that HMRC consider that the principles or reasoning are more likely than not to result in the advantage being denied. He considered, at para 36, that as a matter of language, the word "would" used in section 205(3)(b) meant that HMRC must be of the opinion that, should the point be tested, the principles or reasoning found in the ruling in question will deny the advantage. That demands more certainty than just a perception that there is a 51% chance of the advantage being denied. The more liberal construction proposed by HMRC would, Newey LJ noted, allow follower notices to be given in a surprisingly wide range of cases, whereas they were meant to be available to HMRC only in relatively exceptional circumstances, having regard to the serious consequences that flow from them. In order for Condition C to be satisfied, HMRC must have "a substantial degree of confidence in the outcome" and that had not been shown here: para 37.

52. Gross LJ agreed that the appeal should be allowed for the reasons given by Newey LJ. He added that, given the draconian nature of these powers, it was right that they should be carefully circumscribed, not least because of their impact on access to the courts and the rule of law. He held that the interpretation of sections 204 and 205 of the FA 2014 that he preferred "serves to confine the exercise of these powers to their proper sphere and in accordance with their true statutory purpose": para 66. Sir Timothy Lloyd agreed with both judgments.

Discussion

53. It is important first of all to clear up some confusion about the question being addressed here. The Court of Appeal phrased the question in terms of how firm HMRC's opinion needs to be. That may not be the most helpful way to look at it. HMRC might form the firm opinion that it is not at all clear whether the earlier ruling determines the point against the taxpayer or leaves the point open. That would

be no less an opinion formed by HMRC, though of course it would not be an opinion that satisfies Condition C. What matters is the content of the opinion. What HMRC have to be able to show is first that they formed an opinion and secondly that that opinion was that *Smallwood* was a relevant ruling for the purposes of Mr Haworth's tax arrangements.

54. Condition C makes clear that for a follower notice to be given the opinion must be formed by HMRC. This can be contrasted with other provisions in taxing statutes that require only that an officer of HMRC form a specified opinion: see for example sections 9C and section 29 of the Taxes Management Act 1970. HMRC interpreted Condition C, correctly in my view, as requiring them to set up a procedure whereby the decision whether to issue a follower notice was taken by a senior person within the organisation. The Government's consultation response document "Tackling marketed tax avoidance - summary of responses" published in March 2014 noted that HMRC was putting in place "strict internal governance and safeguards so that follower notices can only be issued following approval at senior level within the organisation, and will be scrutinised by staff other than those who have been working on the detail of the case". This was reflected in HMRC's published guidance "*Follower notices and accelerated payments*" (July 2015) which states, at para 1.19.1, that decisions over the giving of follower notices will be taken by a senior HMRC panel independent from the team who investigate the cases.

55. One can envisage a case in which a taxpayer challenges a follower notice on the basis that the notice was not based on an opinion formed by HMRC but only by an officer of HMRC. Such a challenge by Mr Haworth was rejected by the judge, see paras 95 onwards of his judgment where he held that the establishment of WFGG generally and the decision-making process in respect of Mr Haworth in particular did not involve any improper sub-delegation. Permission to appeal to the Court of Appeal against that finding was refused. Whatever opinion is formed by WFGG, whether the opinion is that the judicial ruling is relevant or that it is not relevant or they are not sure whether it is relevant or not, is an opinion formed by HMRC.

56. The second point is that this is not a rationality challenge in the usual sense of that term. The opinion formed by HMRC was that it was "likely" that *Smallwood* was a relevant ruling covering Mr Haworth's case. I do not understand Mr Haworth's challenge to be that no reasonable body could rationally have formed the opinion that it was so "likely". Rather his challenge is that that opinion is not good enough. There may be other cases in which HMRC purport to form an opinion that a relevant ruling will definitely deny a taxpayer an advantage and that taxpayer challenges on the basis that no reasonable body could have formed that opinion. That would be a true rationality challenge. The issue here is whether, HMRC having reasonably formed the opinion that it is likely that the application of *Smallwood* would deny Mr Haworth his asserted tax advantage, that is enough to establish that Condition C is satisfied.

57. In my judgment this turns on what is meant by "would" in section 205(3)(b) - how certain must it be, in HMRC's opinion, that *Smallwood* provides the answer in Mr Haworth's case before it can be said that HMRC's opinion is that *Smallwood* **would** deny Mr Haworth the advantage he asserts?

58. Mr Stone, appearing before us on behalf of HMRC, argued that the Court of Appeal was wrong to place what he described as a non-statutory, additional threshold or gloss on the wording of section 204(4) by holding that HMRC must have a high degree of confidence or certainty before it can form the opinion that the relevant ruling would deny the tax advantage. The Court must interpret section 205(3) having regard to its purpose and in a way which best gives effect to that purpose: see *UBS AG v Revenue and Customs Comrs* [2016] UKSC 13; [2016] 1 WLR 1005, para 61. That purpose has been summarised by Lewis J in *R (Broomfield) v Revenue and Customs Comrs* [2018] EWHC 1966 (Admin); [2019] 1 WLR 1353, para 80 cited by Gross LJ in the present case. I accept that the purpose of the regime is 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. That does not, however, provide much assistance in distinguishing more precisely between the circumstances which are intended to be caught by the regime and those which are not.

59. In determining where that line falls it is relevant, in my judgment, to take into account the severe consequences for the taxpayer of the giving of a notice. This Court's judgment in *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2)* [2017] UKSC 51; [2020] AC 869 is important here. In that case, the issue before the Court was whether the fees prescribed by the Lord Chancellor for bringing proceedings in the Employment Tribunal and the Employment Appeal Tribunal were unlawful because, among other reasons, they interfered unjustifiably with the right of access to justice. It was acknowledged by the Court in *UNISON* that a secondary objective of the introduction of fees was to deter the bringing of unmeritorious claims and to encourage earlier settlement: paras 57 and 58. Lord Reed, giving the leading judgment, referred to the constitutional principles to which the canons of statutory interpretation give effect. Those principles include the constitutional right of access to justice: para 65. Decisions of the courts and tribunals resolve points of genuine uncertainty as to the interpretation of legislation. That is of general importance because it forms the basis of advice given to others.

60. HMRC argue that the provisions of Part 4 of the FA 2014 are different from the fees order challenged in *UNISON*. A taxpayer who receives a follower notice can still assert his right to the tax advantage in the tribunal but is merely discouraged from doing so by the threat of the penalty. Moreover, HMRC point out, the Court in the present case is construing primary legislation which is properly focused on hindering only those cases which HMRC considers are unmeritorious from being

pursued, whereas the fees in *UNISON* hindered access to justice for both meritorious and hopeless cases alike.

61. Even taking those differences into account, the principle of statutory interpretation referred to in *UNISON* supports, in my view, the Court of Appeal's conclusion. There can be no doubt that the threat of the substantial penalty is intended firmly to discourage a taxpayer from pursuing his appeal. As Lord Reed said at para 80 of *UNISON*, where a statutory power authorises an intrusion upon the right of access to the courts, it must be interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question. Applying that principle, the use of the word "would" in the provision requires that HMRC must form the opinion that there is no scope for a reasonable person to disagree that the earlier ruling denies the taxpayer the advantage. Only then can they be said to have formed the opinion that the relevant ruling "would" deny the advantage. An opinion merely that is likely to do so is not sufficient.

62. I do not accept that this puts a gloss on the wording or imposes a non-statutory threshold as HMRC submitted. It gives full weight to the use of the word "would" as opposed, for example, to "might". I also reject HMRC's submission that construing the word "would" narrowly in this way somehow undermines the role of HMRC in forming the necessary opinion. Mr Stone referred us to the decision of the House of Lords in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153, considered in the Supreme Court in *R (Begum) v Special Immigration Appeals Commission (UN Special Rapporteur intervening)* [2021] UKSC 7; [2021] 2 WLR 556. I fully accept that the opinion required by the provisions is that of HMRC and not that of a reviewing court. I also recognise that HMRC's opinion should be accorded respect and is an evaluative one in the light of all the evidence, though it does not involve the same degree of prediction as those two earlier cases. That is no answer to the question of the degree of certainty which must be achieved by HMRC before Condition C is satisfied.

63. HMRC also argued that this construction of section 205(3) is inconsistent with the test that is applied by the First-tier Tribunal when determining an appeal under section 214(3)(b). I do not see that there is any anomaly created here. HMRC say correctly that in an appeal against a penalty under that provision, the FTT does not review the reasonableness or rationality of HMRC's opinion but determines for itself whether the earlier case is a relevant ruling or not. The tribunal must also apply the wording of section 205(3)(b) when arriving at their decision as to whether the judicial ruling is "relevant". Faced with such an appeal, the tribunal must, therefore, decide whether the ruling would deny the advantage, applying the same high threshold of certainty as applies to HMRC. The same test applies in both contexts in which the issue of whether the judicial ruling is relevant within the meaning of section 205(3) arises; both for HMRC's role in forming the opinion required by

section 204(4) and for the tribunal in determining whether the taxpayer's ground of appeal in section 214(3)(b) succeeds.

64. Whether HMRC can reasonably form the opinion that an earlier ruling is relevant to the taxpayer's asserted advantage will depend on a number of factors. First, it may depend on how fact sensitive the application of the relevant ruling is; in other words, 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. A follower notice may be issued at different stages of the investigation into the taxpayer's affairs. According to Condition A in section 204(2), it may be given as soon as a tax enquiry has been opened into the tax return made by P or it may be given during the course of a tax appeal. If the application of the earlier ruling is very fact dependent, then it may be more difficult for HMRC to form the opinion that the relevant ruling would deny the advantage where HMRC is considering Condition C at the earlier stage. If the follower notice is being considered when the tax appeal is already underway it may be clearer whether the fact patterns are sufficiently similar.

65. Secondly, the relevance of the earlier ruling may turn on HMRC's rejection of the taxpayer's evidence as being untruthful. HMRC will have to consider carefully whether it is satisfied that the untruthfulness of those factual assertions is so clear that it can reasonably form the opinion that the earlier ruling is relevant, despite that contrary evidence.

66. Other cases may be less fact sensitive, for example where the taxpayer has entered into the same mass marketed tax avoidance scheme as the taxpayer in the earlier ruling so that the provisions applicable in his case are identical to those held to be ineffective by the earlier ruling. If it is clear that there is no material difference between the chosen arrangements and the arrangements considered in the earlier ruling, it will be easier in such a case for HMRC to form the opinion that Condition C is satisfied.

67. Thirdly, HMRC will need to consider the legal arguments put forward by the taxpayer. The taxpayer may rely on an argument that was not raised in the earlier ruling. This is what happened in *R (Locke) v Revenue and Customs Comrs* [2019] EWCA Civ 1909; [2020] 1 All ER 459; [2019] STC 2543. In that case, the taxpayer Mr Locke relied on a different statutory provision as entitling him to the tax advantage he asserted as compared to the statutory provision that had been considered and rejected in the earlier case on which HMRC sought to rely as the relevant ruling. The novel argument he made had not been put forward by the other taxpayers who had entered into the same arrangements as Mr Locke. It had not therefore been determined by the earlier ruling so that earlier ruling did not satisfy Condition C. A similar situation might arise where the earlier ruling was based on a concession by a party to those proceedings as to some aspect of the legal framework,

but the taxpayer whose asserted tax advantage is being considered has made clear that he does not make that same concession and wishes to argue the point.

68. Fourthly, HMRC should also consider the nature of the earlier ruling. As Mr Stone pointed out, a ruling by the FTT can be a relevant ruling for the purposes of Condition C even though it has no precedential value. However, a ruling arrived at after a hearing where, for example, the taxpayer did not appear or was not legally represented or where the reasoning in the decision is brief or unclear is less likely to be capable of forming the basis for the necessary opinion required in Condition C.

69. In the present case, Mr Stone fairly accepted that the evidence presented by HMRC does not support the conclusion that HMRC's opinion was anything more than that it was likely that the ruling in *Smallwood* if applied would deny Mr Haworth his tax advantage. That was what was stated in the November Submission and in the evidence of Ms Elsey.

70. I would therefore dismiss the appeal on Ground 1.

Issue 2: did HMRC misdirect themselves in their analysis of *Smallwood*?

71. The Court of Appeal held that the November Submission contained a further misdirection by overstating the significance of Hughes LJ's judgment in *Smallwood*. The November submission stated that Hughes LJ had held that the UK POEM of the trust was the inevitable consequence of the tax scheme because the decisions of the trust whilst resident in Mauritius were orchestrated from the UK. The Court did not agree that Hughes LJ had gone that far and held that this was a material misdirection.

72. HMRC's second ground of appeal asserts that the Court of Appeal were wrong to make such a finding because the judge had found as a fact at para 88 of his judgment that HMRC had properly understood the legislation and the decision in *Smallwood*. That finding was arrived at as a result of a comprehensive review following a three-day hearing that involved a large volume of documentary evidence only a small proportion of which was before the Court of Appeal. There was no basis, HMRC contend, on which the Court of Appeal could properly interfere with that finding.

73. I cannot accept this criticism of the Court of Appeal's judgment. The judge set out his description of the materials on which HMRC formed its opinion in paras 36 onwards. He states that at some point following the handing down of *Smallwood*, HMRC's Solicitor's Office gave advice that in another case the tribunal would reach a similar result having regard to the *Smallwood* pointers. He focused on the

November Submission and the emphasis on whether arrangements in the cases under consideration contained all seven pointers. That was also the evidence of Ms Elsey. He then described the subsequent submissions and the fact that HMRC had been unable to provide direct evidence about the completion of the factual review in Mr Haworth's case: paras 47-48. HMRC were able only to say that a satisfactory review must have been conducted otherwise the notice would not have been issued.

74. There is nothing in that careful account by the judge that suggests that he made a finding of fact that the opinion that HMRC formed in Mr Haworth's case was based on evidence that he had seen other than the submissions he described. The tenor of those submissions is that Hughes LJ found in *Smallwood* that the presence of the seven pointers inevitably led to the conclusion that the POEM of a trust was the UK. Further, the submissions stated and the WFGG proceeded on the basis that if those seven pointers were present in any subsequent case, that justified the issue of a follower notice.

75. That does overstate the conclusion of the Court in *Smallwood*. Hughes LJ did not decide that it was an inevitable consequence of a scheme which shared the *Smallwood* pointers that its POEM would be the UK and not Mauritius. All the members of the Court of Appeal accepted that the test was that set out in the Commentary on article 4(3) of the Model Convention. That Commentary states that "no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management". Although Hughes LJ summarised the findings of the Special Commissioners in para 70 of his judgment, he was not, in my view, listing those pointers as being necessary and sufficient to establish in any other case that the POEM of the trust is the UK. On the contrary, he referred to the full description of the primary facts found by the Special Commissioners as set out in the judgement of Patten LJ as supporting their finding that in Mr Smallwood's case, the POEM of their trust had been the UK.

76. I also consider the Court of Appeal were right to reject HMRC's contention that section 31(2A) of the Senior Courts Act 1981 applied to prevent the follower notice from being quashed. Section 31(2A) provides that the High Court must refuse relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. It is, as Newey LJ said, by no means self-evident that HMRC would have arrived at the same conclusion if the November Submission had not overstated the conclusions arrived at by Hughes LJ. In my view the proper course was to quash the follower notice. Grounds 2 and 3 of HMRC's appeal must therefore be dismissed.

Issue 3: whether the "reasoning given" in the ruling covers factual findings

77. It is convenient to deal at this point with Mr Haworth's submission that factual findings in a judgment do not form part of the principles laid down or reasoning given in a ruling for the purposes of Condition C. The judge and the Court of Appeal both rejected this contention, see paras 82 to 88 of the judgment at first instance and paras 31 to 34 of Newey LJ's judgment.

78. In my judgement they were right to do so. This submission misunderstands the nature of factual findings of this kind and their role in the precedential value of judicial decisions. There are many instances in the taxing statutes, and in other statutes too, where a provision applies to a particular thing and there is an issue about whether the thing in dispute falls within that provision or not. A classic example arose in *Clark (HM Inspector of Taxes) v Perks* [2001] EWCA Civ 1228. In that case the taxpayers were workers on a mobile oil-drilling rig and claimed an exemption for income tax for work performed abroad. This entitlement depended on whether they were employed as "seafarers" and that in turn depended on whether the oil rig was a "ship". Having analysed what the oil rig comprised and how it operated, the General Commissioners concluded that the oil rigs were "ships" so that the workers were "seafarers". On appeal by HMRC, Ferris J accepted that he was bound by the findings of primary fact made by the Commissioners about how the rigs were built and how they operated, but he held that the question whether they were "ships" was a question of law on which he was entitled to form his own view. He held that they were not ships.

79. The Court of Appeal disagreed, holding that the question whether the oil rigs were ships was a question of fact which the judge could only have interfered with on appeal on *Edwards v Bairstow* grounds. Once it had been decided that the word "ship" bore its ordinary meaning rather than some more bespoke meaning, "the application of that meaning to the facts of the particular case is a question of fact, not law." The decision was therefore for the Commissioners and not for the court, whether one was speaking of the findings of primary fact or of the inferences to be drawn from those facts: see para 33 of Carnwath LJ's judgment.

80. The principles laid down in and the reasoning given in *Clark v Perks* would mean that Mr Perks' colleagues working on the same oil rig were also seafarers entitled to the same exemption as Mr Perks and, further, that workers on other oil rigs that were not distinguishable (in the legal sense of that word) from the rigs as described in the judgment were also seafarers. Conversely, if it had been held that the oil rig was not a ship and Mr Perks was not a seafarer, his colleagues could not have sought to relitigate the same matter the next week, dismissing the precedential value of *Clark v Perks* as merely deciding that the General Commissioners had been entitled to conclude as a matter of fact that the rig was a ship. A later case might arise involving some other kind of seaborne structure or turning on the meaning of

the word "ship" in a different statutory provision. No doubt the party seeking to avoid the consequences of *Clark v Perks* would argue that the structure was materially different from the rigs in *Clark v Perks* or that the word "ship" must be construed differently to give effect to the intention of Parliament in that different context. The later court would then undertake the orthodox process of judicial reasoning to decide how relevant, if at all, the reasoning given in *Clark v Perks* was to the case before it.

81. I reject therefore Mr Goodfellow's submission that factual findings of this kind are not part of the reasoning given in the relevant ruling for the purposes of section 205(3)(b). That contention, if correct, would also create an anomalous position where the decision of the FTT might be a relevant ruling if it becomes a final ruling for the purposes of section 205(3)(c) but the reasoning in the decision could not be applied if the decision were upheld on appeal either because there was no *Edwards v Bairstow* challenge or where such a challenge failed. If an appellate judgment upholds the decision of the FTT, the FTT's reasoning to that extent becomes the reasoning given in the appellate judgment.

82. I also cannot accept Mr Goodfellow's submission that it makes any difference whether the appellate court, when rejecting an *Edwards v Bairstow* challenge, expresses its agreement with the conclusion of the fact-finding tribunal or states only that the fact-finding tribunal was entitled to reach that conclusion on the material before it. An example cited to us by the parties is the recent decision of this Court in *Uber BV v Aslam* [2021] UKSC 5; [2021] ICR 657. The issue there was summarised by Lord Leggatt (with whom the other members of the Court agreed) as whether an employment tribunal was entitled to find that Uber drivers worked under "workers' contracts". Lord Leggatt stressed at para 118 that it is firmly established that the question of whether work is performed by an individual as a worker is to be regarded as a question of fact to be determined by the first level tribunal. Absent a misdirection of law, that finding can only be impugned by an appellate court if it is shown that the tribunal could not reasonably have reached the conclusion under appeal. He held, at para 119, that on the basis of the facts found, the employment tribunal was entitled to find that the drivers were workers working for Uber under workers' contracts within the meaning of the statutory definition. He added that that was in his opinion, the only conclusion which the tribunal could reasonably have reached.

83. Mr Goodfellow submitted that that final sentence of Lord Leggatt's conclusion, endorsing the finding of the employment tribunal, would, in the present context make all the difference, effectively converting mere factual findings by the first instance tribunal into part of the reasoning given by the Supreme Court. I disagree. If *Uber v Aslam* had involved tax arrangements, the principles laid down or reasoning given in the Supreme Court's ruling would include the reasoning as to why the Uber drivers fell within the definition. That would be the case whether or

not the appellate court expressed its own agreement with the factual finding as Lord Leggatt did or stated only that the fact-finding tribunal had been entitled to make its findings, as Hughes LJ stated in *Smallwood*. I therefore consider that there is no merit in this first point made in the respondent's form.

Issue 4: the validity of the follower notice

84. Mr Haworth contends that HMRC did not give the explanation required by section 206 as to why *Smallwood* determined its case. The follower notice should at the very least have identified the key facts on which HMRC relied in forming their opinion in his individual case, in particular in determining the fact-sensitive issue of the POEM.

85. I can deal with this issue briefly since it cannot affect the outcome of the appeal. I agree with Newey LJ's conclusion that the follower notice was deficient. Having described the ruling in *Smallwood* in some detail including setting out the seven pointers, the notice then stated baldly that "Corresponding reasoning applies to the circumstances and implementation of the tax arrangements used by you or on your behalf." I would not want to encourage HMRC to send voluminous notices to taxpayers. But some more explanation as to why the corresponding reasoning applied to his arrangements should have been set out. This is required even though there may have been discussions between HMRC and Mr Haworth's advisers prior to the giving of the notice. The notice need not be lengthy, but it should have contained a description of the features of Mr Haworth's arrangements that in HMRC's opinion meant that *Smallwood* would deny him the tax advantage asserted.

86. Although the notice was defective, I agree with the Court of Appeal that on its true construction, section 206 does not provide that any defect in the notice will render it invalid and that the defects in the present case did not invalidate this notice.

Conclusion

87. I would therefore dismiss HMRC's appeal.