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Case Notes

Pitt v HMRC: follower notices, precedent and the "reasonable person"

(1) Introduction

HMRC may issue a follower notice where they consider that an earlier judicial ruling is "relevant", meaning that it would deny a tax advantage asserted by a taxpayer. The taxpayer may then be penalised for continuing to assert the advantage.

Follower notices were considered by the Supreme Court in *R. (on the application of Haworth) v Revenue and Customs Commissioners* (*Haworth*).[1] The court held that, to issue a follower notice, HMRC must form the opinion that there is no scope for a reasonable person to disagree that the earlier ruling denies the asserted advantage.[2]

In *Pitt v Revenue and Customs Commissioners* (*Pitt*),[3] HMRC had issued a follower notice, relying on *Audley v Revenue and Customs Commissioners* (*Audley*)[4] as the earlier ruling. The First-tier Tribunal (FTT) had dismissed the resulting appeals. On appeal to the Upper Tribunal (UT), the taxpayer argued that the FTT erred in comparing the "reconstituted" facts (meaning the evaluative conclusions and inferences drawn from the facts) of *Audley* with those of his case, and ought to have compared only the "primary" facts (meaning the facts from which the conclusions and inferences were drawn).

It is unsurprising that the UT dismissed the appeal. But the FTT and UT decisions are instructive. They suggest a difference in approach between the assessment of whether a judicial ruling is "relevant" for the purposes of the follower notice regime and the orthodox assessment of a ruling's precedential value. The UT also considered the use by the Supreme Court in *Haworth* of the phrase "reasonable person", providing welcome, albeit abbreviated, analysis.

(2) Legal framework

Follower notices are provided for in Pt 4 of the Finance Act 2014 (FA 2014).

Under s.204 FA 2014, HMRC may issue a follower notice to a person (P) in respect of a tax advantage said by P to arise from particular tax arrangements. Several conditions must be met. One of these is that "HMRC is of the opinion that there is a judicial ruling which is relevant to" the arrangements.

[1] *R. (on the application of Haworth) v Revenue and Customs Commissioners (Haworth)* [2021] UKSC 25; [2021] 1 W.L.R. 3521. For fuller discussions of *Haworth* and the follower notice regime, see Michael Blackwell, "Unreasonably Limiting Recourse to the Courts? R. (on the application of Haworth) v HMRC" (2022) 85(6) M.L.R. 1562–1575, 1563–64, and Hartley Foster, "R. (on the application of Haworth) v HMRC (Supreme Court): follow me, don't follow me" [2021] B.T.R 538–58, 539–540.

[2] *Haworth* [2021] UKSC 25 at [61].

[3] *Pitt v Revenue and Customs Commissioners (Pitt (FTT))* [2022] UKFTT 222 (TC); *Pitt v Revenue and Customs Commissioners (Pitt (UT))* [2024] UKUT 21 (TCC); [2024] S.T.C. 258.

[4] *Audley v Revenue and Customs Commissioners (Audley)* [2011] UKFTT 219 (TC); [2011] S.F.T.D. 597.

Under s.205(3) FA 2014, a judicial ruling (or the "earlier ruling") is "relevant" to the arrangements if, among other things, the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage in full or part.

In *Haworth*, the Supreme Court held in relation to the "relevance" condition that

> "… the use of the word 'would' in [s.205(3) FA 2014] 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."[5]

The court also set out factors going to whether HMRC can reasonably form such an opinion.[6]

On an appeal to the FTT under s.214 FA 2014, the FTT must apply this test for itself.[7] As discussed further below, factual findings are part of the "reasoning given" in a judicial ruling for the purposes of s.205 FA 2014.[8]

(3) Factual background

(a) Schedule 13 to the Finance Act 1996 (FA 1996)

The assertion of tax advantage in *Pitt* relied on Sch.13 FA 1996 as in force at the material time.[9] The Schedule made provision, for income tax purposes, about "relevant discounted securities" (RDS).[10]

Paragraph 2 of the Schedule made provision for determining losses sustained on the transfer or redemption of the RDS. Paragraph 8 made provision for where an RDS was transferred to a "connected person".[11]

Paragraph 8 provided that the amount that the acquirer receives on *transferring* the RDS to a connected party is deemed (and deemed to be the same amount as its market value). But the Schedule contained no deeming provision in respect of the amount paid on *acquiring* the RDS. The arrangements in *Audley* and *Pitt* sought to exploit this apparent asymmetry.

In 2002 (subsequent to the arrangements in *Audley* and *Pitt*), a new para.9A of the Schedule was enacted, providing expressly that such exploitation was not possible.[12]

[5] *Haworth* [2021] UKSC 25 at [61].
[6] *Haworth* [2021] UKSC 25 at [64]–[68].
[7] *Haworth* [2021] UKSC 25 at [63].
[8] *Haworth* [2021] UKSC 25 at [77]–[78].
[9] In force (a) when the transactions underlying the asserted tax advantage took place, and (b) for the tax year in which the tax advantage was asserted. See *Pitt (FTT))* [2022] UKFTT 222 (TC) at [38] and *Pitt (UT)* [2024] UKUT 21 (TCC) at [4].
[10] Finance Act 1996 (FA 1996) (as passed) s.102.
[11] As defined in Income and Corporation Taxes Act 1988 s.839.
[12] Finance Act 2002 s.104, with effect in relation to transfers on and after 26 March 2006. Discussed in *Pike v Revenue and Customs Commissioners (Pike)* [2011] UKFTT 289 (TC) at [76]–[78]; [2011] S.F.T.D. 830 and *Bretten v Revenue and Customs Commissioners (Bretten)* [2013] UKFTT 189 (TC) at [167]; [2013] S.F.T.D. 900.

(b) Audley litigation

One Mr Audley had transferred assets worth £2.05 million[13] to one trust settlement (of which connected parties were beneficiaries), received in exchange a loan note on terms such that it was valued at £35,700[14] (although the loan note recorded a £2.05 million issue price)[15] and gifted the loan note to another trust settlement (of which, again, connected parties were beneficiaries).[16] Relying on (among other matters) the apparent asymmetry in Sch.13 FA 1996,[17] Mr Audley claimed an income tax loss of £2,014,300 (the difference between the value of the assets transferred and the loan note's valuation).[18] HMRC disagreed.[19]

The issue on appeal to the FTT was what, for the purposes of para.2(2)(b) Sch.13 FA 1996, was the amount paid by Mr Audley in respect of his acquisition of the loan note.[20]

The FTT dismissed the appeal, applying Court of Appeal authority to the effect that the court is to assess a transaction against paras 1 to 3 of Sch.13 FA 1996 by reference to reality and not merely the transaction's form.[21] The FTT considered that the loan note had no commercial reality, due to the huge discrepancy between its terms and commercial terms.[22] It concluded that Mr Audley paid £35,700 to acquire the loan note and the loss on its subsequent transfer was therefore nil.[23]

(c) Mr Pitt's arrangements

Mr Pitt sought to exploit Sch.13 FA 1996 in much the same way.[24] HMRC issued a follower notice, requiring him to remove the claimed relief.[25] The notice referred to *Audley* as a judicial ruling that was "relevant" for the purposes of s.205(3) FA 2014.[26]

This led to appeals in respect of a closure notice effectively reducing the loss to nil[27] and in respect of a penalty for failing to remove the claimed relief (the "substantive appeal" and "penalty appeal" respectively).[28]

[13] Subject to a deferred completion provision in respect of some of the assets: *Audley* [2011] UKFTT 219 (TC) at [18]–[19].
[14] *Audley* [2011] UKFTT 219 (TC) at [28] and [85].
[15] *Audley* [2011] UKFTT 219 (TC) at [21].
[16] *Audley* [2011] UKFTT 219 (TC) at [22].
[17] *Audley* [2011] UKFTT 219 (TC) at [48]. The Schedule was in force in the same form as set out above.
[18] *Audley* [2011] UKFTT 219 (TC) at [1].
[19] *Audley* [2011] UKFTT 219 (TC) at [42].
[20] *Audley* [2011] UKFTT 219 (TC) at [36], [39] and [40]–[42].
[21] *Astall v Revenue and Customs Commissioners (Astall)* [2009] EWCA Civ 1010; [2010] S.T.C. 137, discussed in *Audley* [2011] UKFTT 219 (TC) at [79]–[81].
[22] *Audley* [2011] UKFTT 219 (TC) at [85].
[23] *Audley* [2011] UKFTT 219 (TC) at [90].
[24] For the key facts see *Pitt (FTT)* [2022] UKFTT 222 (TC) at [6]–[7], [10]–[11], [21]–[25], [27] and [37(8)].
[25] *Pitt (FTT)* [2022] UKFTT 222 (TC) at [29].
[26] *Pitt (FTT)* [2022] UKFTT 222 (TC) at [57(18)].
[27] *Pitt (FTT)* [2022] UKFTT 222 (TC) at [34].
[28] *Pitt (FTT)* [2022] UKFTT 222 (TC) at [35]–[36].

(4) FTT decision

The FTT dismissed both appeals. As to the penalty appeal, the FTT concluded that *Audley* was a relevant judicial ruling for the purposes of s.205(3) FA 2014.[29]

(5) Appeal to the UT

Mr Pitt appealed against the FTT's rejection of the penalty appeal. His basis was that the FTT failed, when identifying whether there were material differences of fact between Mr Audley's case and his, to distinguish "primary facts" from "reconstituted facts".[30] Reconstituted facts were, on his argument, "the evaluative conclusions or inferences which [the FTT] drew from the facts".[31] Such reconstituted facts were identified, on Mr Pitt's argument, through the FTT's application of the approach espoused in *WT Ramsay Ltd v Inland Revenue Commissioners* (*Ramsay*)[32] to Sch.13 FA 1996.[33] For example, the finding that the steps taken by Mr Pitt were an integrated whole was a finding of reconstituted fact.[34] Mr Pitt's argument was that the FTT should have straightforwardly compared the "primary facts" of each case,[35] and that on such a comparison, the facts were sufficiently different.[36] On his argument, the follower notice regime was targeted at chosen arrangements which used the same standardised documents as the taxpayer in the case in respect of which the earlier ruling was given.[37]

One of Mr Pitt's supporting arguments was that the test in *Haworth* was put in terms of what a "reasonable person" thought.[38] It followed, Mr Pitt argued, that the factual comparison ought to be capable of being undertaken straightforwardly.[39]

To address the concern that this approach would only permit follower notices to be issued where the previous judicial ruling arose on facts identical to those in question, Mr Pitt argued that a notice could properly be issued in "route-map" cases.[40] These were cases where the previous judicial ruling was expressed to apply more widely than the facts before the court.

(6) UT decision

The UT dismissed Mr Pitt's appeal. In its judgment, there was nothing in s.205(3)(b) FA 2014 or *Haworth* to suggest that consideration of reconstituted facts was not to form part of the "principles laid down, and reasoning given" in a judicial ruling.[41] There was no real distinction

[29] *Pitt (FTT)* [2022] UKFTT 222 (TC) at [163]–[165].
[30] A term originating from *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2002] EWCA Civ 1853; [2003] S.T.C. 66.
[31] *Pitt (UT)* [2024] UKUT 21 (TCC) at [40] and [42].
[32] *WT Ramsay Ltd v Inland Revenue Commissioners (Ramsay)* [1982] A.C. 300; [1981] S.T.C. 174 HL.
[33] *Pitt (UT)* [2024] UKUT 21 (TCC) at [6] and [41]. The approach espoused in *Ramsay* was summarised in *Berry v Revenue and Customs Commissioners* [2011] UKUT 81 (TCC); [2011] S.T.C. 1057 at [31].
[34] *Pitt (UT)* [2024] UKUT 21 (TCC) at [44].
[35] *Pitt (UT)* [2024] UKUT 21 (TCC) at [45].
[36] *Pitt (UT)* [2024] UKUT 21 (TCC) at [46].
[37] *Pitt (UT)* [2024] UKUT 21 (TCC) at [45].
[38] *Pitt (UT)* [2024] UKUT 21 (TCC) at [45].
[39] *Pitt (UT)* [2024] UKUT 21 (TCC) at [45].
[40] *Pitt (UT)* [2024] UKUT 21 (TCC) at [55].
[41] *Pitt (UT)* [2024] UKUT 21 (TCC) at [48].

between reconstituted facts and primary facts.[42] Instead, there was clear support in the authorities for treating inferences and conclusions drawn from the facts as part of the principles and reasoning of a ruling.[43]

As to the argument about the "reasonable person", the legislation required an assessment of which facts are material, so a straightforward factual comparison did not suffice; there was nothing in the legislation to suggest that it was confined to situations where the assessment was straightforward or that it was to be assumed that the taxpayer would undertake the analysis without specialist advice.[44] Further:

> "… 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 [s.205(3)(b) FA 2014]. 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."[45]

As to the argument about "route-map" cases, there was no support for this in the legislation or *Haworth*, and the principles and reasoning of a ruling could have an effect going beyond the facts at hand even if that effect is not expressly acknowledged.[46]

(7) Comment

(a) Assessment of "relevance" and assessment of precedential value

Haworth did not address comprehensively the extent to which the assessment of a judicial ruling's relevance for the purposes of the follower notice regime should be a different exercise to the orthodox assessment of the ruling's precedential value. Of course, the high standard of certainty expressed in *Haworth* suggests a departure from the orthodox assessment.[47] But there is nevertheless a lack of clarity in this regard. On the one hand, the four factors expressed as relevant to applying the high standard[48] might be read as providing for a sui generis approach because, for example, they do not refer expressly to the entirety of the principles relevant to the orthodox assessment of precedential value. On the other hand, the fourth factor (the "nature" of the judicial ruling, including for example whether the ruling is brief, unclear or arrived at after a hearing where the taxpayer did not appear)[49] could be said to encompass these principles. Further, when explaining that factual findings form part of the "reasoning given" in a judicial ruling for the

[42] *Pitt (UT)* [2024] UKUT 21 (TCC) at [49].
[43] *Pitt (UT)* [2024] UKUT 21 (TCC) at [50].
[44] *Pitt (UT)* [2024] UKUT 21 (TCC) at [52]–[53].
[45] *Pitt (UT)* [2024] UKUT 21 (TCC) at [54].
[46] *Pitt (UT)* [2024] UKUT 21 (TCC) at [55].
[47] *Haworth* [2021] UKSC 25 at [61].
[48] *Haworth* [2021] UKSC 25 at [64]–[68].
[49] *Haworth* [2021] UKSC 25 at [68].

purposes of the follower notice provisions, the court observed that certain factual findings have a "role in the precedential value of judicial decisions".[50]

The FTT's judgment in *Pitt* suggests a difference of approach in that the relevance of an earlier judicial ruling is, for the purposes of the follower notice regime, assessed without reference to the subsequent judicial treatment of that ruling. In its analysis of whether *Audley* was a relevant judicial ruling for the purposes of the follower notice regime, the FTT made no reference to the three subsequent judicial rulings which are consistent with the approach espoused in *Audley*: *Pike v Revenue and Customs Commissioners* (*Pike*),[51] *Bretten v Revenue and Customs Commissioners* (*Bretten*)[52] and *Andrew v Revenue and Customs Commissioners* (*Andrew*).[53] In each of these rulings, the taxpayer sought in materially similar ways to Mr Pitt and Mr Audley to generate a loss and in each the FTT held, applying materially the same approach as in *Audley*, that there was no loss (albeit that *Andrew* concerned the different but similar provisions for strips contained in para.14A of Sch.13).[54] In *Bretten*, the FTT referred expressly to *Audley* and treated it is indicative of the correct approach.[55] In *Pike*, the FTT also referred expressly to *Audley*, although the analysis was obiter and without the benefit of argument.[56]

By contrast, the FTT in *Pitt* referred to each of these three rulings when considering the substantive appeal. It observed that the approach that it preferred was consistent with them and with *Audley*.[57]

This difference of approach was raised before the UT. It was argued for Mr Pitt that there were grounds to question whether the relevance of *Audley* (for the purposes of the penalty appeal) was sufficiently certain in circumstances where the FTT had dismissed the substantive appeal by reference to the principles and reasoning of authorities other than *Audley*. The UT dismissed the argument in the following terms, appearing to acknowledge the validity of such a difference in approach:

> "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."[58]

[50] *Haworth* [2021] UKSC 25 at [78].
[51] *Pike* [2011] UKFTT 289 (TC).
[52] *Bretten* [2013] UKFTT 189 (TC).
[53] *Andrew v Revenue and Customs Commissioners (Andrew)* [2019] UKFTT 177 (TC); [2019] S.F.T.D. 714.
[54] *Andrew* [2019] UKFTT 177 (TC) at [110]–[124].
[55] *Bretten* [2013] UKFTT 189 (TC) at [98].
[56] *Pike* [2011] UKFTT 289 (TC) at [87]–[93].
[57] *Pitt (FTT)* [2022] UKFTT 222 (TC) at [132].
[58] *Pitt (UT)* [2024] UKUT 21 (TCC) at [57].

This description of the exercise of assessing relevance might not be helpful in all cases. Taken to its extreme, it would permit a ruling to be relevant for the purposes of the follower notice regime even if it had later been overruled. Further, considering the matter without reference to any extreme, the relevance of an earlier ruling might be better elucidated by, or not discoverable without, subsequent judicial treatment of it, in which it was for example clarified, given extended scope or preferred by a higher court to another ruling.[59]

The UT may have been influenced by the consistent reference in the follower notice legislation to "a" relevant judicial ruling.[60] It is not stated expressly in this legislation that there may be multiple such rulings. But, even where a follower notice refers to only one judicial ruling, the legislation does not preclude an analysis of the relevance of that ruling by reference to other rulings. It may be said that, because a ruling is relevant if it "would … deny" the asserted tax advantage, the legislation imports the orthodox inquiry as to precedential value.[61]

If relevance is to be assessed by reference to only one earlier ruling, a follower notice might in certain cases need to refer to the latest in a series of connected rulings to be upheld, the logic being that the latest ruling adopts the principles and reasoning given in the previous rulings. The Supreme Court in *Haworth* alluded to such logic when it observed that

> "[i]f an appellate judgment upholds the decision of the FTT, the FTT's reasoning to that extent becomes the reasoning given in the appellate judgment."[62]

But, on such an approach, the argument that the principles or reasoning contained in a single judicial ruling would deny a tax advantage might be strained where the legal proposition denying the tax advantage arises by way of principles and reasoning distributed across a series of rulings. An examination of a judicial ruling on its own may overlook other rulings that are necessary for a true understanding of its reasoning,[63] or at least of the strength of its precedential value.[64]

The UT could have dismissed Mr Pitt's argument on an alternative basis. The basis would be that *Pike*, *Bretten* and *Andrew* supported, rather than undermined, the relevance of Audley for the purposes of the follower notice regime.

(b) Grant of permission to appeal

Mr Pitt's appeal was formulated as a point of law.[65] The appeal concerned what approach to the treatment of facts was required by the law on follower notices.[66] The appeal did not concern the cogency of the FTT's inferences of fact, and thus did not need to overcome the threshold laid down in *Edwards (Inspector of Taxes) v Bairstow*.[67]

[59] Processes described, e.g. in Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1994), Ch.VII.
[60] Finance Act 2014 ss.204–206.
[61] Finance Act 2014 s.205(3)(b).
[62] *Haworth* [2021] UKSC 25 at [81].
[63] MacCormick, *Legal Reasoning and Legal Theory* (1994), p.218.
[64] MacCormick, *Legal Reasoning and Legal Theory* (1994), p.225.
[65] As required by the Tribunals, Courts and Enforcement Act 2007 s.11.
[66] As recognised in *Pitt (UT)* [2024] UKUT 21 (TCC) at [47].
[67] *Edwards (Inspector of Taxes) v Bairstow* [1956] A.C. 14; [1955] 3 W.L.R. 410 HL.

However, in light of the lack of merit in the appeal, it is doubtful whether it was appropriate for permission to appeal to be granted.

The appeal sought to sidestep what is trite: the principles and reasoning of a judicial ruling may be applicable in cases with different but analogous fact patterns, and the primary facts of the chosen arrangements and those with which the earlier ruling was concerned may be different in ways that could have no bearing on the applicable legal analysis. If the FTT were only permitted to consider the primary facts of an earlier ruling to determine its relevance, it would be difficult to see how the follower notice regime could operate.

Further, the Supreme Court in *Haworth* rejected the taxpayer's submission that factual findings in a judicial ruling do not form part of the principles laid down or reasoning given for the purposes of the follower notice regime.[68] In doing so, it gave the example of a finding that an oil rig is a "ship" for the purposes of a statutory provision (the question raised in *Clark (Inspector of Taxes) v Perks*)[69] as exemplifying how it is common that factual findings as to whether a "thing in dispute falls within [a] provision or not" are commonly part of the reasoning of judicial rulings concerning taxing statutes. The UT in *Pitt* recognised both that this is supportive of its conclusions and that there was at least a conceptual distinction between the inferential factual finding described in *Haworth* and those targeted by Mr Pitt's appeal.[70] The distinction is between a finding that a matrix of primary facts comes within the meaning of a legal provision (e.g. an oil rig is a "ship" for the purposes of the provision) and a finding that a matrix of primary facts gives rise to an evaluative conclusion which is relevant to determining whether the matrix comes within the meaning of a legal provision (e.g. a finding that a transaction formed part of a series of transactions which were a composite whole, which is relevant to whether the transaction comes within the meaning of the provision). The distinction ought to be recognised but does not rob the observations in *Haworth* of relevance to Mr Pitt's appeal. The latter kind of finding is an intermediate finding. The former kind is a product of findings of the latter kind.

Whispering Smith Ltd v Revenue and Customs Commissioners (*Whispering Smith*) is also noteworthy (though it was not mentioned by the UT in *Pitt*), both on its own terms and for its discussion of *Haworth*.[71] In *Whispering Smith*, the FTT rejected the taxpayer's argument that *Haworth* implicitly laid down a requirement that the factual matrix of the chosen arrangements and those with which the earlier ruling was concerned must be materially identical.[72] In doing so the FTT noted that one of the factors set out in *Haworth* was how fact-sensitive the earlier ruling is. This observation is prescient. *Haworth* envisaged that an earlier ruling may have varying degrees of fact-sensitivity.[73] By contrast, the premise of Mr Pitt's appeal was that any earlier ruling is fact-sensitive to a very high degree (i.e. that its reasoning is only applicable to the primary facts of the case on which the ruling was given).

The idea of the "route-map case" could not rescue the appeal. Although the UT's judgment does not record this, *UBS AG v Revenue and Customs Commissioners* (*UBS*)[74] was given, in the

[68] *Haworth* [2021] UKSC 25 at [77]–[81].
[69] *Clark (Inspector of Taxes) v Perks* [2001] EWCA Civ 1228 [2001] S.T.C. 1254.
[70] *Pitt (UT)* [2024] UKUT 21 (TCC) at [50].
[71] *Whispering Smith Ltd v Revenue and Customs Commissioners* [2022] UKFTT 165 (TC) at [107]; [2022] S.T.I. 859.
[72] *Whispering Smith Ltd v HMRC* [2022] UKFTT 165 (TC) at [108].
[73] *Haworth* [2021] UKSC 25 at [64].
[74] *UBS AG v Revenue and Customs Commissioners (UBS)* [2016] UKSC 13; [2016] S.T.C. 934.

course of argument for Mr Pitt, as an example of such a case. *UBS* does mention other similar cases and does describe the typical mechanisms of the type of scheme in question.[75] But, in a precedent-based system, no judgment can realistically be treated as giving an implicit indication of its own precedential value.

What remains of the possible justifications for the grant of permission is the use in *Haworth* of the phrase "reasonable person". This is considered under the subsequent sub-heading.

It bears note that the argument upon which Mr Pitt's appeal was based does not appear, from the FTT's judgment, to have been raised at first instance. Rather, part of Mr Pitt's argument before the FTT was to distinguish his case and Mr Audley's by reference to the facts in *Audley* as viewed realistically.[76] However, it is unsurprising that this was no bar to the grant of permission. A new point which is a point of law may be raised on appeal where it does not cause prejudice, it would not have required the proceedings at first-instance to operate differently had they been raised at first-instance, and the costs position can be protected.[77]

(c) "Reasonable person"

The UT's judgment appears to contain the first UT-level consideration of the use of the words "reasonable person" in *Haworth*. Its conclusion is welcome albeit confirmatory. There is indeed no indication in *Haworth* that the Supreme Court intended to include a "reasonable person" construct in its legal test. There is no mention by the court of those words other than in the passage setting the standard of certainty required of HMRC,[78] and no explanation of the kind one would expect if the court were attempting to impose such statutory gloss. Nevertheless, the inclusion of the words was unnecessary and risked confusion.

The UT's reasoning regarding the words "reasonable person" is abbreviated. It could be said in support of the UT's conclusion that there is nothing in the FA 2014 to suggest that Parliament intended HMRC (or the FTT) to consider a fictional reasonable person's assessment of the relevance of a previous judicial ruling. There is no purpose with which the perception of the fictional person might assist (unlike in other contexts, such as identification of apparent bias,[79] or implication of contractual terms).[80] Along similar lines, the UT noted that there was nothing in the FA 2014 to suggest an intention that the taxpayer be able to determine whether the earlier judicial ruling is relevant without specialist advice.[81] To this, it may be added that the definition of relevance in the legislation, and the *Haworth* factors, require a form of analysis that cannot be conducted without specialist legal advice.

Further, the characteristics of the "reasonable person" need not necessarily represent those of the ordinary lay taxpayer. As Lord Hoffman observed in *Adams v Bracknell Forest BC*, in

[75] *UBS* [2016] UKSC 13 at [2] and [25].
[76] *Pitt (FTT)* [2022] UKFTT 222 (TC) at [92].
[77] *Altrad Services Ltd (Formerly Cape Industrial Services Ltd)v Revenue and Customs Commissioners* [2023] EWCA Civ 474; [2023] S.T.C. 931 at [32]; *Boxmoor Construction Ltd v Revenue and Customs Commissioners* [2016] UKUT 91 (TCC); [2016] S.T.I. 522 at [24].
[78] *Haworth* [2021] UKSC 25 at [61].
[79] The "fair minded and informer" test espoused in *Porter v Magill* [2001] UKHL 67; [2002] 2 A.C. 357.
[80] The "officious bystander" test, summarised, e.g. in *Yoo Design Services Ltd v Iliv Realty Pte Ltd* [2021] EWCA Civ 560 at [51].
[81] *Pitt (UT)* [2024] UKUT 21 (TCC) at [53].

relation to s.14 of the Limitation Act 1980 (LA 1980), the degree of objectivity imported by the term "reasonable" may vary according to the assumptions made about the person whose conduct is in question, and these assumptions depend on the reasons why the law imports the objective standard.[82] This observation has been reflected in the case law on s.32 LA 1980 concerning whether a claimant could have discovered fraud, concealment or mistake with "reasonable diligence". The assumptions made about the reasonably diligent claimant have developed over time and in no linear fashion.[83]

Harmish Mehta[*]

[82] *Adams v Bracknell Forest BC* [2004] UKHL 29; [2005] 1 A.C. 76 at [33].
[83] *OT Computers Ltd (In Liquidation) v Infineon Technologies AG (OT Computers)* [2021] EWCA Civ 501; [2021] Q.B. 1183 at [28]–[42] (review of the authorities) and [45]–[61] (consideration of whether it is relevant to the objective analysis that the claimant was in liquidation at the material time).
[*] Pupil Barrister, Radcliffe Chambers. All views and errors are the writer's own.