All bets are off

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Rebecca Sheldon considers the role that the Transfer of Assets Abroad code plays in the sale of a UK telebetting business to a Gibraltar company

Key Points

What is the issue?

The case of Fisher v HMRC concerns the tax consequences of the sale and transfer in March 2000 of a telebetting business by a UK resident company to a Gibraltar company.

What does it mean to me?

The Upper Tribunal found that the Transfer of Assets Abroad code could in theory be engaged even in a situation where the taxpayer was not seeking to avoid income tax by making the relevant transfer.

What can I take away?

The decision gives significant guidance on the scope of the Transfer of Assets Abroad code and how it should be interpreted. It demonstrates that for the code to be engaged, it is not a requirement that there be avoidance of income tax specifically.

In *Fisher v HMRC* [2020] UKUT 62 (TCC), Philip Baker QC and Rory Mullan successfully represented taxpayers Stephen, Anne and Peter Fisher ('the taxpayers') on appeal from the decision of the First-tier Tribunal on 14 August 2014.

The case concerns the tax consequences of the sale and transfer in March 2000 of a telebetting business by a UK resident company called Stan James Abingdon Ltd (SJA) to a Gibraltar company named Stan James Gibraltar Ltd (SJG).

Factual summary

Stephen and Anne Fisher were resident in the UK during the relevant times, while Peter was resident in the UK until 2004. The family ran the Stan James Betting business.

Until 2001, general betting duty was charged under the Betting and Gaming Duties Act 1981 s 1 on any bet 'made with a bookmaker in the United Kingdom otherwise than by way of pool betting or coupon betting'.

In 1997, SJA decided to set up a branch office in Gibraltar. This was prompted by the acquisition of a loss-making postal betting operation which was taking bets on German football games. SJA decided the business might run profitably from a jurisdiction which charged little or no betting duty. Gibraltar was chosen because it had only 1% betting duty.

Stephen believed that UK sourced bets would need to be taken by a separate legal entity, rather than through a branch. On 15 July 1999, Peter Fisher resigned as a director of SJA. On 22 July 1999, SJG incorporated in Gibraltar on Peter's instructions. On 3 August 1999, the taxpayers and their daughter Dianne (a non-UK resident) acquired all the shares in SJG between them.

Initially, it was intended to just transfer the business conducted by the branch to SJG, but on 10 January 2000 it was decided that the remainder of SJA's existing telebetting operation and its other activities (except for its 12 shops) would also be transferred. It was decided this would be with effect from 29 February 2000. On 3 February 2000, Dianne Fisher resigned as a director of SJA and was then appointed as a director of SJG, as were several others who were not family members. Stephen Fisher resigned as a director of SJG with effect from 3

August 1999.

However, the Fisher family remained the sole shareholders. At the date of the transfer of the business, Stephen and Anne Fisher held almost 38% of the shares of SJA and Peter and Diane held just over 12%. Stephen and Anne each held 26% of the issued share capital of SJG and Peter and Dianne each held 24%.

The agreements for the sale and transfer of the businesses between SJA and SJG were signed in early March 2000 at market value. This included the telebetting operation located in Abingdon and the Gibraltarian branch. SJG paid all taxes due under Gibraltar law and from 2003 onwards developed internet betting and gaming platforms.

In 2003, SJG became the parent company of SJA, and in 2009 it was re-registered as Stan James Plc. SJA continued with its other business streams until October 2001, when the UK betting regime changed: it then became possible for UK bookmakers to compete with offshore bookmakers in taking telebets. After the change, SJA established its own UK telebetting operation.

HMRC assessed Anne, Stephen and Peter as liable to income tax on the profits of SJG for the years 2000/01 to 2007/08, on the basis of the Income and Corporation Taxes Act (ICTA) 1988 s 739 and the Income Tax Act 2007 s 720.

The findings of the First-tier Tribunal

The FTT found that the taxpayers (shareholders and/or directors of both companies) were quasi-transferors of the business, invoking the provisions of the Transfer of Assets Abroad code (the TOAA code). It was held that they were subject to a charge under ICTA 1988 s 739 on the profits of SJG. It was further held that the motive defence under s 741 was not available to the taxpayers because the main purpose of the transfer was to avoid liability to pay betting duty.

However, as Anne is an Irish national, the TOAA code restricted her freedom of establishment. Interpreting this in conformity with EU law, the legislation had to be interpreted as restricted to situations where tax was avoided by artificial means: as this was not the case here, Anne was able to use the motive defence and was not liable. Her husband and son, however, could not benefit from this narrower interpretation as English nationals.

In addition, Stephen Fisher's appeals for 2005/06 and 2006/07 were allowed on the basis that the discovery assessments were not validly made, and Peter Fisher's appeals for the period 2002/03 were allowed on the basis that the assessment for this year was out of time.

The findings of the Upper Tribunal

The Honourable Mrs Justice Andrews DBE and Judge Kevin Poole, sitting in the Upper Tribunal, summarised the four key issues to consider as follows:

1. Was the TOAA code engaged?
2. Was the motive defence under ICTA 1988 s 741 available?
3. Does the TOAA code breach EU law?
4. Were the discovery assessments valid?

Was the TOAA engaged?

The Upper Tribunal firstly found that the TOAA code could in theory be engaged even in a situation where the taxpayer was not seeking to avoid income tax by making the relevant transfer (para 56 of the decision). This was because it was held that the intention behind ICTA 1998 s 739(1A)(b) was to head off the argument that avoiding income tax was a relevant condition, to ensure that the purposes of the transferor were only relevant and fully examined in the context of the motive defence in s 741.

However, it was held at para 95 that the language of s 739 did not allow the interpretation given to it by the decision in the FTT. The transfer in this case was made by SJA and not by any of its individual shareholders or directors, and 'there is no basis for treating any of them as the "real transferor and SJA as merely an instrument by which they effected the transfer of assets'. The Upper Tribunal went on to hold that the FTT had erred in treating acts by SJA's directors as procuring SJA to do something when they were carried out for and on behalf of the company: it was 'not possible to impute the transfer to any of the taxpayers in this case as "quasi-transferors'. The TOAA code was therefore not engaged at all.

Although this was sufficient to dispose of the appeal in favour of the taxpayers, the Upper Tribunal went on to consider the other issues. It firstly considered whether all of the income of SJG derived from the transfer of SJA, as s 739(2) treats any income of the non-resident transferee as if it were the income of the transferor where he has the power to enjoy 'by virtue of or in consequence of any such transfer, either alone or in conjunction with associated operations'.

The Upper Tribunal stated that if it were relevant, it would have found for HMRC on this issue. Mr Baker QC had contended that the statute could not apply to income derived from a wholly new commercial business developed by SJG after the transfer or, if not, to income generated in consequence of factors independent of the transfer. However, the Upper Tribunal agreed with the FTT's reasoning that 'associated operations' included indirect assets and income arising from assets whether directly or indirectly.

Was the motive defence available?

In summary, the FTT held that however clear it was that there was a non-tax avoidance motive, if avoidance of tax formed any part of the arrangements, it must be regarded as at least one of the purposes of the transaction. Both Stephen and Peter Fisher had the motive to avoid betting duty, and the first limb of the motive defence could therefore not apply. Anne Fisher, however, had no purpose in relation to the transfer.

Concerning the second limb of the motive defence, the FTT was satisfied that the transfer and associated operations were 'bona fide commercial transactions', but it considered that they were designed for the purpose of avoiding liability to taxation. The Upper Tribunal considered that the live issue was whether or not the transfer and any relevant associated operations were 'designed for the purpose of avoiding liability to taxation', i.e. the second limb of the motive defence.

It held that Parliament had legislated for two potential motive defences, with the second of these available where there are bona fide commercial transactions which were not designed for the purpose of avoidance. The existence of any tax avoidance purpose at all disqualifying a taxpayer from benefiting from the second limb of the defence 'cannot be right' (para 145). The fact that the main reason for the transfer was the survival of the business therefore meant that the FTT had fallen into error in reaching its conclusion that the motive defence was unavailable to Stephen and Peter in these circumstances.

Does the TOAA code breach EU law?

On the issue of whether the TOAA code breaches EU law, the Upper Tribunal held that the FTT was right to hold that the TOAA code restricted Anne Fisher's freedom of establishment, with the consequence that it must be interpreted in a manner that would make it compatible with EU law. However, the position for Stephen and Peter was 'more complex' (para 181).

The Upper Tribunal held at para 203 that although the negative tax treatment had no direct impact on Anne Fisher's own tax position, the connection between spouses may be regarded as 'sufficient to entitle an individual to rely upon the adverse measure affecting them, on the exercise of the Treaty freedoms of someone else'. Stephen Fisher was therefore entitled to rely on the Treaty of the Functioning of the EU (TFEU) Article 49. Peter Fisher's connection to his mother Anne as an independent adult was however insufficient, and so he could not rely on Article 49. However, the Upper Tribunal held that the conforming interpretation should not apply to persons whose situation does not fall within the scope of EU law, agreeing with the FTT.

Were the discovery assessments valid?

The final issue concerned the validity of assessments for 2005/06 and 2006/07 which were notified to Stephen and Anne Fisher. The FTT concluded that the hypothetical officer could have been reasonably expected, on the basis of information made available to her before the relevant time, to be aware of the situation mentioned in TMA 1970 s 29(1). However, the Upper Tribunal disagreed, holding that if it was wrong in relation to the other questions, the assessments for these years would be upheld. This was because the finding of the FTT required knowledge to be imputed from documents which had not been provided to the officer until after the enquiry window closed.

Analysis

The decision is a really important one in that it gives significant guidance on the scope of the TOAA code and how it should be interpreted. In particular, it clarifies that the motive defence can apply even if there is a saving of betting duty alongside the main purpose of transferring the business abroad in order to save it.

In terms of general scope, it also demonstrates that for the TOAA code to be engaged, it is not a requirement that there be avoidance of income tax specifically. Moreover, it clarifies how EU law can extend to the spouse of an EU national (but how the ties to an adult independent child were in this case insufficient to be included). It also, not unsurprisingly, confirms the view given previously in the FTT that the TOAA code is contrary to EU law.

However, the case is also significant in that it highlights the delays that can occur in tax proceedings. The case has been ongoing for well over a decade (and in part involves matters that happened 20 years ago). There is also of course the possibility that the case will go higher. Although this case appears to be a particularly severe example, it demonstrates that both tax advisers and their clients should be aware that challenging HMRC assessments may well take a significantly longer time than first anticipated.

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