Neutral Citation Number: [2018] EWHC 1966 (Admin)

Case No: CO/2656/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2018

Before:

THE HONOURABLE MR JUSTICE LEWIS

- -

Between:

THE QUEEN ON THE APPLICATION OF AILEEN MARIE BROOMFIELD & OTHERS	**Claimants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendants**

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- -

Mr Keith Gordon and Miss Ximena Montes Manzano (instructed by **Sharpe Pritchard LLP**) for the **Claimants**
Sir James Eadie QC, Mr Richard Vallat QC and Mr David Yates (instructed by **HMRC Solicitors Office**) for the **Defendants**

Hearing dates: 28 and 29 June 2018

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Approved Judgment

The Honourable Mr Justice Lewis :

INTRODUCTION

1. This is a claim brought by 342 claimants challenging notices, known as follower notices, and accelerated payment notices ("APN's") issued by the defendants, Her Majesty's Commissioners for Revenue and Customs, pursuant to Part 4 of the Finance Act 2014 ("the 2014 Act"). A follower notice requires a taxpayer to take corrective action to relinquish a particular tax advantage arising out of that taxpayer's tax arrangements. A taxpayer who fails to take corrective action to relinquish that advantage is liable to a penalty. An APN provides, in effect, that any disputed tax must be paid immediately.

2. In summary, the claimants entered into arrangements whereby they provided services through a partnership based in the Isle of Man to companies in the United Kingdom. The partnership paid part of its profits into trusts established by the claimants in the Isle of Man. Payments were then made by the trust to the claimants who were the beneficiaries under the trust. They claimed that the monies received were exempt from income tax under the United Kingdom-Isle of Man double taxation arrangements. The defendants disagreed and sought to assess the claimants to income tax on the monies. The claimants appealed to the First-tier Tribunal.

3. The First-tier Tribunal had already ruled, in a case involving similar arrangements to the present, that the monies received were income which was subject to income tax. The claimants contend in their appeal to the First-tier Tribunal that that ruling was incorrect and that the monies they received under similar arrangements should be treated as exempt under the relevant double taxation arrangement and so not subject to income tax. They also contend that if the money was income then they were in fact employees and they are to be treated as if income tax had already been deducted and the defendant ought to seek to recover any tax due from their employers.

4. The defendants gave the claimants follower notices as they were of the opinion that there was a judicial ruling relevant to the claimants' tax arrangements which, if applied to the arrangements, would mean that the particular tax advantage did not arise. The claimants contend that, on a proper construction of the relevant statutory provisions, they cannot be given follower notices or APNs in circumstances in which their appeal is brought on two grounds only one of which is dealt with by the judicial ruling on which the defendants rely.

5. The claimants also contend that the follower notices and APNs are invalid as there were breaches of sections 206 and 221 of the 2014 Act as the notices did not correctly state the number of days for the making of representations objecting to the notices or, in the case of follower notices, for taking corrective action. They further contend that the follower notices failed to describe correctly the corrective action that the defendants now say the claimant must take, namely abandoning the argument that the monies received are not income and so are exempt from income taxation under the double taxation arrangements (but not abandoning their other ground of appeal before the tribunal, namely that, if the monies are income, then the claimants are to be treated as if income tax had already been deducted). If the follower notices are invalid, then they say that the APNs are also invalid. Further, three claimants (Mr Bennett, Mr

Cary and Mr Cibulskis) claim that they were not given the follower notices by the relevant date and contend that the notices are invalid in their cases for that reason.

6. The defendants initially took the position that the claimants had to abandon all aspects of their appeal before the tribunal. They now contend that the relevant provisions of the 2014 Act permit the giving of a follower notice requiring the claimants to relinquish the claim that the monies are not exempt from income tax and so are not subject to tax under the relevant double taxation arrangements and to abandon that argument in their appeal or be liable for a penalty although they recognise that the claimants may maintain their other ground of appeal without being liable to a penalty. They contend that any errors in relation to the time period for making representations or the taking of corrective action do not render the relevant notices invalid. They contend that the follower notices do in fact accurately describe the corrective action or, in any event, a remedy ought to be refused as a matter of discretion.

THE FACTS

The Arrangements

7. The claim for judicial review was argued by reference to the facts of Ms Aileen Broomfield's case as her circumstances are said to be typical of the arrangements made by all 342 claimants. In broad terms, Ms Broomfield established a trust in the Isle of Man of which she was the beneficiary. The trustee was resident in the Isle of Man. The trustee became a partner in a partnership also based in the Isle of Man. Ms Broomfield entered into a contract with the partnership to provide services and was paid an annual fee of, at least initially, £15,000. She was not a member of the partnership.

8. The partnership itself also entered into a contract with a recruitment company to supply the services provided by Ms Broomfield to other companies. By a series of contracts, Ms Broomfield's services were provided over time to different companies in the United Kingdom. Monies paid by those companies were ultimately paid to the partnership. At least some of the partnership's profits were paid into the trust fund of which Ms Broomfield was the beneficiary. Payments were made from that trust fund to Ms Broomfield. The scheme was intended to operate in a way that the fee of £15,000 would be subject to income tax and national insurance contributions but that the payments from the trust to Ms Broomfield would be exempt from income tax under the terms of the UK-Isle of Man double taxation arrangements.

9. Ms Broomfield completed annual tax returns for the tax years 2001/2002 to 2007/2008 inclusive. The return for the 2001/2002 tax year recorded as foreign income (the payments from the Isle of Man trust) a sum of £22,450. The tax return claimed an exemption in relation to that sum on the basis that income tax was not payable under the terms of the double taxation treaty between the United Kingdom and the Isle of Man. The claim for exemption included within the tax return was expressed in these words:

> "Profits of IOM Trust
>
> Claim for exemption under Article 3 of the UK-IOM DTA".

10. Similar returns were made in subsequent years. In 2002/2003, for example, profits of £100,966.64 were shown and again a claim for exemption from income tax under the double taxation arrangements was made.

The Changes in the Law

11. Earlier court decisions had established that partnership income was exempt from income tax under the double taxation arrangements. Legislation was enacted to alter that position and to provide that partnership income was not exempt. However, trusts were structured in such a way that the individual recipients of payments from trusts were not partners and so it was contended that the payments to these individuals were not partnership income and remained exempt from income tax. In 2008, the Finance Act 2008 ("the 2008 Act") was enacted to counteract this argument. It did so by providing that a "member of a firm" included any person entitled to a share of the income of the firm. On this basis beneficiaries under the trust who were entitled to a share of the profits from the partnership were treated as members of the firm and payments from the trust would be treated as the partnership income of the beneficiary. That income would not be exempt from income tax under the double taxation arrangements. A claim for judicial review, alleging that the legislation contravened Article 1 of the First Protocol to the European Convention on Human Rights as it involved retrospective taxation, was unsuccessful: see *R (Huitson) v Revenue and Customs Commissioners* [2011] EWCA Civ 893, [2012] Q.B. 489.

The Ruling of the First-tier Tribunal in Huitson

12. The claimant in that case then appealed to the First-tier Tribunal against the assessment in his case, contending that, on a proper interpretation, the relevant statutory provision (now section 858 of the 2008 Act) did not in fact apply to the payments from the trust. The sole issue was whether the profits of the partnership constituted "income" within the meaning of section 858(4) of the 2008 Act. The First-tier Tribunal held that the share of a profit of a partnership, in the context of a beneficiary's entitlement to trust income comprising the trust's share of the profits of a partnership of which it was a partner, was income and so liable to tax: see *Huitson v Revenue and Customs Commissioners* [2015] UKFTT 448 (TC) especially at paragraphs 88 to 90.

13. Mr Huitson was granted permission to appeal against that ruling. However, he failed to enter the relevant notice of appeal and, on 21 January 2017, that ruling became final and not subject to any further appeal.

The Appeals in the Present Case

14. In 2004, the defendants served notices of enquiry on Ms Broomfield enquiring into her tax returns for 2001/2002 and 2002/2003. Notices of enquiry were also served in relation to the subsequent years of assessment. On 27 February 2009, the defendants served a closure notice under section 28A of the Taxes Management 1970 ("TMA") in relation to 2001/2002 year. That stated that the defendants' conclusion was that "Foreign income assessable from Isle of Man Trust is £22,450 and no exemption is due. This results in additional tax being due and payable as detailed below". The amounts chargeable to income tax were then set out. Further closure notices in materially similar terms were sent in relation to each of the years from 2002/2003 to

2006/2007 inclusive. The amounts of income involved ranged from £22,450 in 2001/2002 to £147,200 in 2006/2007. The total amount of payments involved was in excess of £590,000. A similar notice was served in 2011 in relation to the 2007/2008 year". That stated the defendants' conclusions as "the income in the trust, which you claimed as exempt, is chargeable as partnership income tax and Class 4 NIC". A further sum was stated to be due.

15. Section 31 TMA provides for a right of appeal against, amongst other things, any conclusions stated in, or amendment made by, a closure notice. The notice of appeal must be made in writing and the notice of appeal "must specify the grounds of appeal" (see section 31A(5) TMA). Ms Broomfield, and the other claimants, appealed to the defendant and in due course notified their appeals to the First-tier Tribunal. There are two notices of appeals, representing two groups of appellants. The notices of appeal for each group are in materially similar terms. One of the two notices of appeal states at paragraph 4 that the appellants:

> "appeal on two alternative bases:
>
> a. that the grounds put forward by Mr Huitson are correct ("Ground 1"); or
>
> b. that until August 2007 the Appellants were employees of a UK company, and all of the income tax arising from their work should have been subject to PAYE and Class 1 NICs ("Ground 2") after that date they were within the agency rules at Income (Earnings and Pensions) Act 2003, with the result that all the income arising from their work should properly have been subject to PAYE and Class 1 NIC ("Ground 2A").

16. In other words, the first ground of appeal sought to argue that the First-tier Tribunal was incorrect in its decision in *Huitson.* The claimants want to argue that, despite the ruling in *Huitson*, the payments to them as beneficiaries of a trust did not amount to income within the meaning of section 858(4) of the 2008 Act and so the payments were still exempt from taxation under the double taxation arrangements. The second ground contended, in effect, that if that was wrong, and if the payments were income, then the claimants were to be treated as employees for the purposes of income under section 44 of the Income Tax (Earnings and Pensions) Act 2003. Consequently, tax should have been deducted from their income by their employers. In those circumstances, they would be treated as if income tax had already been deducted from their earnings and no further income tax would be payable by reason of regulation 185 of the Income Tax (PAYE) Regulations 2003 ("the 2013 Regulations").

The Follower Notices and APNs

17. The defendants gave Ms Broomfield follower notices dated 25 November 2016 for each of the tax years in issue in her case, that is 2001/2002 to 2007/2008. Ms Broomfield received the notices on 30 November 2016. The notices identified the relevant scheme. They stated that the conditions which needed to be met before a follower notice could be given, referred to in the legislation as Conditions A, B, C and D, had been meet. They identified the final relevant judicial ruling in the following terms:

> **"The final judicial ruling relevant to the chosen arrangements**

> On 3rd September 2015 the First Tier Tribunal (F-t-T) gave a ruling ("decision") in the case of *Robert Huitson v The Commissioners for HM Revenue & Customs [2015] UKFTT 448 (TC) ("Huitson v HMRC").* The decision was that the arrangements used in that case did not achieve the intended tax result. The decision has not been appealed and is now final.
>
> You have used a similar scheme. We consider that your scheme involves tax arrangements as you participated in transactions to provide services through an Isle of Man/Channel Islands partnership and trust which you claimed resulted in no income tax or national insurance due on the profits arising from those services.
>
> We consider that the decision in *Huitson v HMRC* applies to your tax arrangements as the principles laid down or the reasoning given in that decision would, if applied to your arrangements, deny the asserted advantage. In particular:
>
> - you established a trust of which you were the beneficiary and entitled to its income,
> - the trust became a partner in an Isle of Man/Channel Islands partnership which entered into a contract for services with you for an annual fee,
> - you received a share of the partnership income as a beneficiary under the trust,
> - in the year ended 5th April 2002 you claimed relief in respect of income tax and Class 4 National Insurance Contributions (NIC's) in relation to the sums paid to a beneficiary under the trust on the basis that under the terms of the relevant Double Taxation Agreement, the partnership profits were exempt from tax in the UK and the income received from the trust's share of the partnership's profits was similarly exempt.
> - you claimed that the reference in s.858(4) ITTOIA 2005 to a share of income from a partnership did not include a share of partnership profits and resulted in a reduction in respect of income tax and Class 4 National Insurance Contributions in the year ended 5th April 2002 ["the asserted advantage"]."

18. The follower notices then set out parts of the decision in *Huitson*. They said that:

> "Applying the same reasoning and principles to the facts in your case results in all of the asserted advantage from the arrangements being denied and the profit share from the IoM partnership treated as income of the individual and therefore chargeable to income tax. Section 16(1) of the Social Security Contributions & Benefits Act 1992 applies the follower notice provisions of Part 4, FA 2014 to include Class 4 contributions. The legislation provides that Class 4 contributions are payable in the same

> manner as any income tax chargeable on the profits of a UK trade, profession or vocation. Consequently the above reasoning and principles apply equally to deny the asserted advantage in respect of Class 4 NIC's.
>
> This means that additional income tax and Class 4 National Insurance Contributions for the year ended 5th April 2002 are due as a result of denying your claim for exemption ("the denied advantage")."

19. The follower notices said that if Ms Broomfield did not take the necessary corrective action by 28 February 2017 she would be liable to pay a penalty under section 208 of the 2014 Act. It said that:

> " To take corrective action, you must:
> - **first step:**
> - take all necessary action to enter into a written agreement with us to relinquish the denied advantage.
>
> - **second step:**
> - tell us you have taken the first step
>
> - tell us the amount of the denied advantage and (where different) the additional amount has or will become due and payable in respect of tax by reason of the first step being taken."

20. The follower notices stated that if Ms Broomfield disagreed she could make written representations no later than 28 February 2017. They stated that if representations were made, and the follower notice was not withdrawn, then Ms Broomfield would have to take corrective action no later than 28 February 2017 or "30 days after the date on which we tell you of our decision in respect of your representations" whichever was later. The defendant also gave APN's to Ms Broomfield for each of the tax years 2001/2002 to 2007/2008 identifying the amount of tax due for each year.

21. Ms Broomfield made representations to the defendants and provided a copy of the grounds of appeal in her case to the First-tier Tribunal. Ms Broomfield stated, amongst other things, that the primary ground of appeal was that any income tax due was payable by a different person (the employer) not her and so the arrangements had not lead to any tax advantage to her. Consequently, she said, one of the conditions for issuing a follower notice, Condition B, was not satisfied. Ms Broomfield also contended that the application of the ruling in *Huitson* to her case would not lead to the same result as the appeal was proceeding on grounds unrelated to *Huitson*. The defendants considered the representations but decided to confirm the follower notices.

22. None of the 342 claimants took corrective action within the prescribed period. They maintained their appeals to the First-tier Tribunal on both grounds. All, bar possibly a small number of claimants, are continuing their appeals. Those appeals have not yet been heard. In the meantime, Ms Broomfield, and the other claimants, brought a claim for judicial review of the follower notices and APNs issued in their cases.

The Arrangements for the Giving of Notices

23. The defendants have described their arrangements for giving follower notices and APNs. In the case of notices from one centre (Redruth), the date on the notice was the date on which it was sent from that centre. In the case of three other centres, the follower notices were dated two working days after the date on which they were physically placed in the tray for posting. The mail was then taken from all centres to a central mailing unit and would arrive there the next day. Notices were then posted to the addressee (mail for addresses with an address abroad were sent from Heathrow also within 24 hours of dispatch from the relevant centre). Mail was expected to be delivered within four working days for addresses within the United Kingdom or within five to seven days for destinations abroad.

24. More significantly, in all cases, the notices set out a date by which representations had to be made (if the taxpayer disputed the notice) or for taking corrective action. That date was calculated as being 90 days from the date on the notice plus an expected four working days for the follower notice to be served on the addressee. The practices governing the date placed on the follower notice, and the arrangements for mailing, are likely to mean that in some cases the periods for making representations, or taking corrective action, were either less than the 90 days prescribed by the legislation or in some cases more. By way of example, if a notice was sent from Redruth, the notice would bear the date it was sent from that centre. The date specified in the notice for making representations or the taking of corrective action would have been calculated as 90 days from a date four working days after the date on the notice. It would take one working day for the notice to arrive at the central mailing unit and could take four working days to arrive at the address to which it was sent, i.e. a total of 5 days from being sent from Redruth. The date specified for representations or taking corrective action would then give one day less than the 90 days that the legislation specified. Furthermore, notices sent abroad might take up to seven working days, meaning that, even allowing for the additional time built into the calculation of the date for responding, they may still have specified a date which was one or two days less than the 90 days prescribed by the legislation for responding.

25. Conversely, some notices sent within the United Kingdom arrived within two working days. The date specified for responding would have been calculated, however, on the assumption that it would take four working days to arrive. The notice would, therefore, have specified a date for making representations or taking action which was longer than the 90 day period prescribed in the legislation. By way of example, if the notice came from one of the three centres (not Redruth), the date on the notice would be a date two working days after the date the notice was placed in the tray to be taken to the central mailing unit. The date for responding would have been calculated by using a date four working days later. The date would have been calculated by assuming that there would be six days between the notice being placed in the tray for posting and the notice arriving at the address on the notice. There would be a difference of 96 days between the date on the notice and the date specified for responding. The notice, however, would take one day to arrive at the central mailing unit and could arrive at the recipient's address within a further two or three days. The date specified for responding or taking corrective action could be up to two or even three days more than the 90 days prescribed by the legislation.

26. Further, the follower notices stated that if representations were made but the defendants, after considering them, did not withdraw them, then the taxpayer had to

take corrective action within 30 days "after" the date on which the taxpayer was told of the decision. In fact, the legislation requires action to be taken within a 30 day period "beginning" with the date on which the taxpayer was told. In other words, the period should include the day when the taxpayer is told of the decision but the follower notice stated that it did not. The follower notices, therefore, misstates (by one day) the period for taking corrective action after the making of representations.

27. The defendants accept that it is likely notices in the case of at least some claimants would not have given the correct periods required by the legislation described below for the making of representations or taking corrective action.

28. In addition, a follower notice cannot be given after the end of a 12 month period beginning with the date when the judicial ruling became final. In the present case, it is agreed that the decision in *Huitson* became final on 21 January 2016 and any notice had to be given on or before the 20 January 2017. In the case of 8 claimants, permission was granted on the ground that it was arguable that they had not been given the notice by the relevant date as it was said that they had not received it before that date. In the case of four claimants, Mr Childow, Mr Tang, Mr Van Giessen and Mr Ware, the defendants accept this and steps have been or will be taken to withdraw the notice in their case. In the case of a fifth, Ms Kyriacou, that claimant no longer pursues this ground. Three others, Mr Bennett, Mr Cary and Mr Cibulksis, maintain that they were not given the notice by the relevant date and the facts of their individual cases are discussed below.

THE STATUTORY FRAMEWORK

Background

29. The provisions governing follower notices and accelerated payments are contained in Part 4 of the 2014 Act. The background to the legislation dealing with follower notices is described in the judgment of Sir Ross Cranston in *R (Haworth) v Commissioners for HM Customs and Revenue* [2018] EWHC 1271 (Admin) at paragraphs 54 to 61.

The Statutory Provisions Governing Follower Notices

30. Chapter 2 of Part 4 of the 2014 Act sets out (1) the circumstances in which follower notices may be given (2) the content of the notices (3) the making of representations about such notices and (4) penalties if the taxpayer does not take corrective action to relinquish a particular tax advantage.

Definitions

31. Section 210 of the 2014 Act defines "tax advantage" and "tax arrangements" for the purposes of Part 4 in the following ways.

> "(2) *"*Tax advantage*"* includes—
>
> (a) relief or increased relief from tax,
>
> (b) repayment or increased repayment of tax,

(c) avoidance or reduction of a charge to tax or an assessment to tax,

(d) avoidance of a possible assessment to tax,

(e) deferral of a payment of tax or advancement of a repayment of tax, and

(f) avoidance of an obligation to deduct or account for tax.

"(3) Arrangements are "tax arrangements" if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.

"(4) "Arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)."

Circumstances in which a follower notice may be given

32. A follower notice may be given if four conditions, Conditions A, B, C and D, are satisfied. The relevant provision is section 204 of the 2014 Act which provides that:

"(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."

33. Section 205 of the 2014 Act then deals with what constitutes a final judicial ruling for the purposes of Condition C. The material provisions provide that:

> "(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."

Contents of, and representations about, a follower notice

34. Section 206 of the 2014 Act provides that:

> "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."

35. Section 207 of the 2014 Act deals with representations about a follower notice. That section provides that the person to whom it is given "has 90 days beginning with the day that notice is given to send written representations" objecting to the follower notice on certain grounds. The defendants must then consider the representation and either confirm (with or without amendment) or withdraw the follower notice.

Penalties

36. Chapter 2 of Part 4 of the 2014 Act also makes provision for penalties if the taxpayer does not undertake what is referred to as corrective action following the giving of a follower notice. Section 208 of the 2014 Act provides so far as material that:

"(2) P is liable to pay a penalty if the necessary corrective action is not taken in respect of the denied advantage (if any) before the specified time.

"(3) In this Chapter *"the denied advantage"* means so much of the asserted advantage (see section 204(3)) as is denied by the application of the principles laid down, or reasoning given, in the judicial ruling identified in the follower notice under section 206(a).

"(4) The necessary corrective action is taken in respect of the denied advantage if (and only if) P takes the steps set out in subsections (5) and (6).

"(5) The first step is that—

(a) in the case of a follower notice given by virtue of section 204(2)(a), P amends a return or claim to counteract the denied advantage;

(b) in the case of a follower notice given by virtue of section 204(2)(b), P takes all necessary action to enter into an agreement with HMRC (in writing) for the purpose of relinquishing the denied advantage.

"(6) The second step is that P notifies HMRC—

(a) that P has taken the first step, and

(b) of the denied advantage and (where different) the additional amount which has or will become due and payable in respect of tax by reason of the first step being taken.

"(7) In determining the additional amount which has or will become due and payable in respect of tax for the purposes of subsection (6)(b), it is to be assumed that, where P takes the necessary action as mentioned in subsection (5)(b), the agreement is then entered into.

"(8) In this Chapter—

"the specified time" means—

(a) if no representations objecting to the follower notice were made by P in accordance with subsection (1) of subsection 207, the end of the 90 day post-notice period;

(b) if such representations were made and the notice is confirmed under that section (with or without amendment), the later of—

(i) the end of the 90 day post-notice period, and

(ii) the end of the 30 day post-representations period;

"the 90 day post-notice period" means the period of 90 days beginning with the day on which the follower notice is given;

"the 30 day post-representations period" means the period of 30 days beginning with the day on which P is notified of HMRC's determination under section 207".

37. The amount of the penalty is 50% of the value of the denied advantage: see section 209 of the 2014 Act. Provision for the assessment and payment of a penalty is made by section 211 of the 2014 Act which provides so far as material that:

> "(1) Where a person is liable for a penalty under section 208, HMRC may assess the penalty.
>
> "(2) Where HMRC assess the penalty, HMRC must—
>
> (a) notify the person who is liable for the penalty, and
> (b) state in the notice a tax period in respect of which the penalty is assessed.
>
> "(3) A penalty under section 208 must be paid before the end of the period of 30 days beginning with the day on which the person is notified of the penalty under subsection (2).
>
> "(4) An assessment—
>
> (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Chapter),
> (b) may be enforced as if it were an assessment to tax, and
> (c) may be combined with an assessment to tax.
> …..
>
> "(5) No penalty under section 2018 may be notified under subsection (2) later than—
> (a) in the case of a follower notice given by virtue of section 204(2)(a) (tax enquiry in progress), the end of the period of 90 days beginning with the day the tax enquiry is completed, and
> (b) in the case of a follower notice given by virtue of section 204(2)(b) (tax appeal pending), the end of the period of 90 days beginning with the earliest of—
>
> (i) the day on which P takes the necessary corrective action (within the meaning of section 208(4)),
> (ii) the day on which a ruling is made on the tax appeal by P, or any further appeal in that case, which is a final ruling (see section 205(4)), and
> (iii) the day on which that appeal, or any further appeal, is abandoned or otherwise disposed of before it is determined by the court or tribunal to which it is addressed."

Accelerated payment notices or APNs

38. Chapter 3 of Part 4 of the 2014 Act deals with accelerated payment notices. The defendants may give an APN to a person if Conditions A, B and C are met. Section 219 of the 2014 Act provides so far as material to this case:

> "(1) HMRC may give a notice (an "accelerated payment notice") to a person ("P") if Conditions A to C 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 arrangements ("the chosen arrangements").

"(4) Condition C is that one or more of the following requirements are met—

(a) HMRC has given (or, at the same time as giving the accelerated payment notice, gives) P a follower notice under Chapter 2—

(i) in relation to the same return or claim or, as the case may be, appeal, and

(ii) by reason of the same tax advantage and the chosen arrangements;

….."

39. So far as Condition A is concerned, the present claim involves notices given under section 219(2)(b) of the 2014 Act as they involve cases where each of the claimants has made an appeal. So far as Condition C is concerned, these are cases where the defendants have given a follower notice and so the cases fall within section 219(4)(a) of the 2014 Act.

40. There are other circumstances in which an APN may be given. These include cases where the particular scheme was notified to the defendants under the provisions governing the disclosure of tax avoidance schemes (the provisions are known as "DOTAS"). The Court of Appeal has considered the purpose of the APNs in that specific context in *R (Rowe) v Revenue and Customs Commissioners* [2017] EWCA Civ 2015, [2018] 1 W.L.R. 3030. These claims, however, do not fall within the scope of the DOTAS provisions.

41. Section 221 of the 2014 Act deals with the contents of an APN in cases where there is a pending appeal. It provides, so far as material that:

"(2) The notice must—

(a) specify the paragraph or paragraphs of section 219(4) by virtue of which the notice is given,

(b) specify the disputed tax (if any),

(c) explain the effect of section 222 and of the amendments made by sections 224 and 225 so far as relating to the relevant tax in relation to which the accelerated payment notice is given …".

42. Section 222 of the 2014 Act deals with representations about APNs. A taxpayer has 90 days "beginning with the day that notice is given to send written representations" to the defendants objecting to the notice on the grounds that Condition A, B or C is not met, or objecting, amongst other things, to the amount specified as the amount of

the disputed tax under section 221(2)(b) of the 2014 Act. The defendants must consider the representations and decide whether to confirm (with or without modification) or withdraw the notice.

43. In cases involving appeals against assessments of tax or closure notices, there is provision in section 55 TMA enabling payment of the tax to be postponed until the appeal is determined. Section 224 of the 2014 Act, however, amends section 55 TMA to provide that that section does not enable postponement of disputed tax specified in the APN in accordance with section 221(2)(b) of the 2014 Act. Consequently, an amount equal to the disputed tax would become due and payable to the defendants after the giving of an APN.

44. Finally, section 227 of the 2014 Act deals with the withdrawal of APNs and provides so far as material that:

> "(1) In this section a *"*Condition C requirement*"* means one of the requirements set out in Condition C in section 219.
>
> "(2) Where an accelerated payment notice has been given, HMRC may, at any time, by notice given to P—
>
> (a) withdraw the notice,
>
> (b) where the notice is given by virtue of more than one Condition C requirement being met, withdraw it to the extent it is given by virtue of one of those requirements (leaving the notice effective to the extent that it was also given by virtue of any other Condition C requirement and has not been withdrawn),
>
> (c) reduce the amount specified in the accelerated payment notice under section 220(2)(b) or 221(2)(b), or
>
> (d) reduce the amount specified in the accelerated payment notice under section 220(2)(d) or 221)(2)(d).
>
> "(3) Where—
>
> (a) an accelerated payment notice is given by virtue of the Condition C requirement in section 219(4)(a), and
>
> (b) the follower notice to which it relates is withdrawn,
>
> HMRC must withdraw the accelerated payment notice to the extent it was given by virtue of that requirement."

THE PROCEEDINGS AND THE ISSUES

45. The claimants' application for permission to claim judicial review of the follower notices and APNs was directed to be heard before Nugee J. There is a transcript of his ruling.

46. The defendants at that stage were contending that the provisions of the 2014 Act enabled them to give follower notices to the claimants which would have the effect of requiring them to abandon their appeals to the First-tier Tribunal or be subject to a penalty. That is, the defendants contended that, in order to avoid liability to a penalty,

the claimants had to abandon both the ground of appeal contending that the decision in *Huitson* was wrong, so that the payments should be treated as exempt from income tax under the double taxation agreement, and also the ground that, if the payments were not exempt from income tax, then the defendants should have recovered tax from the employer and the claimants were to be treated as if income tax had already been deducted. If the claimants declined to do so, on the approach then taken by the defendants, the claimants would be faced with paying a penalty and would have to pay the disputed tax pending the outcome of the appeal.

47. Nugee J. considered that that approach could lead to potentially unusual and unjust results where, as in this case, two grounds of appeal were advanced and the judicial ruling related only to one of them. In those circumstances, he thought it arguable that certain provisions (including, in particular, the phrase "particular tax advantage" in section 204(3) of the 2014 Act) may need to be given a particular meaning to avoid those results. Nugee J. therefore granted permission to argue that the follower notices were not valid on the grounds that the relevant statutory conditions for giving the notices were not met. He granted permission to challenge the APNs on the ground that, if the follower notices were invalid, then the APNs were similarly invalid as they could only be given if there were valid follower notices in place. Those were grounds 1 and 3 in the claim form. Nugee J. also granted permission to argue that the follower notices and the APNs failed to comply with the relevant statutory requirements governing what the relevant notices must specify. He also granted permission to eight claimants to argue that they had not, on the particular facts of their case, been given a follower notice by the relevant date. He stayed consideration of certain grounds pending the outcome of the determination of an appeal to the Court of Appeal in another case and refused permission on other grounds.

48. Following that hearing, the defendants reconsidered their understanding of the operation of Part 4 of the 2014 Act. By the time of the substantive hearing of the claim, the defendants were no longer contending that the claimants could only avoid liability for a penalty by abandoning both grounds of appeal in the First-tier Tribunal. The defendants contended that Part 4 properly interpreted permitted the giving of a follower notice but that the provisions would be operated in such a way that the claimants would be able to avoid liability to a penalty, and an APN, by taking corrective action which involved only abandoning that part of their appeal relating to the claim for relief under the double taxation arrangements whilst maintaining their appeal in relation to the other ground of appeal.

49. In the course of submission, Sir James Eadie Q.C. for the defendants confirmed that the defendants intended to provide the claimants with the opportunity to take this course of action. Sir James Eadie indicated that the defendants would provide details of their proposed course of action to the court before judgment was given and would provide a copy of the letter they intended to send to the claimants. The relevant letter was duly provided on 6 July 2018 and is in the following terms:

> " Dear [X]
>
> We refer to the Follower Notices dated [**insert**] in respect of tax years [**insert**] ("**the FNs"**) and to the Accelerated Payment Notices dated [**insert**] in respect of tax years [**insert**] ("**the APNs**").

During the course of the judicial review application *R (Broomfield & Others) v HMRC* (CO/2656/2017) ("**Broomfield**") in which you are a claimant, HMRC have considered and clarified how the Follower Notice regime should operate where a taxpayer has two arguments against tax being payable but only one would be denied by the application of the reasoning in a previous judicial ruling.

In light of this, HMRC confirm that they will not assess a penalty under section 208 Finance Act 2014 in respect of the FNs insofar as you take the following action ("**the Required Action**") within the time limit set out below.

(1) Withdraw any argument in your appeal(s) before the First-tier Tribunal in which you seek to challenge the correctness of *Huitson v HMRC* [2015] UKFTT 448 and/or its application to your facts.

(2) Agree in writing with HMRC that you will not seek to re-introduce such arguments in the First-tier Tribunal or any other tribunal or court.

The time limit here is the end of 45 days beginning with the day on which the High Court (Lewis J) hands down judgment in *Broomfield*.

Insofar as a penalty has already been assessed on you, HMRC will not seek to enforce the penalty assessment before the expiry of the time limit set out above and to the extent that you take the Required Action within that time limit will withdraw the penalty assessment and refund any part of the penalty that you have paid to HMRC.

Further, to the extent that you take the Required Action within the time limit, HMRC will refund any amounts paid to HMRC pursuant to the APNs and, if applicable, will not seek the enforce the APNs further."

50. In light of the change in the way that the defendants understood the operation of Part 4 of the 2014 Act, the claimants at the hearing sought to amend their claim to add an additional ground. This ground contends that the follower notices failed to specify the effects of section 208 of the 2014 Act as they had not specified the corrective action that had to be taken. Full argument was heard on that issue. I grant permission to the claimants to amend the claim form to include the additional ground set out in the document dated 28 June 2018.

51. The issues in this case are ultimately ones of statutory construction. The parties recognise that the relevant provisions of the 2014 Act are complex and not necessarily easy to interpret. The fact that the defendants initially took one view of the proper interpretation of the statutory provisions but now take a different view is not, of itself, of assistance or of relevance. The question is whether on a proper interpretation of the provisions of the 2014 Act, follower notices could be served on the claimants in a situation such as this where the appeal involved one ground of appeal governed by a relevant judicial ruling and one ground which was not. In addition, there are issues about whether the defendants properly complied with certain statutory procedural requirements.

52. Against that background, the issues that arise are as follows:

(1) Were the statutory requirements for the giving of a follower notice, that is Condition B and C in sections 204(2)(b) and (c) of the 2014 Act, satisfied (ground 1 of the claim)?

(2) Was there a failure to comply with the procedural requirements in section 206(c) of the 2014 Act (or section 221(c) in respect of APNs) and, if so, does any such failure invalidate the follower notices, in respect of the explanation given in the relevant notice of the time:

(a) for the making of written representations objecting to the follower notices and the APNs

(b) for taking corrective action (ground 2)?

(3) Was there a failure to comply with the procedural requirements in section 206(c) of the 2014 Act and, if so, does any such failure invalidate the follower notices, in relation to the explanation of the corrective action that a claimant had to take to avoid liability to a penalty (the additional ground)?

(4) Was there a failure to give follower notices by the relevant date to three claimants, Clive Bennett, Ian Cary and Martin Cibulksis (part of ground 1)?

(5) Was the statutory requirement for the giving of APNs, that is Condition C in section 219(4) of the 2014 Act, satisfied (ground 3)?

THE FIRST ISSUE – WERE CONDITIONS B AND C SATISFIED?

The Submissions

53. Mr Gordon, for the claimants, contends that properly interpreted the statutory provisions do not provide for the giving of follower notices in cases such as the present where there is an appeal with two grounds, and there is a judicial ruling which relates to one ground but not the other ground. In broad terms, he submitted that the purpose underlying the provision governing follower notices was to discourage an appeal in relation to tax arrangements which were the carbon copy of tax arrangements already subject to a judicial ruling, relying on the analysis of the background to the provisions described by Sir Ross Cranston in the *Haworth* case. He also relied upon the judgment of Lord Reed, with whom the other members of the Supreme Court agreed, in *R (Unison) v Lord Chancellor* [2017] 3 W.L.R. 409 especially at paragraphs 76, 78 and 80 to the effect that statutory powers authorising an intrusion upon the right of access to the court should be interpreted as authorising only such a degree of intrusion as was reasonably necessary to fulfil the objective of the provisions in question. He submitted that any ambiguity as to the scope of the statutory provisions in the present case ought to be construed in favour of the claimants as the provisions involved, amongst other things, imposing a liability to a penalty if an argument was to be maintained in an appeal to a tribunal.

54. In specific terms, Mr Gordon submitted that the provisions which were not satisfied here were section 204 (3) and (4) of the 2014 Act. First, Condition B required that "an

appeal is made on the basis that a particular tax advantage" results from the particular tax arrangements. He submitted that, here, the appeal is not made on that basis. There are two grounds of appeal and the appeal is not made, or not made solely, on the ground that the claimants are entitled to a particular tax advantage.

55. Secondly, he submitted that the "particular tax advantage" in section 204(3) of the 2014 Act, which was "the denied advantage" in section 205(3), meant the end result sought by the tax payer. In this case, the end result sought was that there would not be any additional income tax due, either because the payments were not subject to income tax because they were exempt under the relevant double taxation arrangements or because the claimants were to be treated as having had the income tax deducted already. Mr Gordon submitted that the judicial ruling in *Huitson* would not, if applied to the arrangements in the claimants' cases, deny that particular tax advantage. The ruling would not affect the claim that the claimants could not be required to pay additional income tax because, even if any income tax were due on the payments in question, they were to be treated as if that tax had already been deducted. Consequently, he submitted, that the defendants could not lawfully form the opinion that there was a relevant judicial ruling as the application of that ruling would not deny the asserted advantage.

56. Sir James Eadie submitted that the particular tax advantage in section 204(3) of the 2014 Act – which was referred to in the next two sections as the asserted advantage – was the claim that the payments from the trust were exempt from income tax by reason of the double taxation arrangements. He submitted that Condition B was satisfied as the appeal was made on the basis that that particular advantage resulted from each claimant's particular tax arrangements. There was a relevant judicial ruling. The reasoning in *Huitson* would, if applied to the claimants' particular tax arrangements, deny that asserted advantage.

57. Sir James Eadie submitted that the provisions governing penalties, corrective action and APNs could (and indeed had to as a matter of public law) be operated in accordance with those provisions. First, the corrective action required was in essence to relinquish the particular tax advantage, that is the claim to exemption under the double taxation arrangements. If that were done, the taxpayer would not be liable to a penalty. If the asserted advantage were not relinquished, he would be. The penalty would be 50% of the value of that advantage and if the taxpayer persisted in appealing on the basis that he was exempt from income tax, that penalty would be payable if the taxpayer lost (and returnable with interest if the taxpayer won). The taxpayer would be able to continue with the appeal in relation to the ground that he was to be treated as having paid the income tax. Sir James Eadie submitted that the discretion to serve an APN could not be exercised if the taxpayer had relinquished the claim for exemption under the double taxation arrangements as that would not be consistent with the purpose underlying the statutory scheme, and the defendants would have to exercise the statutory discretion to withdraw any APN already given.

Analysis

58. The starting point is the wording of the relevant provisions themselves read in context. Section 204(3) of the 2014 Act provides that Condition B, which is one of the conditions that must be satisfied before a follower notice may be given, is that "an

appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular tax arrangements ("the chosen arrangements")".

59. First, the phrases "tax advantage" and "tax arrangements" are defined in section 201 of the 2014 Act. Section 199 of the 2014 Act expressly provides that "sections 200 to 203 set out the main defined terms in" Part 4 of the 2014 Act. Applying the definition in section 201(3) of the 2014 Act, the tax arrangements in the present case are the arrangements under which a trust was established by the taxpayer in the Isle of Man, that trust entered into a partnership, the taxpayer entered into a contract with the partnership to provide services, the partnership contracted with other companies to provide the taxpayer's services, monies were paid to the partnership in respect of those services, some of the partnership's profits were paid into the trust, and payments were then made to the taxpayer as the beneficiary under the trust. Those arrangements were intended to enable the taxpayer to obtain a tax advantage, namely exemption from liability to income tax as the payments from the trust were said to be exempt from income tax by virtue of the UK-Isle of Man double taxation arrangements.

60. The exemption of the payments from income tax under the relevant double taxation arrangements was the "tax advantage" as defined by section 201(2) of the 2014 Act. That was the "particular tax advantage" referred to in section 204(3) of the 2014 Act resulting from the particular tax arrangements entered into and which is described in section 204(3) as "the asserted advantage". Similarly, when section 205(3) of the 2014 Act refers to denying "the asserted advantage", that must be a reference to the asserted advantage within the meaning of section 204(3) of the 2014 Act, that is, the exemption from income tax under the relevant double taxation arrangements.

61. Secondly, on a natural reading of section 204(3) of the 2014 Act, "an appeal is made on the basis" that a particular tax advantage results from particular tax arrangements where it is asserted in the appeal that that advantage arises from those arrangements. The appeal in the present cases is made on that basis. The grounds of appeal assert that the decision in *Huitson* is wrong and the payments from the Isle of Man trust in the present case are exempt from income under the double taxation arrangements. It is correct that the appeal is also made on one other basis in this case. Notwithstanding that, the fact is that, as a matter of language, the appeal in this case is made on the basis that a particular tax advantage results from the arrangements. Put negatively, where an appeal is made on two grounds, grounds A and B, it cannot be said that the appeal is not made on the basis of ground A because it is also made on ground B. The reality is that the appeal is made on ground A. It is also made on ground B. Prima facie, therefore, the words of section 204(3) of the 2014 Act are satisfied in this case as the appeal is made on the basis that a particular tax advantage results from the particular tax arrangements made by the taxpayer.

62. On that analysis, the submissions of the claimants would not be correct. The particular tax advantage is the exemption from income tax under the relevant double taxation arrangements not the end result sought by the taxpayer, that is that no additional tax is payable. The reasoning in the First-tier Tribunal decision in *Huitson* would, if applied to their particular tax arrangements deny that particular tax advantage. Prima facie, therefore, Conditions B and C would appear to be satisfied on a natural reading of the language of section 204(3) and (4) of the 2014 Act.

The Structure of the Relevant Provisions as a Whole

63. It is important then to consider the wording and structure of Part 4 of the 2014 Act as a whole. The other provisions governing follower notices are linked with section 204 of the 2014 Act. The provisions governing accelerated payment notices are meant to operate when a follower notice is given (although APNs may be given in other circumstances). The question is whether those other provisions indicate that the provisions governing follower notices were not, in fact, intended to apply to situations such as the present. Furthermore, if, on a consideration of the wording and structure of the provisions of Part 4 of the 2014 Act, the interpretation given to section 204 above would lead to consequences that appear not to be consistent with the statutory regime as a whole, it may be necessary to consider carefully whether, on analysis, those sections in fact are to be interpreted differently.

The provisions governing penalties and corrective action

64. I deal first with penalties and corrective action. It is clear that liability to a penalty arises if "the necessary corrective action is not taken in respect of the denied advantage": see section 208(2) of the 2014 Act. The denied advantage "means so much of the asserted advantage (see section 204(3))" as is denied by the application of the judicial ruling.

65. The necessary corrective action is taken, in appeal cases, where the taxpayer takes two steps. The first is taking "all necessary action to enter into an agreement with HMRC (in writing) for the purpose of relinquishing the denied advantage": see section 208(5)(b) of the 2014 Act. The second step is the taxpayer notifying the defendants that he has taken the first step and notifying the defendants of the denied advantage and where different the additional amount which has or will become due. Section 209 of the Act provides that the penalty is 50% of the "value of the denied advantage".

66. In other words, liability to a penalty is linked to a failure to take the necessary action to enter into an agreement with the defendants to relinquish the particular tax advantage resulting from the particular tax arrangements. The amount of the penalty is assessed by reference to the value of that advantage. In a simple case, there may be only one ground of appeal. The taxpayer may appeal on the basis that he is entitled to a particular advantage (e.g. exemption from income tax under a particular double taxation treaty) but the defendants are of the opinion that the reasoning in a judicial ruling makes it clear that arrangements of that nature do not result in that advantage. The taxpayer will have to take corrective action. That will involve agreeing to take steps to relinquish the asserted advantage, e.g. ceasing to claim that the income is exempt from tax and, probably, withdrawing the appeal, and notifying the defendants accordingly. If the taxpayer declines to take corrective action in respect of the particular tax advantage, the taxpayer will be liable to a penalty if he maintains the appeal.

67. The position is more complex in cases where the appeal is made on two grounds as here. The provisions relating to penalties, however, do not of themselves indicate that the provisions governing follower notices did not apply to such situations. Further, the provisions can be operated without difficulty.

68. The corrective action is taking the necessary steps to enter into an agreement to relinquish the denied advantage. In this case, for the reasons given above, the natural meaning of the "denied advantage" is the claim that payments from the trust fund are exempt from income tax by reason of the relevant double taxation arrangements. That is the particular tax advantage within the meaning of section 204(3) of the 2014 Act. It is that tax advantage which will be denied by the application of the reasoning of the First-tier Tribunal in *Huitson.* Taking the necessary action to relinquish that advantage would involve the taxpayer agreeing to cease to claim that the payments are exempt from income tax and agreeing not to maintain that ground of appeal in the appeal before the First-tier Tribunal. That would not require the taxpayer to abandon the other ground of appeal, namely that if the payments are income subject to income tax, then the taxpayer is to be treated as having had income tax deducted already. If the taxpayer does not wish to abandon that other ground of appeal, he may continue with it and will not be liable to a penalty.

69. Mr Gordon submitted that the only way in which the claimants could relinquish the denied advantage was by agreeing to withdraw the entire appeal to the First-tier Tribunal. I do not accept that submission. First, there is no reason why the claimants and the defendants cannot agree, simply, that the claimants will not advance the ground of appeal relating to the double taxation arrangements before the First-tier Tribunal. Second, and separately, I did not receive detailed submissions on the appeal provisions. However, I was provided after the hearing with a copy of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, Regulation 17 of which provides that a party may give notice of "the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case". Where an appellant includes a number of grounds of appeal in an appeal notice, those grounds would be the appellant's case. There seems no reason why the appellant cannot withdraw part of his case, that is withdraw one or more grounds of appeal. Even if that were not for some reason correct, there is nothing to prevent each claimant and the defendants agreeing, as I have indicated above, that the claimant would not advance the ground of appeal covered by the relevant judicial ruling.

The provisions governing APNs

70. A further set of statutory provisions of relevance are those dealing with APNs. Those provisions apply not only when a follower notice has been given but also in relation to other forms of tax avoidance, such as those which are subject to the DOTAS arrangements, or notices under the statutory provisions relating to the general anti-abuse rule.

71. In relation to follower notice cases, an APN must specify, amongst other things, "the disputed tax": see section 221(2)(b) of the 2014 Act. That is defined in section 221(3) to mean, in the present case, the amount of the charge to tax resulting from the conclusion in the closure notice (in this case, the conclusion that the payments from the trust are not exempt from income tax under the double taxation arrangements) "as a designated HMRC officer determines, to the best of that officer's information and belief" are required to counteract what the officer determines as the denied advantage. Section 221(4) of the 2014 Act provides that the phrase "the denied advantage" has the same meaning as in section 220(5) of the 2014 Act. That subsection itself refers back to section 208(3), i.e. so much of the asserted advantage as would be denied by the application of the principles in the relevant judicial ruling. In other words, in the

present case the amount of tax to be specified in the APN is that which the officer considers necessary to counteract the denied advantage, that is the claim that the payments from the trust are exempt from income tax. The APN may be given at the same time as a follower notice is given (see section Condition B set out in section 219(4) of the 2014 Act).

72. Applied to the facts of this case, the provisions could mean that the tax would be required to be paid immediately (as the provisions postponing payment pending the outcome of the appeal would not apply). That could lead, potentially, to the following situations. A taxpayer who only appealed on the ground that he should be treated as having had the tax deducted would not normally be required to pay the income tax due until the appeal was determined. A taxpayer who initially appealed on both grounds but agreed to relinquish the claim to exemption (and abandon that ground) would, if an APN had been given, be liable to pay the income tax immediately even though that taxpayer was now in an identical position to the other taxpayer (because he was now only arguing the second ground of appeal). Furthermore, a taxpayer who declined to relinquish the claim for exemption, and continued to appeal on both grounds would have to pay the income tax immediately, even though one of the grounds was that he should be treated as having had the income tax deducted and he would not normally be required to pay the income tax until the appeal raising that issue was determined.

73. Those potential consequences raise the question of whether the provisions governing APNs contemplated that a follower notice would only have been given when the scope of the appeal and the denied advantage were co-terminous. They may indicate that, if the appeal was made on grounds other than one related to the denied advantage, a follower notice and hence an APN could not be given.

74. That consideration, however, has to be assessed against other provisions relating to APNs and the provisions including those governing the withdrawal of an APN. Section 227 of the 2014 Act provides power for the defendants "at any time" to "withdraw the notice". Those powers would have to be exercised, in accordance with general principles of public law, in a way that furthered the statutory purpose.

75. The giving of an APN in this context is linked to the aims underlying the giving of a follower notice. That appears from the provisions generally and from section 227(3) of the 2014 Act in particular. That section provides that an APN must be withdrawn when it is given consequent upon the giving of a follower notice and the follower notice is withdrawn.

76. Similarly, if the taxpayer has taken corrective action and relinquished the denied advantage, the purpose underlying the giving of the follower notice would have been achieved. The taxpayer would no longer be liable to any penalty under the follower notice provisions. He would no longer be maintaining the appeal on the basis that he was entitled to claim the particular advantage. In those circumstances, if the taxpayer had other reasons for maintaining the appeal, he should not normally be required to pay the disputed tax immediately. It would be inconsistent with the specific and limited purpose of an APN given in a follower notice case for the APN to apply and prevent postponement of payment of the income tax until the appeal on the other ground was determined. In those circumstances, the defendants would need to withdraw the APN and any refusal to do so might itself be subject to judicial review.

77. The provisions governing APNs can, therefore, work in harmony with the provisions governing follower notices, at least where the taxpayer takes corrective action, and they do not indicate that any more limited meaning ought to be given to section 204 of the 2014 Act.

78. There is one further situation which needs consideration. If a taxpayer refuses to take corrective action and seeks to maintain an appeal on the ground related to the denied tax advantage and other grounds, the APN will still prevent postponement of, and hence require immediate, payment of the income tax. That, however, would not be inconsistent with the intention of Parliament. The scheme is intended to require payment immediately if a taxpayer is not prepared to take corrective action to relinquish a denied advantage. Even if the taxpayer has other grounds of appeal and would not normally be required to make immediate payment of tax until after the appeal on those grounds had been determined, the fact is where the taxpayer is maintaining an appeal on the basis that a particular tax advantage results from his chosen arrangements and, in the defendants' opinion, a judicial ruling would, if applied, deny that advantage, the position is different. The statutory provisions are intended to penalise the taxpayer in such circumstance and deny him the benefit of having the disputed tax if he does not relinquish that particular tax advantage. That is the price that Parliament intended a taxpayer to pay if he insists on maintaining a ground of appeal which was the subject of a judicial ruling. The way that the statutory provisions operate in such circumstances does not therefore lead to unexpected consequences at variance with the statutory scheme and does not justify a departure from the meaning of the natural, or prima facie wording, of section 204(3) and (4) of the 2014 Act.

The purpose underlying the giving of follower notices

79. The interpretation of section 204(3) and (4) of 2014 Act given in paragraphs 58 to 62 above is also consistent with the purpose underlying the provisions governing follower notices. I was not referred to any material said to assist with the determination of the aim of the relevant provisions although I was referred to the judgment of Sir Ross Cranston in *Haworth* where he reviewed earlier material such as consultation papers, statements made to Parliament, and the explanatory notes to the Bill which became the 2014 Act.

80. The purposes underlying Chapter 2 of Part 4 of the 2014 Act appear from the terms of the legislation. The aim is to discourage taxpayers from making claims, or maintaining appeals, which seek tax advantages arising out of schemes which have already been the subject of final rulings by a court or tribunal. The aim is, broadly, to deter further litigation on points already decided by the relevant judicial court or tribunal and to deter taxpayers from spinning out disputes with the Revenue when the issues have already been resolved. Deterring taxpayers from relitigating points is intended to reduce the administrative and judicial resources needed to deal with such claims and appeals and to ensure that the taxpayer does not continue to have the benefit of retaining the amount of the disputed tax until the dispute is resolved. Those aims are to be achieved by making taxpayers liable to a penalty if they continue to make such claims or maintain such appeals and by requiring them to pay the disputed tax immediately.

Conclusion

81. On the natural interpretation of section 204(3) of the 2014 Act, Condition B is satisfied if an appeal is made on the basis that a particular tax advantage results from particular tax arrangements. The particular tax advantage is the specific tax advantage that results from the taxpayer's chosen arrangements (not the end result that the taxpayer seeks to achieve). In the present case, the particular tax advantage was the claim that payments from the trust were exempt from income tax under the relevant double taxation agreements. The appeal was made on the basis that the particular tax advantage did result from the chosen arrangements. Condition B was therefore satisfied.

82. Similarly, that particular tax advantage was the "asserted advantage" for the purposes of section 204(3) and that, in turn, was the denied advantage for the purpose of deciding if there were a relevant judicial ruling within the meaning of section 205 of the 2014 Act. The ruling in *Huitson* would, if applied to the chosen arrangements, deny the asserted advantage. Condition C was therefore satisfied. Follower notices could therefore be given in the present case as Conditions B and C were met (and it was accepted that satisfied Conditions A and D were satisfied).

83. That conclusion is not altered by a consideration of the statutory provisions governing follower notices and APNs read as a whole. Furthermore, that conclusion is consistent with the purpose underlying the provisions governing follower notices.

THE SECOND ISSUE – FAILURE TO COMPLY WITH THE RELEVANT STATUTORY PROCEDURAL REQUIREMENTS

Submissions

84. Mr Gordon for the claimants submits that the follower notices were invalid as they failed to comply with section 206 of the 2014 Act and the APNs were invalid as they failed to comply with section 221 of that Act. Section 206(c) of the 2014 Act provides that a follower notice must, amongst other things, explain the effects of section 207 to 210 of the 2014 Act, i.e. the opportunity to make representations within 90 days beginning with the date when the notice was given and the need to take corrective action within the same time to avoid liability to a penalty (or, if the notice is challenged but is confirmed, by the end of the 30 day period beginning with the day on which the individual claimant was notified of the decision on the representations). Section 221 of the 2014 Act provides that an APN must explain the effects of, amongst other things, section 222, i.e. the right to make written representations within 90 days beginning with the day when the APN notice was given. Mr Gordon submits that on the facts it is accepted that the explanation given in the follower notices and APNs about the period of time for making representations was likely to be wrong as the dating and postal arrangements for giving these notices, described above, meant that many claimants were lead to believe that they either had less time, or in some cases more time, for making representations than in fact was permitted by the statute. Similarly, he submitted that the time for taking corrective action was wrongly described as the notices said that the claimants had one day more to take corrective action than was permitted as they said the 30 day period began after the day on which the defendants gave notice of its determination on any representations whereas it began on the day on which the notice was given.

85. Mr Gordon submits that there must be an accurate description of the time limits in the follower notice and the APN. The explanation needs to be precise and correct about the times for making representations and taking corrective action and if the notice incorrectly states the effect of the relevant time periods specified in the 2014 Act, even by one day, that is fatal to the validity of the follower notice or APN and if such notices are invalid they must be quashed.

86. Mr Gordon submitted that in one case, that of Mr Campbell Dean Stewart, there was a further error. Follower notices dated 18 November 2016 were given in relation to various years of assessment and these stated that representations had to be received (and corrective action taken if no representations were made) no later than 21 February 2017. Those notice were withdrawn, and follower notices were given dated 6 days later, that is dated 24 November 2016. Those notices again stated that representations had to be made (and corrective action taken if none were made) no later than 21 February 2017. In other words, although new follower notices were given six days after the earlier follower notices, the date specified in the earlier, withdrawn notices was repeated. That meant that the notices in Mr Campbell Stewart's case incorrectly described the effects of section 207 and 209 of the 2014 Act as they stated that he had fewer days than the period prescribed by statute to make representations and corrective action. That failure to comply with section 206 in his case, submitted Mr Gordon, rendered the follower notices in his case invalid.

87. Counsel for the defendant, accepted that the combination of the practice of calculating the period for responding to notices by adding four days to the date shown on the notice, together with the internal procedures for posting notices and the likely delivery times, meant that it was very likely that a number of the claimants had not been given a strictly correct description of the time periods for responding. He also accepted that the use of the word "after" in describing the start of the period for taking corrective action when a determination by the defendants to confirm a notice following objections was notified to the claimant was wrong (and led to a one day error) as the 30 day period began with the day when the notification of the determination was given. He submitted, however, that Parliament would not have intended that the consequences of any breach of a procedural requirement to give a description of the effects of the relevant sections meant that the notices were invalid. Alternatively, he submitted that the follower notices were not invalid by reason of section 114 TMA which provided that a proceeding was not to be quashed or deemed void by reason of a mistake, defect or omission. Finally, he submitted that no remedy should be granted, even if a follower notice or APN was technically flawed by reason of the failure, as there was no evidence that any claimant had suffered any prejudice as a result of the error.

Discussion

88. Parliament has provided that a follower notice and an APN gives an explanation of the effects of certain statutory provisions. I accept, as was common ground between the parties, that that required the relevant notice to describe the period of time for making representations or taking corrective action. I accept that if, as here, the defendants chose to do that by stating the dates by which certain actions had to be taken, the intention of Parliament would be that those dates were accurately set out. I did not hear argument, and do not decide, whether the defendants could discharge their duty under section 207 and 221 of the 2014 Act by giving generalised

descriptions of the relevant period (e.g. reproducing the wording in the section and saying that representations had to be made or corrective action taken, if no representations were made, within 90 days beginning with the day when notice was given but without specifying precise dates). In the present circumstances, therefore, the question is how a court should approach a failure to give an accurate description of the effects of the relevant section in the follower notice or the APN and, in particular, whether that failure renders the notices invalid so that no action may be taken in relation to them under Part 4 of the 2014 Act.

89. The question is whether, on a proper interpretation of the statutory provisions, Parliament intended that a failure to comply with the relevant statutory procedural requirements should render the notices invalid. That will generally involve consideration of the wording of the particular statutory provisions, the underlying purpose of the statute, the role and significance of the statutory procedural requirements in the overall statutory scheme and the likely consequences of the breach. See, generally, *R v Soneji* [200] 1 A.C. 40 at paragraphs 21 to 23.

90. First, the relevant provisions in this case – sections 206(c) and 221(c) of the 2014 Act – are provisions prescribing the content of the notices to be given. They provide that a description of the effects of certain statutory provisions be included in a follower notice or an APN. Secondly, the purpose underlying the provisions is to inform the taxpayer of his right to make written representations if he objects to a notice and the need to take corrective action to avoid becoming liable to a penalty. The description may, as here, include a description of the time frame within which representations are to be made or corrective action taken. As such, the provisions play a significant role in ensuring that taxpayers are aware of their rights. The time limits themselves however, are contained in other provisions of the legislation. Thirdly, the likely consequences of failing to provide an adequate description need also to be assessed within the context of the statutory provisions governing follower notices and APNs.

91. Parliament would not have intended that the fact that a notice states that a shorter period is available for making representations or taking corrective action than that actually prescribed should result in the total invalidity of those notices. The notice would still have performed the function of alerting the taxpayer to the need to object to the notices and to take corrective action to avoid a penalty. The fact that the taxpayer was told that he had to do that in less time than actually permitted by the statute would not be the sort of failure that Parliament would have intended should result in the total invalidity of the notices.

92. I reach a similar conclusion in relation to those follower notices and APNs which stated that the taxpayer had a few days more to make representations than the legislation provided for. First, the notice would still have performed part of the purpose of informing the taxpayer of his rights and the need to take action within a particular period. Secondly, the statute provides that the taxpayer must have a period of 90 days for making representations. The hypothesis here is that defendants misdescribed that period (because of its practices in relation to dating and posting of notices, or due to error). The likely consequences would be either that that had no effect (because a taxpayer would not want to object or, in fact, made the representations within the period actually prescribed by statute) or, in some cases, it is conceivable that a taxpayer would rely on the dates given in the notice and make representations outside the statutory 90 day period. I do not consider that section

207(1) and 222(1) which provide that a taxpayer has 90 days from the date that notice is given to make representations would be interpreted as meaning that representations cannot be considered by the defendants if they are made outside the 90 day period but within the time described in a notice. The defendants would be able to consider them. I do not consider, therefore, that Parliament would have intended any follower notice or APN to be invalid because of a misdescription of the period for making written representations.

93. In relation to corrective action, the position is that liability to a penalty arises unless corrective action is taken by the specified time. If no representations are made, that is defined as the period of 90 days beginning with the day on which the follower notice was given. That period was misdescribed in the follower notices. Further, if representations are made, liability to a penalty arises if corrective action is not taken by the end of 30 days beginning with the day on which the defendants' decision to confirm the notice is notified to the taxpayer. That was misdescribed by one day (as the follower notices said that the time began after, not beginning with, the day on which notice was given). First, the notices performed part of their function of alerting the taxpayer to the need to take corrective action to avoid liability to a penalty. Secondly, in terms of likely consequences, some taxpayers would either not intend to take corrective action or would do so well within the relevant time and the misdescription in the notice would not have had any practical consequence. It is possible that some taxpayers would have wanted to take corrective action but did not do so until the last day (or days) specified in the notice and that may be outside the time permitted by the statute for taking such action. However, the consequences of that is the taxpayer would be liable to a penalty. Section 211 of the 2014 Act then provides power for the defendants to assess the penalty before any penalty is payable. That statutory power has to be exercised lawfully and in accordance with the statutory purpose underlying Part 4 of the 2014 Act. Where a taxpayer takes corrective action in accordance with the terms of a follower notice, it is unlikely that it would be a lawful exercise of discretion to assess a penalty and enforce payment. In any event, considering the matter as a whole, I do not consider that Parliament intended that the consequence of a misdescription in a follower notice of the period available to take corrective action before a taxpayer would become liable to a penalty would result in the follower notice itself being invalid.

94. Those conclusions relating to the misdescription of the period for making representations and taking corrective action also apply to the particular case of Mr Campbell Stewart. In his case, notices were withdrawn, new notices given six days later but, in error, the new notices gave the same date as the earlier notices for making representations or taking corrective action. That meant that Mr Campbell Stewart was told that he had less time for responding to the notices than statute provided for. That misdescription of the effects of the relevant statutory provisions did not have the consequences that the notices were invalid in his case.

95. The defendant also relied upon section 114 TMA. That provides that an assessment or determination or warrant "or other proceeding" shall not be quashed or deemed void for want of form "or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning" of the relevant statute As I consider that the follower notices and APNs are valid, it is not necessary to express a view on that matter.

96. For completeness, I note that, as a matter of discretion, I would not have granted any remedy in relation to any of the follower notices or APNs given to these claimants on this ground. None of the claimants has suggested in any of the evidence that they have suffered any injustice, or any prejudice, as a result of an any error in the description of the periods for making representations or taking corrective action. None of the claimants who were told that they had less than 90 days to make representations has said that he or she did not make representations but would have done so if he or she had had a few more days. None has said he or she would have made different or fuller representations if he or she had had longer to do so. None has said that representations were made in accordance with the dates specified in the follower notice or APNs but the defendants refused to consider them. None has said that he or she took corrective action within the period specified by the notice but outside the period specified in the statute and have been assessed for a penalty. Remedies in judicial review are discretionary. A remedy may be refused where the claimant has not in fact suffered any injustice as a result of the particular public law error that has occurred. In the present case, there is no evidence that any of the claimants has suffered any injustice by reason of any erroneous description of the time for making representations or taking corrective action. Even if I had found the errors in this case to have affected the validity of the notices (which I do not) I would have declined to grant a remedy on that basis.

THE THIRD ISSUE - THE DESCRIPTION OF THE CORRECTIVE ACTION

97. This issue arises in the following way. The follower notices given to the claimants described the corrective action to be taken as relinquishing the denied advantage. At that stage, the defendants' position was that they understood that to mean that each claimant had to abandon that claimant's appeal to the First-tier Tribunal on both grounds. Now, following the permission hearing, the defendants accept that the position is that the claimants would only be required to abandon the ground of appeal contending that the ruling in *Huitson* was incorrect and they would not be required to abandon the other ground of appeal. In those circumstances, Mr Gordon for the claimants submits that the follower notices as given did not describe the effects of section 208 of the 2104 Act adequately and that, in itself, is a breach of section 206(c) of the 2014 Act which invalidates the notices.

98. The defendant contends that the follower notices are, in fact, adequate in their description. Furthermore, Sir James Eadie indicated in argument that the defendants were considering putting in place a process so that any claimant who may now wish to abandon the argument relating to *Huitson,* and only maintain the argument that the claimant should be treated as if tax had already been deducted, would not be prejudiced. The defendants subsequently provided the letter, set out above, that they undertook they would send to the claimants in this case (save for those four claimants where the follower notices and APNs have been withdrawn). That would enable each claimant within 45 days to decide if he or she agreed to withdraw the argument relating to *Huitson*, and, if so, the defendants would withdraw any penalty assessment (and repay any penalty already paid).

Discussion

99. Section 206(c) of the 2014 Act requires the follower notice to include an explanation of the effects of, amongst others, sections 208 to 210 of the 2014 Act. Those are the

sections providing for corrective action to be taken to relinquish the denied advantage and to render the taxpayer liable to a penalty if that corrective action is not taken within the appropriate time. As discussed above, the denied advantage is the claim for exemption from income tax by reason of the double taxation arrangements.

100. In the present case, the follower notices do describe the particular tax advantage in issue. They explain the particular tax arrangements that were adopted by the particular claimant, namely that the claimant had provided services, and received payments, through a trust and a partnership in the Isle of Man, which the claimant contended had the effect that there was "no income tax or national insurance due on the profits arising from those services". The follower notices explain that, in the light of the ruling in *Huitson*, the defendants were of the view that the tax arrangements did not have the effect contended for. They said that the reasoning applied to deny the claimant the asserted advantage and the profits from the arrangements were chargeable to tax. The notices said that this "means that the additional income tax and Class 4 National Insurance Contributions for [the relevant year] are due as a result of denying your claim for exemption ("the denied advantage")." The follower notices then set out what the claimant had to do to take corrective action, namely take all necessary action to enter into a written agreement with the defendants to relinquish the relevant advantage and then tell the defendants that the claimant had done so and the amount of the denied advantage and where different any additional amount due and payable.

101. First, the follower notices do in fact set out the corrective action that needs to be taken. It describes adequately what the denied advantage is. It sets out the corrective action to be taken, namely taking steps to enter into an agreement with the defendants to relinquish that denied advantage. That is an adequate description of the effects of section 208 to 210 of the 2014 Act.

102. The difficulty arises, in truth, not from the terms of the follower notice itself but from the understanding of the defendants at the time the notices were given as to what steps were necessary. That was not a matter set out in the notice. I do not consider that the notices failed to comply with section 206(c) of the 2014 Act because they did not set out in terms what the agreement relinquishing the denied advantage required the taxpayer to do.

103. Secondly, if, contrary to that view, the follower notices should have done that, and failure to do so amounted to a breach of section 206(c) of the Act, I would not consider that Parliament would have intended the notices to be invalid as a result.

104. Thirdly, and in any event, if there were a breach of section 206 and if that were considered to have affected the validity of the follower notices, I would have refused to grant a remedy in this case. The problem arises from the operation of the statutory provisions in the 2014 Act governing follower notices and penalties. All parties accept that the legislation is complex and that the statutory provisions are not easy to interpret. The problem, and the potential injustice to the claimants, is that, given the stance taken by the defendants previously, one or more claimants might have wanted to abandon the arguments relating to *Huitson* in their appeals and only pursue the other argument but thought they were prevented from taking that course of action. That injustice is recognised by the defendants who accept that claimants must be given the opportunity to take corrective action by giving up the argument relating to

Huitson. That is what is now to be done. In all those circumstances, the claimants will not suffer any injustice arising out of any failure to specify in the notices the scope of the corrective action that they are required to take to avoid liability to a penalty. As mentioned above, remedies in judicial review are discretionary and may be refused where the claimant has not in fact suffered any injustice as a result of the particular public law error that has occurred. In the particular circumstances of this case, if there were any error arising out of any failure to specify correctly the corrective action that needed to be taken, no injustice will be suffered as a result. It would not be appropriate or right, therefore, to grant a remedy in relation to the follower notices.

THE FOURTH ISSUE – THE VALIDITY OF FOLLOWER NOTICES NOT SERVED ON OR BEFORE 20 JANUARY 2017

Submissions

105. Mr Gordon submits that in three cases (Mr Bennett, Mr Cary and Mr Cibulskis) follower notices were not received on or before 20 January 2017 as required by section 204(5) of the 2014 Act. He submits that the notices in those cases were invalid. In so far as the defendant seeks to rely on the provisions governing postal service, he submits that the defendants could not claim that the follower notices were sent to the last known address of each of the claimants as the defendants knew that they were no longer at that address. Further, he submits that each of the claimants has proved that he did not receive the follower notice. Mr Yates, who dealt with this aspect of the matter for the defendants, submitted that, in fact, on a proper analysis of the law and the evidence the follower notices had been served on or before 20 January 2017.

The Facts

106. It is sensible first to start with the material facts of the three cases so far as they emerge from the evidence before the court. Dealing first with Mr Bennett, the position in his case is as follows. On 23 February 2014, he wrote to the defendants giving his address as 25 Plymouth Street, Karori, Wellington, New Zealand. In that letter, he said that he would shortly be leaving the country and asked that the defendants not post letters to that address after 10 April 2014.

107. On 28 May 2015, Mr Bennett wrote again to the defendant giving the address as 25 Plymouth Street, Karori. The letter said that he had a temporary address (which was not provided), that he would be moving at some point and he no longer resided at 25 Plymouth Street (although he had arranged to have mail redirected). The letter said that the defendants may use the Plymouth Street address for correspondence as mail would be redirected.

108. Mr Bennett sent a letter to the defendant dated 4 November 2016. The letter did not bear any address. The letter said it was from "Clive Bennett (I'm currently in a temporary address)". That temporary address was not provided. The letter does not refer to any other address. It says that Mr Bennett can be contacted by e-mail and an email address is given.

109. Follower notices and APNs for the relevant years of assessment, dated 16 November 2016, were posted to Mr Bennett at 25 Plymouth Street, Karori in New Zealand. Ms

Elaine Bradley, an officer with the defendants, says in her witness statement that the notices were issued on 11 November 2016 and addressed to Mr Bennett at 25 Plymouth Street, Karori, Wellington, New Zealand as that was the address that the defendants had on their data base for Mr Bennett.

110. By letter dated 26 January 2017 (after the date by which follower notices needed to be served by the defendant) Mr Bennett wrote again stating that he had no permanent address and did not expect to have one. His letter said at the top "No current address". Correspondence was subsequently undertaken by e-mail. On 13 February 2017 he made written representations about why follower notices should not be issued to him. On 20th February 2017, Mr Bennett was sent copies of the follower notices and APNs by e-mail.

111. Mr Bennett has made a witness statement dated 21 September 2017 in which he states that he received the notices on 20 February 2017.

112. On or about 23 March 2017, the follower notices and APNs sent by post in November 2016 were, it seems, returned to the defendants marked returned, undelivered. Ms Bradley states there is an electronic folder for Mr Bennett on the defendants' data base, that is marked "RLS" which means returned letter service. The electronic folder contains a copy of an envelope and a copy of part of the defendants' letter of 11 November 2016 sent to Mr Bennett. I infer, therefore, in the light of all the evidence that the follower notices and APNs were returned undelivered to the defendants in Mr Bennett's case.

Mr Cary

113. Follower notices and APNs dated 23 December 2016 were sent to Mr Ian Cary at an address at Heinrichstrasse 108, Zurich 8005, Switzerland. At the time that these were sent, that was the address that the defendants had on their base for Mr Cary. However, the data bases showed that mail sent to Mr Cary at that address had been returned in August 2016.

114. On 3 January 2017, the notices sent to Mr Cary at the Heinrichstrasse address were returned to the defendants. The note on the returned envelope appears to say, in French, Italian and German, that the addressee could not be found at that address. On 19 January 2017, the defendants then sent copies to Mr Cary at an address in Peterbrough where his parents lived. Mr Cary did not live there. He lived in Switzerland (at an address in Thalwill, not the Heinrichstrasse address).

115. Mr Cary has made a witness statement. Mr Cary says that the follower notices were sent to him by his parents and he believes that he received them on about 30 January 2017. He says he cannot be sure of the correct date but if they were sent to his parents on the 19th January, and then sent by them to him in Switzerland, it would be about the 30 January 2017 that he received them.

Mr Cibulskis

116. A letter dated 1 November 2016 was sent to Mr Cibulskis at an address in Walterton Road, Maida Vale in London telling him that follower notices and APNs would be sent

117. Follower notices and APNs dated 17 November 2017 were sent to Mr Cibulskis at the Walterton Road, Maida Vale address in London. Ms Bradley, says in her witness statement that that was the address that the defendants had on their data base for Mr Cibulskis at the time.

118. By letter dated 25 November 2017, which bore no address, Mr Cibulskis wrote referring to the letter of 1 November 2017. That letter set out Mr Cibulskis' arguments that the *Huitson* ruling was not a final ruling.

119. By letter dated 4 January 2017, sent to the Maida Vale address, the defendants reminded Mr Cibulskis of the dates for taking corrective action. There is a record of a telephone call from Mr Cibulskis to the defendants on 3 February 2017, stating that he had received the letter of 1 November 2016 but not the follower notices or the APNs. The note records Mr Cibulskis saying that the residents of the address where the post would have been sent had confirmed that the missing correspondence did not arrive there. There is a short letter dated 3 February 2017 from Mr Cibulskis stating that he had received the warning letter but not the actual copies of the follower notices or the APNs. That letter, however, confirmed that he had received the reminder notice on 4 January 2017. It did not refer to the persons resident at the Maida Vale address confirming that the correspondence had not been received.

120. Mr Cibulskis has not provided a witness statement in these proceedings. There is a statement from Mr John Cassidy. He has prepared a table of all the claimants and the date if known when the claimant received the follower notice and APN from information provided by the claimants. That table lists Mr Cibulskis as receiving the notices on 7 February 2017. The implication is that Mr Cibulskis has provided that information to Mr Cassidy.

The Law

121. Section 204(6) of the 2014 Act provides that a follower notice "may not be given after the end of the period of 12 months" from, effectively, the date when the judicial ruling became final. In the present case the ruling became final on 21 January 2017. Follower notices had, therefore, to be given on or before 20 January 2017. That is a case where applying *R v Soneij* [2006] 1 A.C. 340 and *R v Clarke* [2008] 1 W.L.R. 338, the statutory provision is intended to be complied with and notices not given before that date are intended to be invalid and no further action in relation to that notice may be given.

122. Section 204(1) of the 2014 Act provides that the defendants "may give" a person a follower notice. Section 115(2) TMA provides, so far as material, that:

> "(2) Any notice or other document to be given, sent, served or delivered under the Taxes Act may be served by post and, if so given, sent, served or delivered to or on any person by HMRC may be so served addressed to that person –
>
> (a) at his usual or last known place of residence, or his place of business or employment, or
>
> ….."

123. Section 7 of the Interpretation Act 1978 ("the 1978 Act") provides that:

> "References to service by post
>
> "7. Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the normal course of posting".

124. First, section 7 of the 1978 Act is in two parts. As the case law recognises, service is deemed to be effected by properly addressing, pre-paying and posting a letter. No more is required. If, however, the date by which such service is effected is critical, then the date of service is the time at which the letter would have been delivered to the address in question in the normal course of posting, unless the contrary is proved. See *Calladine-Smith v Saveorder Ltd.* [2011] EWHC 2501 (Ch) at paragraphs 21 and 25.

125. Secondly, in the present case, the date is critical. Section 204(6) of the 2014 Act requires that a notice be given on or before a particular date. If it is not so given, then it cannot provide the foundation for making the taxpayer liable to a penalty if he or she fails to take corrective action or for the giving of an APN removing the power to postpone payment of the tax. That has the consequence that the second part of section 7 of the 1978 Act is relevant. The notice has to have been delivered to the address in question by that date. It will be deemed to have done so in the ordinary course of posting unless the contrary is proven: see, by analogy, *Customs and Excise Commissioners v Medway Draughting and Technical Services Ltd.* [1989] STC 346.

126. Thirdly, the address to which the notice must be posted, by reason of section 115 TMA, is the "usual or last known place of residence" in the present case (place of business or employment not being relevant). If the defendants do not know where a taxpayer usually resides, they may send the notice to the last known place of residence. I do not accept the submission of Mr Gordon that where the defendants know that a taxpayer has ceased to reside at a place, the defendants cannot send the follower notice to that address. That address remains the last known address at which the taxpayer resided. In the present case, on the evidence, the last known place of residence of Mr Bennett, Mr Cary and Mr Cibulskis was the address on the defendants' data base to which they sent the follower notices. In the case of Mr Bennett, the last known address where he resided was 25 Plymouth Street, Karori. Although he had said he had ceased to live there, he had not provided another address. In the case of Mr Cary, the last known address at which he had resided was the Heinrichstrasse address in Zurich. The defendants did not know of any other Swiss address for him. His parents' address was not the last known place of residence as, on the evidence, he had not resided there. The last known place of residence of Mr Cibulksis was the Maida Vale address to which the follower notices were sent. There is still the question of whether a particular claimant can prove that it was not delivered at that address which I deal with next.

127. Fourthly, a person may be able to prove that the follower notice was not delivered on the date that it would have been delivered in the normal course of posting. What is critical, however, is whether the claimant can prove that it was not delivered at that address. It is not enough for the claimant to prove that he no longer lived there and he

had not, personally, received the follower notice (because he was not at the address and it was not forwarded to him). That is consistent with the language of section 7 of the 1978 Act. The document is taken to have been served at the time when it would have been delivered. That must mean delivered to the address referred in the first part of that section which, in the present case, is the last known address of each of the three claimants by reason of section 115(2) TMA.

128. Mr Gordon submitted that it was enough for a claimant to prove that he did not receive the follower notice personally, relying on observations in *Calladine-Smith v Saveorder Ltd.* It is correct that Morgan J. talks of the notice in that case being delivered or served or received by the claimant: see, for example, paragraph 26 of the judgment. The facts in that case, however, were that the letter was properly addressed and posted to the individual claimant at the relevant address, i.e. 77 Cumberland Road. The dispute, however, concerned the fact that it had not arrived at that address and consequently the individual had not received it. The issue did not concern the question of whether the letter arrived at the address to which it was sent but the individual no longer lived there and did not receive it. The issue was whether it was sufficient for the individual to prove that the letter was not delivered to the address or whether the individual had to provide further evidence to prove what had happened to the letter: see paragraph 2 of the judgment. The judge held that it was the former which the individual had to show. It was in that context that the individual succeeded because he had shown that the letter had not been received because he had proved that it had not been delivered to the address to which it was sent. The case is not authority for the proposition that it is sufficient for an individual to prove that he personally did not receive it. He must show that the notice or document was not delivered to the address to which it was, properly, addressed. If an individual can prove it was not delivered on the date it would usually be delivered in the normal course of posting, or if it was not delivered at all (because it was returned to the sender), the individual would have proved that service was not effected on that date: see *R v County of London Quarter Sessions Appeals Committee ex p. Rossi* [1956] 1 Q.B. 682.

129. Applying those principles to the present cases, the position is as follows. In Mr Bennett's case, the follower notice was sent to the last known address at which he resided, that is 25 Plymouth Street, Karori. It would be treated as having been given to Mr Bennett on the date on which it would have been delivered in the normal course of posting unless he proved that it had not been delivered to that address. On the evidence, however, that is proven. Ms Bradley's own witness statements, and exhibit, shows that the follower notice was returned undelivered on or about 23 March 2017. That is consistent with Mr Bennett's own witness statement, in which he states that he did not receive the follower notices until they were sent electronically on 20 February 2017. In the circumstances, the follower notices were not given to Mr Bennett on or before 20 January 2017 and those notices in his case are invalid.

130. In relation to Mr Cary, the follower notices were served at the last known address where Mr Cary resided, namely the Heinrichstrasse address. However, Ms Bradley's own evidence again records that the follower notices were returned undelivered to the defendants on 3 January 2017. That is consistent with the fact that earlier correspondence sent to that address in August 2016 had been returned undelivered. It is consistent with Mr Cary's own witness statement that he did not receive the follower notices until the copies sent to his parents were forwarded to him at the end

of January 2017. The follower notices were sent to an address in Peterborough. But Ms Bradley does not suggest in her evidence that the defendants believed that that was his last known place of residence. She says that the defendants understood that address to be his parents' address and there is no suggestion that the defendants believed that he resided there. In the circumstances, the follower notices were not given to Mr Cary on or before 20 January 2017 and those notices in his case are invalid.

131. In relation to Mr Cibulskis, the follower notices dated 17 November 2016 were sent to an address in Maida Vale, which was the address that the defendants had on their data base. I infer that that was the last known place of residence of Mr Cibulskis. In the normal course of posting, those follower notices would have arrived well before 21 January 2017. Even considering the evidence of the defendants as to how follower notices were dated and sent out, the notices would have arrived well before 21 January 2017. The notices would, therefore, be deemed to have been given on or before 20 January 2017 unless the claimant proved the contrary.

132. As explained above, Mr Cibulskis would have to prove that the follower notices were not delivered to the Maida Vale address. On all the evidence before this court, I do not consider that Mr Cibulskis has proved that on a balance of probabilities. Ms Bradley does not suggest in her witness statement that the notices were returned in Mr Cibulskis' case (she does in the other contested cases confirm that the follower notices were returned). I infer, therefore, that the follower notices were not returned undelivered to the defendants. There is correspondence from Mr Cibulskis confirming that a letter dated 1 November 2016 and a letter dated 4 January 2017 (i.e. correspondence sent either side of the date when the follower notices were sent) were delivered to the Maida Vale address. That indicates that some correspondence at least from the defendants was being delivered to this address. Mr Cibulskis has not made a witness statement in these proceedings to confirm that the follower notices were not delivered to the Maida Vale address (or, indeed, received by him). There is a note of a telephone call between him and an officer of the defendants on 3 February 2017 in which it is recorded that he said that he not received the follower notices or the APNs, that he was now abroad and that the residents of the house to which the notices were sent had confirmed that the correspondence (which I take to be the follower notices) had not arrived there. That was not something confirmed in the letter of 3 February 2017 sent by Mr Cibulskis. He has not made a witness statement to that effect. Mr Cibulsksis may have told Mr Cassidy that he received the notices on 3 February 2017 but no detail is given, and in particular, no details are given as to whether or not Mr Cassidy was told that the notices were not delivered to the Maida Vale address as opposed to being told that they were not received by Mr Cibulsksis personally. In all the circumstances, on the evidence before the court, Mr Cibulskis has not proved, on the balance of probabilities, that the follower notices were not delivered to his last known place of residence, i.e. the Maida Vale address, before the relevant date. The follower notices are, therefore, valid in his case.

133. For completeness, I consider the position if, contrary to my view, it would be sufficient if Mr Cibulskis could prove that he, personally, had not received them. On all the evidence, I would have concluded that he has not done so. For the reasons given, I am satisfied that the follower notices were delivered to the Maida Vale address. On Mr Cibulskis' own correspondence, it is clear that he received letters

from the defendants sent to that address before and after the date when the follower notices were sent. He has not made a witness statement saying that he did not personally receive them. The comments made in a telephone call and the inference as to what he told Mr Cassidy about the date he received them are insufficient, given the other evidence, to establish on a balance of probabilities, that he did not personally receive the follower notices before the relevant date.

THE FIFTH GROUND – THE APNS

134. The fifth ground is that the APNs are invalid as they could only be given if a follower notice had been given, or was given at the same time as the APN: see Condition C in section 219(4) of the 2014 Act. If a follower notice were invalid, then an APN could not validly be given in respect of the matters covered by the follower notice, and the APN would also be invalid.

135. The follower notices served on all bar six of the 342 claimants were valid for the reasons given above. Consequently, the APNs satisfied Condition C, and the other conditions, and could, validly, be given. The notices were not, as discussed above, invalid because of any failure to describe accurately the effect of the statutory provisions governing the making of representations. In all these cases, therefore, the APNs are valid.

136. In four cases (Mr Chidlow, Mr Tang, Mr Van de Giessen and Mr Ware), I understand that the defendants accept that the follower notices were invalid as they were not served on or before 20 January 2017. I understand that the follower notices and APNs served on those four claimants have been withdrawn: if not, they would be invalid. In addition, the follower notices given to Mr Bennett and Mr Cary were invalid and the APNs given in their case are also invalid as Condition C in section 219(4) of the 2014 Act is not met in their cases.

CONCLUSION

137. The statutory requirements for the giving of follower notices were satisfied in the present case. The defendants were entitled to serve a follower notice requiring the claimants to take corrective action to relinquish the claim to exemption from income tax on the payments from the Isle of Man trust and, to that end, abandon that part of their appeals to the First-tier Tribunal contending that the payments were exempt from income tax. The follower notices and APNs were not invalid because of any inaccuracies in the description of the period of time available to make representations or to take corrective action or in the description of the corrective action that had to be taken. In two cases, the claimants have established that the follower notices had not been given to them on or before 20 January 2017 (as required by section 204(6) of the 2014 Act) and the follower notices in those two cases, and the APNs served consequent upon those notices, are invalid. Save for those two cases, this claim is dismissed.