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Analysis

Certainty vs deterrence: the Supreme Court's approach to anti-avoidance legislation in *Fisher*

Speed read

In *Fisher v HMRC*, the Supreme Court confirmed that the primary charging provision in the transfer of assets abroad regime still contains a requirement for the individual to have made a transfer of assets and that a transfer by a company cannot be treated as a transfer made by its shareholders. The court preferred to restrict the legislation to provide certainty in its application, rather than leaving it unclear as a deterrent against tax avoidance. If HMRC consider that this leaves a lacuna in the legislation then Parliament must fill it in a fair, appropriate and workable manner.

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The transfer of assets abroad regime

The transfer of assets abroad regime ('TOAA') is one of the UK's oldest anti-avoidance codes. First introduced by FA 1936, the regime has been re-enacted four times – ITA 1952, ICTA 1970, ICTA 1988 and it presently resides in ITA 2007 Part 13 Chapter 2. The regime has expanded but the primary charging provision (now ITA 2007 s 720) has remained remarkably similar since the regime's creation.

In *HMRC v Fisher* [2023] UKSC 44, both ICTA 1988 (s 739) and ITA 2007 (s 720) were under consideration by the courts. The Supreme Court refers primarily to the ICTA 1988 (as does this article) but the judgment applies equally to the current legislation in ITA 2007.

The main conditions of s 739 are:

- that there is a transfer of assets;
- as a result of the transfer, either alone or in conjunction with other transactions (referred to as 'associated operations'), income becomes payable to a person resident or domiciled abroad; and
- an individual has 'power to enjoy' the income of the person abroad ('power to enjoy' is defined in broad terms in s 742).

Where the legislation applies, the income of the person abroad is treated as if it were the income of the individual which, since the individual is UK resident, will generally give rise to a charge to income tax. TOAA also imposes charges where the person receives a capital sum connected with income arising (s 739(3)) and where a person receives actual benefits out of assets which are available as a result of the transactions (s 740); those provisions were not directly under consideration in *Fisher* but form important parts of the legislative context.

An exemption to the charge is that the legislation does not apply if, in relation to transactions before 5 December 2005 either (a) the purpose of avoiding liability to 'taxation' was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected, or (b) the transactions were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation – which is generally referred to as the 'motive defence' (s 741). (The wording of the motive defence for post-2005 transactions is different.)

Applied in appropriate circumstances, TOAA is considered a legitimate deterrent in the battle of manoeuvre between the Legislature and those minded 'to throw the burden of taxation off their own shoulders on to those of their fellow subjects' (*Lord Howard de Walden* [1942] 1 KB 389, per Lord Greene MR).

The transferor issue and its history

The paradigm case in which TOAA applies is straightforward to identify: a UK resident individual transfers an income-producing asset to a non-resident person, such as a company or trust, in circumstances in which the individual retains power to enjoy that income. *Latilla* [1943] AC 377 was such a case where UK residents had transferred an interest in a partnership to a Rhodesian company.

However, the legislation contains an ambiguity: does the individual need to be the person who actually makes the transfer of the assets in question? And, if so, what does it mean to be a transferor?

> The TOAA legislation contains an ambiguity: does the individual need to be the person who actually makes the transfer of the assets in question? And, if so, what does it mean to be a transferor?

Prior to *Fisher*, TOAA had already been considered by the House of Lords on no less than six previous occasions (and by the High Court and Court of Appeal in a number of other cases), and those cases are the context to the Supreme Court's most recent decision.

In *Congreve* (1946-1948) 30 TC 163, Mrs Congreve was assessed to tax even though it was accepted that she knew nothing about the complex series of transactions that had been effected by her father. Whilst the High Court considered that the legislation required Mrs Congreve to be the transferor if she were to be charged to tax, the Court of Appeal and House of Lords declined to read that requirement into the wording of the legislation (but, in the alternative, accepted that the transfers in that case had been 'procured by the individual' by Mrs Congreve acting through her agent). In *Bambridge*, which concerned the settlement and wills of Rudyard Kipling and his wife), the Court of Appeal ([1954] 1 WLR 1460) applied and agreed with the interpretation in *Congreve*, and that interpretation was not disturbed on appeal to the House of Lords ([1955] 1 WLR 1329).

The *Congreve* interpretation stood as the law for over 30 years until TOAA came before the House of Lords again in *Vestey* [1980] AC 1148. The facts of

Vestey highlighted a problem with the legislation: in that case the terms of the offshore settlement were such that 30 beneficiaries had power to enjoy the income arising within the funds. However, in the absence of any specific apportionment provision within the legislation (contained at the time in ICTA 1970, but *Vestey* concerned the predecessor legislation in ITA 1952), how was the proportion of the income arising to each beneficiary to be determined? The Commissioners' answer was that they were entitled to tax each beneficiary on the whole of the trustees' income but they had a discretion which enabled them to assess one or all of the individuals in such sums as they thought fit. In other words, the Commissioners contended that the possibility of double taxation was acceptable because they would operate an extra-statutory discretion to ensure that this did not occur.

Lord Wilberforce considered that the Commissioners' interpretation was not only arbitrary and unjust, but it also conflicted with the constitutional principle that a person's tax liability cannot be decided by an administrative body: 'Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined'. He also approved the observation of Walton J (the judge in the High Court): 'One should be taxed by law, and not be untaxed by concession.'

'Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined' Lord Wilberforce in *Vestey*

Faced with the unpalatable prospect of the Commissioners being granted a discretion to tax one individual over another, the House of Lords in *Vestey* therefore overruled *Congreve* and interpreted TOAA as containing a condition that there had to be some connection between the individual being charged and the transfer of assets. However, what the connection had to be remained unclear, with Lord Wilberforce himself stating that the charge applied in circumstances in which the individual 'was associated with' the transfer.

In *Pratt* [1982] STC 756, the transfer in question was a transfer of land made by a company of which the taxpayers were minority shareholders. Before the High Court, Walton J was the judge once again and considered that individuals who 'procured' transfers could be taxed under s 739 in the same way as individuals who effected transfers themselves. However, the Court rejected the Commissioners' argument that the shareholders in that case had 'procured' a transfer by the company: the sale of the land was a matter for the company's board and there was no question of any of the taxpayers, alone or in concert, either at board or shareholder level, being able to procure the company to do anything. TOAA could not be interpreted in a way which enabled a transfer of assets by a company to be ascribed to each individual shareholder who acted collectively to bring about the transfer.

In *Vestey*, Lord Wilberforce had not been concerned if his interpretation left a gap in the legislation as Parliament could amend it: 'Gaps when they are found in our tax laws are usually speedily filled.' However, Parliament did not amend the legislation to remove any requirement for the chargeable individual to be a transferor; instead it introduced an apportionment provision (which was subsequently re-enacted in ICTA 1988 s 744) authorising the Commissioners to allocate the income in such proportions as appeared just and reasonable (subject to a right of appeal) in circumstances in which there was a choice as to the persons who might be charged. In addition, a further charging provision (subsequently re-enacted as ICTA 1988 s 740) was introduced which charged non-transferors on benefits received out of income arising to a person abroad by virtue or in consequence of transfers of assets.

The House of Lords again considered TOAA in *Willoughby* [1997] 1 WLR 1071. In that case, the relevant transfers of assets (comprising payments of premiums on offshore personal portfolio bonds) occurred when Professor Willoughby and his wife were not resident in the UK, and the taxpayer argued that this precluded the application of the TOAA. This argument was accepted with the reasoning of Lord Noland appearing to endorse the approach in *Vestey* (notwithstanding that the legislation had subsequently been amended). In fact, before the House had even heard the appeal in *Willoughby*, Parliament amended the legislation again (through s81 FA 1997) to put it beyond doubt that the individual did not need to be UK resident at the time of the transfer of assets. However there was still no amendment clarifying whether or not the chargeable individual had to be the transferor of the assets, or how this requirement might be applied in relation to companies.

The facts of *Fisher*

The Fisher family, consisting of Anne, Stephen and their children Peter and Dianne, were the four shareholders of a UK resident company, Stan James (Abingdon) Ltd ('SJA'), with none of them holding a controlling shareholding. The business was one of the first to recognise and exploit the possibilities of the fast-developing market for 'telebetting', that is the placing of bets by telephone. If the customer could place their bet by telephone, it was not necessary for the bet to be placed in the UK, where it would incur UK betting duty (at a rate of 6.75% at the time).

The Fishers' evidence was that their competitors in the industry had moved their telebetting businesses to Gibraltar in 1999 and that SJA's business would have collapsed if it did not take similar steps to move its telebetting operations abroad (and in this regard it might be said that the Fishers' situation invoked considerable sympathy). In February 2000, SJA therefore transferred the telebetting operations to a new company incorporated in Gibraltar, Stan James Gibraltar Ltd ('SJG'), of which the Fishers were the shareholders.

HMRC considered that TOAA applied specifically because the transfer of the business by SJA to SJG was a transfer of assets made by the Fishers which gave them power to enjoy the income arising to a person abroad, with the result that the income of SJG should be treated as belonging to the Fishers. HMRC therefore assessed Anne, Stephen and Peter for the years 2000/01 to 2007/08 and the Fishers appealed those assessments.

Decisions of the FTT, Upper Tribunal and Court of Appeal

At each stage of the proceedings there were three main issues:

1. Whether s 739 applied to the Fishers in circumstances in which the transfer of assets had been made by a company (SJA) rather than the Fishers personally?
2. Whether the Fishers could rely on the motive defence where the ultimate purpose of the transfer had been to save the business?
3. Whether there was restriction of the Fishers' EU law rights and, if so, what were the consequences of any such restriction?

In relation to the EU law argument the difficulty for the Fishers was that, whilst Gibraltar is outside the UK for TOAA purposes, for EU law purposes it is part of the UK and therefore the transfer of the business from SJA to SJG was treated as entirely internal; this was confirmed by the CJEU (Case C-192/16) in a reasoned order following a reference by the Upper Tribunal. The Fishers' argument therefore depended on whether Anne could invoke EU law rights because she was an Irish national and, if so, whether Peter and Stephen could also take advantage of those rights.

The FTT (Judge Raghavan and Mrs Sadeque) considered that the introduction of the apportionment provision in s 744 put an entirely different complexion on TOAA and permitted there to be multiple 'quasi-transferors' in relation to a transfer by a company. Adopting the terminology used in *Pratt*, the Fishers had jointly 'procured' the transfer of the business. The FTT further held that avoiding betting duty was one of the purposes of the transfer (but the avoidance of income tax was not), and that freedom of establishment had been breached in relation to Anne because of her Irish nationality (but not in relation to Stephen or Peter). Having identified a breach of Anne's EU rights, the FTT applied a conforming construction to expand the motive defence such that it applied whenever the taxpayer was exercising a Treaty freedom (in other words, unless the arrangements were artificial). Overall, Anne's appeals therefore succeeded but Peter and Stephen's were dismissed.

The Upper Tribunal (Andrews J and Judge Poole) set aside all of the assessments on the grounds that the facts of the case had no connection with the mischief against which TOAA was aimed and the transfer made by SJA could not be imputed to its shareholders. In particular, the tribunal considered that there must be some proper basis for ascribing the acts of the person who is actually transferring the assets to the individual concerned, which might be the case where that person was acting as an agent or the individual was in a position to direct the transferor to make the transfer (for example, where the transfer is made by a trustee and the individual is a beneficiary of the trust). It was therefore possible to conceive of situations in which a transfer by a company might be imputed to an individual who controlled it, in which case the company would be a mere instrument. However, none of the Fishers were able to, or did, tell SJA what to do as none of them individually had a controlling interest in SJA, or did anything (individually or collectively) which would justify treating them as being the 'real' transferor of the company's assets.

The Upper Tribunal also held that:

- the motive defence applied because the avoidance of betting duty was simply a means of achieving the main purpose of saving the business.
- Anne and Stephen's EU law rights were breached (but not Peter's), and the Tribunal applied the same conforming construction as the FTT by expanding the motive defence.

The Court of Appeal unanimously overturned the Upper Tribunal's decision on two of the three issues by concluding that none of the taxpayers' EU law rights were breached and, in relation to the motive defence, the avoidance of betting duty and saving of the business were inseparable, the former being a means to the latter end. The Court considered that it should not be open to a taxpayer to circumvent TOAA by arguing that their avoidance of tax was not the ultimate end sought: 'It will rarely, if ever, be the case that a transferor wishes to avoid liability to tax for the sake of it; in normal circumstances, a transferor will be intending to use the avoidance of tax to attain another object. That being so, were someone able to escape section 739 by looking beyond the tax avoidance to its consequences, the motive defence would, as the FTT pointed out, be generally available. That will not have been Parliament's intention.'

However, the court was divided in relation to the transferor issue: Phillips LJ (dissenting) considered that minority shareholders could not be treated as quasi-transferors, even where they together hold a controlling interest. However, Newey LJ (with whom Arnold LJ agreed) held that there was no error in the FTT's approach of asking 'who the transferors are in reality', and it was possible for two or more individuals to 'procure' a transfer where they actively cause a company to effect a transfer. This meant that Stephen and Peter, who were the directors who signed the agreement transferring the business, were transferors, but Anne was not since she had played no active role in the transfer. Overall, the majority of the Court of Appeal therefore set aside Anne's assessments (because she was not a transferor) but upheld Peter and Stephen's assessments.

> In its judgment, the Supreme Court was evidently undertaking a balancing act between, on the one hand, applying a broad interpretation that resulted in uncertainty and, on the other, applying a stricter approach which might allow taxpayers to circumvent an important anti-avoidance regime

Appeal to the Supreme Court

HMRC (in Anne's appeal), Stephen and Peter appealed to the Supreme Court on the three main issues. In relation to the transferor issue, the Fishers relied on *Vestey* to argue that they could only be charged if they were the transferors of the business and, as minority shareholders, they could not be treated as transferors. HMRC's position was that in fact there was no requirement in the legislation for an individual to be a transferor in order for the legislation to apply. This was not presented as an attempt to overturn *Vestey* (and return to the interpretation in *Congreve*); rather HMRC argued that the primary concern of the House of Lords had been the lack of an apportionment mechanism, and the arbitrary and unconstitutional consequences that followed from the Commissioners' case that they had an extra-statutory discretion in applying the charge. However, the legislation did now contain an apportionment provision (s744) and so the constitutional concerns relating to multiple transferors no longer applied. In the alternative, HMRC argued that the Fishers should be treated as transferors as they had jointly procured the transfer of the business.

In relation to the motive defence, the Fishers raised a new argument concerning the definition of 'taxation' in s741, specifically arguing that the defence applied unless there was a purpose of avoiding *income* tax, and therefore still applied where there was a purpose of avoiding any other tax or duty (in particular betting duty). This point had been determined by the Court of Appeal in *Sassoon* (1943) 25 TC 154 and, once their appeals reached the Supreme Court, the Fishers could finally challenge the correctness of that decision (after 80 years). In relation to the EU law issue, the Supreme Court refused Stephen and Peter permission to appeal, but Anne (as respondent in her appeal) could still rely on the argument.

Balancing certainty and the deterrence of tax avoidance

More than 23 years after the transfer of SJA's telebetting business to Gibraltar, the Supreme Court has upheld the Fishers' argument that they were not transferors. In considering the transferor issue, the court posed two questions:

1. Does the transfer of assets have to be a transfer by the individual who has the power to enjoy the income, or can the transfer be by any person?
2. If the individual has to be the transferor, in what circumstances (if any) can an individual be treated as a transferor of the assets where the transfer is in fact made by a company of which the individual is a shareholder?

In relation to the first question, the court accepted that the House of Lords in *Vestey* had evidently been concerned by the absence of an apportionment mechanism in TOAA at the time of that case. However, the primary reason that the House of Lords had overturned *Congreve* was because the more natural interpretation of the legislation was that the charge was limited to individuals who transferred assets: the individual who is the subject of s 739 must be one with the characteristics referred to in that provision, namely one who not only is resident in the UK but who also has tried to avoid liability to income tax by means of transfers of assets (as Lord Nolan had also concluded in *Willoughby*).

In reaching this conclusion the court considered that HMRC's position was fatally undermined by the existence of s 740, which was specifically designed to deal with non-transferors who are not caught by s 739. Moreover, the existence of an apportionment provision in the amended legislation did not fully mitigate the penal and harsh features of the charge, nor are such punitive consequences justified by the purpose of the legislation. A point that evidently weighed heavily in the Supreme Court's deliberations was that Parliament could have amended s 739 following *Vestey* (as Lord Wilberforce had effectively suggested), but had chosen not to do so.

In relation to the second question, the court's starting point was that the legal transferor of the assets had been SJA and not the Fishers and therefore asked whether there was any reason to construe TOAA as extending to the shareholders of a company on the basis that they were 'associated with' or 'procured' the transfer of assets by that company?

In the court's view, there were no principled criteria which could be applied to justify such an extension: whilst imputing the transfer to a controlling shareholder might be possible, minority shareholders are more problematic as they have no power themselves to procure any transfer. In the case of a PLC with thousands of shareholders, a majority vote in favour of a transfer could therefore potentially result in all shareholders being rendered transferors and liable to charge under TOAA. It was particularly difficult to say what would be the correct answer if, say, a shareholder declines to vote because they know the transfer will be approved by the majority of shareholders. Further issues would arise on the application of the motive defence since it might not be available to a particular shareholder even though individually they had no tax avoidance motive (or perhaps no knowledge at all of the transaction).

> The Supreme Court has effectively left it open to future courts to counteract artificial avoidance – albeit the precise circumstances in which this will be appropriate are unclear

However, the court went further as it also held that even 'controlling' shareholders should not be treated as transferors under TOAA. The concept of 'control' was not even clear as there are many places in the tax code where Parliament carefully defines the circumstances where an individual is treated as controlling a company, but no such provision had been included in TOAA and it was therefore difficult to see where any bright line might be drawn. Even in the case of a 100% shareholder, the decisions in relation to a transfer might be taken by directors without consulting the shareholder.

The court was evidently unimpressed by the uncertainty inherent in the application of the legislation to shareholders and the suggestion by HMRC that this might enhance its anti-avoidance purpose. The court considered that this had a flavour of the same unconstitutional approach that was so strongly deprecated in *Vestey* and agreed with the Fishers that the law should not be left unclear 'just to scare people'. Addressing whether this left a lacuna in the legislation, the court observed that non-transferors would still be chargeable under s 740 if they receive a benefit and (echoing Lord Wilberforce in *Vestey*) it remained open to Parliament to fill any gap 'in a fair, appropriate and workable manner'.

Given that its decision on the transferor issue disposed of the proceedings, the Supreme Court gave no judgment on the arguments relating to the motive defence or EU law.

Does the Supreme Court's judgment limit the application of TOAA?

HMRC's arguments in relation to the transferor issue were rejected, but in fact it is not necessarily clear whether in practice this will greatly limit HMRC's application of TOAA.

In relation to the question of whether or not a chargeable individual has to be the transferor, the Supreme Court has affirmed the interpretation which has been accepted since *Vestey*. In fact HMRC's own guidance on TOAA (in their *International Manual*) accepts throughout that the current charge under ITA 2007 s 720 only applies if the individual is also the person who made, or is associated with, the transfer of assets.

By precluding shareholders from being treated as transferors in relation to transfers by a company, the court has evidently restricted the manner in which HMRC can apply the legislation in those particular circumstances. However, the court made express reference to the possibility that there may be facts where it can be concluded that a person who is not the owner or legal transferor of assets has nonetheless procured their transfer or in which they have used an agent to make the transfer. It also observed that there might be cases in which the use of a company might be regarded as a device and the substance of the transactions is still a transfer by an individual. The Supreme Court has therefore effectively left it open to future courts to counteract artificial avoidance – albeit the precise circumstances in which this will be appropriate are unclear, particularly given that TOAA will only apply where there is some form of tax avoidance afoot.

In addition, in many cases it may be that HMRC can still rely on TOAA but will need to refine their analysis to take account of the Supreme Court's ruling. For example, if shareholders subscribe for shares and invest capital in a company which (potentially many years later) then makes a transfer to a person abroad, HMRC are now precluded from arguing that the transfer by the company can be imputed to the individual shareholders – but might HMRC instead be able to argue that the original investments in the company are the relevant transfers of assets made by the individuals, with the subsequent transfer by the company simply being an associated operation? In other words, depending on the facts, HMRC may be able to identify a different transfer of assets made by the individual.

Where does this leave the other issues?

It would have been interesting to see the Supreme Court's discussion of the other issues before it: on the motive defence, the term 'taxation' has now been defined in the legislation as all taxes and duties for which HMRC are responsible (ITA 2007 s 737). However, that definition only applies where the transaction under consideration occurred after December 2005. There will be many TOAA cases where some transactions have occurred before this date and therefore the uncertainty in the term 'taxation' (now contained in ITA 2007 s 739) remains. Given that the Supreme Court declined to overrule it, the broad definition in *Sassoon* has effectively survived (and remains binding) for pre-2005 transactions.

The argument concerning whether a person has a tax avoidance purpose where the saving of tax is merely a means to an end has relevance beyond TOAA. 'Main purpose' tests are used in a variety of anti-avoidance regimes (including transactions in securities) and targeted anti-avoidance rules (see, for example, the recent decision in *Delinian Ltd* [2023] EWCA Civ 1281). Absent further consideration, the Court of Appeal's decision that the means and end may be inseparable could prove significant.

In relation to the EU law argument, there will be many cases in which transactions within TOAA do give rise to a restriction of the taxpayer's EU law rights. Where that can be demonstrated, the Upper Tribunal's conclusion that the legislation is disproportionate and therefore incompatible with EU law remains the highest judicial statement on this issue. The outcome of the FTT and Upper Tribunal decision may therefore be that, where a taxpayer can demonstrate an infringement of their EU law rights, the effect of the conforming construction is that they can rely on the motive defence unless the arrangements are artificial.

The Supreme Court's judgment provides hope for taxpayers that, if the outcome sought by HMRC results in excessive uncertainty and ostensibly grants HMRC a discretion in relation to their application of the legislation, the courts may prefer a narrower interpretation which provides taxpayers with greater certainty

Wider implications of the judgment

In its judgment, the Supreme Court was evidently undertaking a balancing act between, on the one hand, applying a broad interpretation that resulted in uncertainty and, on the other, applying a stricter approach which might allow taxpayers to circumvent an important anti-avoidance regime. In this case, the court preferred the narrower interpretation due to the uncertainty in the operation of TOAA and its potentially penal consequences if it were applied to shareholders of a company making a transfer. This echoes the concern of Lord Wilberforce in *Vestey*, but is not a concern that applies uniquely to TOAA: there are a number of anti-avoidance provisions and regimes that are open to interpretation or not entirely clear in their application in specific circumstances. The consequential uncertainty might act as a deterrent to taxpayers and encourage HMRC to seek to apply the legislation in a broad range of circumstances (beyond the paradigm case envisaged by Parliament).

The Supreme Court's judgment therefore provides hope for taxpayers that, if the outcome sought by HMRC results in excessive uncertainty and ostensibly grants HMRC a discretion in relation to their application of the legislation, the courts may prefer a narrower interpretation which provides taxpayers with greater certainty. This may be the case even if restricting the legislation ostensibly leaves a gap: as emphasised by the Supreme Court, judges have other weapons at their disposal to counteract avoidance devices where the substance of the transactions falls within the mischief at which the legislation is targeted – but the court did not consider *Fisher* to be such a case. ■

The author was one of HMRC's counsel in this case.

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- Back to basics on transfer of assets abroad (J Hills & A McGregor, 5.5.22)