TAX ALERT

December 2023

TRANSFER OF ASSETS ABROAD AND THE FISHER CASE

HMRC v Fisher

The long-running Fisher case arrived at its denouement with the publication on 21 November 2023 of the Supreme Court's judgment. The Judgment was written by Lady Rose, with the other four law lords all in agreement. This is an important case on the Transfer of Assets Abroad (ToAA) anti-avoidance provisions.

Relevant facts

Stephen and Anne Fisher with their two children, Peter and Dianne, between them owned all of the share capital of a UK company, Stan James (Abingdon) Limited ('SJA'), a betting company. Stephen and Anne owned 38% each, with the remaining 24% split equally between Peter and Dianne. The four were the only directors of the company. In practice, Stephen and Peter were the only family members actively involved in running the business. Dianne was non-resident throughout the period relevant to this case (and was therefore outside the scope of the ToAA provisions) and Anne left it to her husband and son to operate the business. It was relevant to certain aspects of how this case was argued that Anne was a citizen of the Republic of Ireland.

The circumstances which led to the 'transfer'

The Fishers were entrepreneurial and recognised early the opportunities of 'telebetting', the process of placing bets by telephone rather than having to walk in to a betting shop to do it. This enabled individuals from abroad to place bets with a UK betting company and the difference between betting duties in the UK and abroad then became an important consideration. Under the Betting and Gaming Duties Act 1981, bookmakers have to account for betting duty on

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bets placed by customers. By 1999 the duty charged in the UK was 6.75%, comparing unfavourably with the 1% rate charged in Gibraltar. It was legally possible for a UK customer to place a bet in Gibraltar, in which case UK betting duty would be avoided. There was a prohibition on overseas bookmakers advertising in the UK.

Initially the Fishers set up a branch of SJA in Gibraltar which took bets from overseas customers, but when it started to take bets from UK customers by telephone, there was a significant surge in its business, with the need to increase staff from 6 to 20 and install more computers and telephone lines. In July 1999 a new company was set up in Gibraltar, Stan James Gibraltar Limited ('SJG'). Between August 1999 to February 2000, arrangements were put in place for the transfer of all of SJA's telebetting business and the rest of its business except for the betting shops to SJG. The transfer, which took effect from 29 February 2000, took the form of a sale at an independently assessed value, with Stephen signing the agreement as director on behalf of SJA and Peter signing as director for SJG. This was the 'transfer' which formed the subject of the enquiry. At the time of the sale, the share capital of SJG was held as to 26% each by Stephen and Anne and 24% by Peter and Dianne. Other major competitors had already taken steps to avoid UK betting duty in the same way, and it was a commercial imperative for SJA/SJG to follow suit in order to remain competitive and not haemorrhage its customer base. The business did well and from 2003 SJG developed internet and gaming platforms generating revenues from new activities.

The ToAA provisions

At the time of the case, the applicable legislation was at s739 ICTA 1988 but is still largely unchanged in its current form at s720 ITA 2007 (and, more broadly, at Part 13 Chapter 2 ITA 2007). It applies to individuals who are resident in the UK and is triggered where there is a transfer of assets, and as a result of the transfer and/or one or more associated operations, income becomes payable to a person abroad. The income arising to the person abroad (which would include a company) can be attributed to an individual or individuals who have 'power to enjoy' the income, whether or not they receive it. A charge under these provisions can be avoided if HMRC are satisfied that there is a 'motive defence'. The wording of the motive defence has been somewhat refined with several rewrites and additions in 2005 and 2012. The version which applied in relation to this transfer provided a defence where it could be established that the transfer or any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to (UK) taxation.

The assessments

HMRC issued assessments on Stephen and Anne for the tax years 2000/01 to 2007/08 and on Peter for 2000/01 to 2004/05 (Peter became non-resident in the UK in July 2004), although the FTT held that the 2002/03 assessment on Peter was out of time, which HMRC did not appeal. The figures in the assessments were based on the percentage interests held in SJG so that 26% of SJG's income was treated as the income Stephen and Anne (26% each) and 24% was treated as Peter's. No assessments were issued on Dianne who was non-resident in all years.

The findings of the First Tier Tribunal

The FTT determined, following a hearing in 2014, that the assessments on Stephen and Anne for 2005/06 and 2006/07 were defective, and also the assessment on Peter for 2002/03.

Otherwise, the FTT considered three principal matters and decided as follows:

- Stephen, Anne and Peter were to be treated as 'quasi-transferors' who had jointly procured the transfer by SJA to SJG and, as such, the whole of the transfer was attributable to each of them. The profits of SJG were therefore taxable under the ToAA provisions, including later profits deriving from the internet and gaming activities which arose from 'associated operations' linked to the initial transfer since they were funded from the profits of the original transferred business.

- There was no motive defence available in the circumstances. Although it was argued on behalf of the taxpayers that the main purpose of the transfer was ensuring the survival of the business, the FTT concluded that avoiding betting duty was the main purpose.

- However, they also concluded that the ToAA provisions are incompatible with article 49 of the Treaty on the Functioning of the EU, the provision dealing with freedom of establishment. Accordingly, Anne, as a citizen of the Republic of Ireland, was entitled to the protection of EU law. In her case, it was necessary to interpret the ToAA provisions more narrowly so as only to be engaged with a transaction which was a wholly artificial arrangement to avoid the payment of tax. This high bar test wasn't met since SJG was conducting a bona fide trading operation paying tax in Gibraltar. In her case, the denial of the motive defence would be disproportionate to any legitimate objective which the ToAA provisions sought to achieve so the motive defence should succeed in her case. The assessments on Peter and Stephen, as UK citizens, were upheld on the basis that the EU provisions were not applicable to transfers from the UK to Gibraltar. The UK took responsibility for Gibraltar's external relations under EU law so there should be no narrower interpretation used in their case.

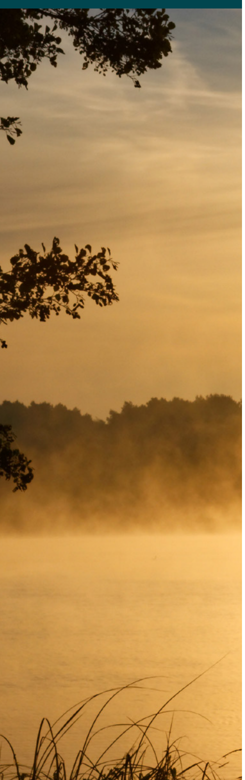
The Fisher family appealed against the FTT's decision.

The findings of the Upper Tier Tribunal

The UTT handed down judgment in March 2020, and came to a very different view to the FTT. The main findings of the UTT were as follows:

- Fundamentally, they regarded it as incorrect to apply the ToAA provisions to a situation where the transferor is a company, not an individual. If the code were to apply to corporate transfers and the individual involved is only a shareholder or director of that company, the effect 'would be to widen the ambit of the section to such an extent as to depart altogether from the language used in the state and the purpose it serves'. The UTT recognised the possibility that there may be justification for lifting the corporate veil and attributing a transfer to an individual where that individual is responsible for effecting the transfer, but rejected the idea that Parliament's intention was for the code to be applied to all transfers made by companies in which a shareholder or director with any level of control can enjoy the income of the transferred assets.

- Although, in light of the findings in the first bullet point, it was not necessary to consider the availability of the motive defence, the UTT did examine the position and concluded that the main purpose of the transfer had been to ensure the survival of the business, the avoidance of UK betting duty merely being the means of achieving



that main purpose. The motive defence would therefore have been available to all three taxpayers.

- On the EU law point, the UTT agreed with the FTT that the ToAA provisions breached Anne's EU rights, but considered also that Stephen would have been entitled to the narrower interpretation of the motive defence. This was on the basis that Stephen would have had to move abroad and become non-UK resident to avoid the damaging effects of the ToAA provisions, and this would have had a knock-on detrimental financial and emotional impact on Anne and Stephen as a married couple. The UTT therefore concluded that Stephen could also rely on EU law, although not Peter.

HMRC appealed against the UTT's findings.

The findings of the Court of Appeal

The Court of Appeal judgment was handed down on 6 October 2021. The main judgment was written by Newey LJ, agreed in full by Lord Justice Arnold. Lord Justice Phillips dissented in one important aspect, covered below.

The findings of the Court of Appeal were as follows:

- The most important point was whether Stephen, Anne and Peter were transferors for the purposes of the ToAA provisions in relation to the transfer made by SJA. In other words, were they 'quasi-transferors'? Case law, in particular Congreve v CIR, Vestey v CIR and CIR v Pratt were considered at some length. Newey LJ considered that it was possible to have multiple quasi-transferors, and then considered which of Stephen, Peter and Anne could be considered quasi-transferors who had actually procured the transfer by SJA. He came to the view that Anne had merely entrusted her responsibilities to Stephen and Peter, having no active involvement in the company. He concluded that 'procure' implied some positive action and not just passively permitting others to do things. He therefore decided that Stephen and Peter were 'quasi-transferors' but that Anne was not.

- The Fishers had sought to argue that it was necessary for income tax to actually have been avoided in order to engage the ToAA provisions. Newey LJ thought this to be illogical since the legislation made it clear that there was no requirement for an income tax avoidance purpose.

- On the motive defence issue, it was observed that a 'main purpose' test had been adopted in Carvill v IRC, and that this test had been applied by the FTT based on the facts and circumstances of the transfer in Fisher. The FTT had concluded that avoidance of betting duty was the main purpose of the transfer, and that having thus concluded on the basis of the facts, the UTT had no entitlement to interfere with their conclusion. Newey LJ felt that the avoidance of betting duty and the preservation of the business were inextricably linked, and that there could be no question of the motive defence applying because a transferor hopes that an intended avoidance of a liability to taxation will achieve some further end.

- On the EU law point, Newey LJ concluded that it was impossible for a measure to fall foul of EU law simply because it discourages investment in a different part of a single member state (the CJEU have concluded that this was the case with the UK and Gibraltar). He therefore took the view that the ToAA provisions did not infringe Anne's freedom of establishment in any relevant way so there was no question of Anne, Stephen or Peter being able to invoke EU law in relation to their tax assessments.

The only finding with which Phillips LJ disagreed was the vital one of when a minority shareholder might be a ‘quasi-transferor’ by virtue of having ‘procured’ a transfer. His comments were:

In my judgment it is wrong in principle, and illogical, to regard a minority shareholder as ‘procuring’ an act by a company of which they are a member simply by voting in favour of (or otherwise supporting) that act. Unless such a shareholder forms some voting pact with other shareholders (by formal agreement or otherwise), a minority shareholder has no power themselves to procure any outcome, having to abide by the majority decision.

For my part, I would dismiss the appeal in its entirety.

The Fishers appealed to the Supreme Court.

The findings of the Supreme Court

In essence, the Supreme Court focused on two fundamental issues in order to resolve the case:

1. Does the transfer of assets which is the subject of the legislation have to be a transfer by the individual who has the power to enjoy the income which becomes payable to the person abroad, or can the transfer be by anyone, provided that the individual assessed to tax has the power to enjoy that income in consequence of the transfer?

2. If the individual has to be the transferor of the assets, in what circumstances can an individual be treated as the transferor of the assets where the transfer is in fact made by a company in which the individual is a shareholder?

On the first point, Lady Rose’s judgment involves a detailed review of case law before concluding the point decisively in favour of the Fishers, that they can only be charged to the s739 provisions if they are properly regarded as the transferors of the assets sold by SJA to SJG. So all then rested on the second question of whether they can be regarded as the transferors of the assets.

On the second point, clearly the legal transferor of the assets was SJA, so HMRC could only succeed by placing reliance on references in case law to individuals who ‘procure’ the transferor to transfer assets, or who are ‘in reality’ the transferor or who are ‘quasi-transferors’. Lady Rose disagreed (‘respectfully’) with Newey LJ’s analysis of Congreve and Vestey and considered that the Court of Appeal in Congreve expressly distanced itself from the view that a shareholder procured transfers made by the company, even if that shareholder owned all or practically all of the shares. She agreed with Phillips LJ’s dissenting judgment in the Court of Appeal as regards his comments on minority shareholders (quoted above in italics) but went further and rejected the view that even a controlling shareholder is to be treated as ‘procuring’ the transfer of assets by the company. The Supreme Court judgment observed that a set of facts may emerge in the future where HMRC can properly argue that someone who is not the owner or legal transferor of the assets had nonetheless procured the transfer or used an agent to transfer the assets. However, it is clear that the shareholders of a company, especially minority shareholders, even if they are also the directors, are not quasi-transferors and do not procure the transfers made by the company. Lady Rose’s judgment made clear

that s739 is expressly limited to individuals, and that the absence from the legislation of any definition of what it means for an individual to control a company in order to be the transferor of assets transferred by that company strongly suggested that s739 was not intended to apply to transfers by companies.

So what do we take away from this?

The Supreme Court judgment does not explore in detail the circumstances in which individuals may be quasi-transferors. It really went as far as to explain why the Fishers were not to be regarded as transferors but didn't examine where the boundaries might be. Fisher is a case where the transfer was made by a company owned entirely by four shareholders each with a significant minority shareholding who also made up the board of directors. This is an authoritative judgment by the Supreme Court and must significantly narrow the circumstances in which HMRC can successfully invoke the ToAA transferor provisions where a person other than the individual actually makes the transfer.

Another interesting aspect still to be explored is the EU law issue. Although Newey LJ in the Court of Appeal rejected the argument that Anne Fisher's rights under EU law had been infringed by the ToAA provisions, it was clear that this was because the transfer had been between entities situated in two areas regarded as being in the same de facto Member State. If the transfer had been to a company in, say, Germany, the findings might well have been different. Section 742A ITA 2007 took effect from 6 April 2012 and HMRC's view is that this has made the ToAA regime compatible with EU law, although this remains untested. And of course the UK left the EU on 1 January 2021 and this is likely to have a bearing on the issue.

More generally, the Supreme Court offered a narrow interpretation of the application of the TOAA anti-avoidance rules, rejecting HMRC's position that these rules should be interpreted widely to in effect create uncertainty amongst taxpayers and thereby deter tax avoidance. This is significant because the tax code contains a great deal of widely drafted anti-avoidance rules which HMRC seek to apply broadly for deterrent reasons. This Supreme Court judgement therefore offers the prospect that the courts may now apply more restrictive and narrower interpretations of anti-avoidance rules to provide greater certainty to taxpayers in future.

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