Will it be a safe landing?

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Helen McGhee and Tom O'Reilly consider the Court of Appeal's judgment in the Fisher case and how it is likely to impact the rules on transfer of assets abroad

Key Points

What is the issue?

On 6 October 2021, the Court of Appeal handed down its hotly anticipated judgment in HMRC v Fisher and others [2021] EWCA Civ 1438. The case considers various aspects of the application of the complex transfer of assets abroad legislation, and how the rules applied to the transfer of a UK telebetting business to a company in Gibraltar.

What does it mean to me?

The Court of Appeal decided that the transfer of assets abroad rules may be invoked where the transfer is procured by a minority shareholder voting in favour of a course of action. It is also clear from the judgment that the motive defence is lost if any commercial rationale is too closely linked to a tax mitigation objective.

What can I take away?

If practitioners are actively pursuing any of the arguments which were the subject of discussion in the Court of Appeal in Fisher, they might be well advised to pause and await an almost inevitable appeal to the Supreme Court. This might offer some much needed finality and clear limits to the scope of the potentially very far reaching transfer of assets abroad code.

The transfer of assets abroad provisions exist to counteract tax avoidance achieved by means of a relevant transaction which results in income becoming payable to a person abroad by virtue of a transfer of assets. Where the transfer of assets abroad code applies, it operates to treat income arising to the person abroad as belonging for UK tax purposes to any UK resident individual responsible for the original transfer of assets to a non-UK person.

In the case of HMRC v Fisher and others [2021] EWCA Civ 1438, the Court of Appeal allowed HMRC’s appeal and reversed the decision of the Upper Tribunal, ruling (subject to a convincing dissenting judgment from Philips LJ) that:

- the transfer of assets abroad anti -avoidance legislati on was indeed triggered;
- the moti ve defence was not available; and
- EU law did not off er any respite for the taxpayers.

The story so far

The facts of the case have been rehearsed previously in the Tax Adviser article ‘All Bets Are Off ’ (June 2020). To briefly set the scene, the case concerned the Fisher family, who consisted of four members – Stephen, Anne, Peter and Dianne. From the late 1980s unti l 1999, the family ran a telebetting business (SJA) in the UK through a UK company.

The patriarch Stephen dealt with the shops and administrati on, and had overall responsibility for the company. He and his son Peter were responsible for the day to day running of the business, future planning and strategy, and they made the majority of the decisions. Dianne worked on accounts administrati on, while the matriarch, Anne, had virtually nothing to do with the business from 1996 onwards and played no active part in the company’s decision making processes. No assessments were raised on Dianne as she had not been UK resident at the relevant time.

In 1999, a major competitor in the betting industry moved its entire betting operation to Gibraltar, which charged a much lower rate of betting duty. The entire industry quickly followed and by July 1999, it had become clear that the only way in which to save the business would be to move it to Gibraltar.

On 29 February 2000, the majority of the SJA business was sold to a Gibraltar company which was also owned by the family (SJG). On the date of the transfer, Stephen and Anne held approximately 38% of the shares of SJA and Peter and Dianne each held approximately 12%. Following the transfer, Stephen and Anne each held 26% of the issued share capital of SJG and Peter and Dianne each held 24%.

Stephen, Anne and Peter were assessed by HMRC under the transfer of assets abroad code to a proportion of the profits of SJG in line with their shareholding from 2000/01 to 2007/08.
The First-tier Tribunal held that the assessments had been validly raised and that the transfer of assets abroad code was invoked. The FTT also held that the code infringed Anne’s EU law rights as an Irish citizen.

The Upper Tribunal quashed HMRC’s assessments in their entirety, holding that the transfer of assets abroad code did not apply; and that even if it had applied, the taxpayers were entitled to claim the motive defence contained in Income and Corporation Taxes Act 1988 s 741.

The Court of Appeal

Before the Court of Appeal, the following issues were considered:

1. Given that the transfer of the business had been effected by the company SJA, rather than by Stephen, Anne and Peter personally, was the transfer of assets abroad code engaged at all?This is referred to as the quasi-transferor issue.

2. For the code to apply, did there need to have been avoidance of income tax?

3. In the event that the transfer of assets abroad code applies, was the moti ve defence available?

4. Was the transfer of assets abroad code compatible with EU law? If not, was it open to Stephen and Peter, as well as Anne (as an Irish citizen), to rely on a breach of EU law to argue that the transfer of assets abroad provisions should be disapplied?

5. Was some of SJG's income too remote from the transfer of the business to be the subject of the charge? This is not considered in detail in this article. The taxpayers were seeking to establish that the income being assessed did not arise from the transfer but was instead retained profits. Importantly, the Court of Appeal did not allow the taxpayers to challenge a finding of fact at this stage in the proceedings that they had not challenged at the appropriate time at first instance – a valuable learning point.

6. Were the assessments on Stephen and Anne for 2005/06 and 2006/07 defective, having regard to the requirements of the Taxes Management Act 1970 s 29? We do not consider the discovery issue in this article – suffice to say the assessments were not considered to be defective.

The tax years under appeal straddled the rewrite of the transfer of assets abroad code from the Income and Corporation Taxes Act (ICTA) 1988 to its current location at Income Tax Act (ITA) 2007 Part 13 Chapter 2. The parties agreed that the rewrite had not altered the law in any relevant way and the judgment refers to the ICTA 1988 provisions.

Who can be a quasi-transferor?

The concept of a quasi-transferor was first alluded to in the case of Congreve v IRC (1948) 30 TC 163, where, although the House of Lords held that any individual could be taxed by the transfer of asset codes, the alternative idea emerged that the transfer of assets abroad code could apply even if an individual didn't actually effect the transfer but instead procured it.

In Vestey v IRC [1980] AC 1148, the House of Lords partially overturned Congreve, holding that an individual must be a transferer to be taxed, but left open the possibility of taxing an individual associated with the transfer. Walton J, who coined the phrase 'quasi-transferor' in IRC v Pratt [1982] STC 756, contributed to the evolution of the concept and considered (albeit in a different context and under an older version of the provisions) whether there could be multiple transferors and a corresponding apportionment of income between taxpayers; he held there could not.

With this backdrop of jurisprudence, the Fisher judgment considers the question as to whether the taxpayers had procured the transfer at length. It was decided that this is a broad spectrum anti-avoidance provision intended to apply to any number of transferors (or quasi-transferors) who could be said to have procured the transfer by virtue of doing something positive to bring about the transfer.

Note that taking no active part in the decision making, merely passively allowing someone else to do something (as Anne had done here), was not enough to bring her within the scope of the provisions – Anne had not procured the transfer and so could not be a quasi-transferor.

In addition, a director who is not also a shareholder could not be a quasi-transferor, as he would be acting solely in his capacity as an officer of the company and not on his own behalf. However, directors/shareholders having control jointly (but not individually) of a company may be regarded as together procuring a transfer, thus invoking the transfer of assets abroad provisions.

Lord Justice Phillips, dissenting, considered it wrong in principle and illogical to regard a minority shareholder as procuring an act by the company of which the shareholder was a member simply by voting in favour or otherwise supporting that act. Unless there was a voting pact with other shareholders, a minority shareholder had no power in his own person to procure any outcome. Phillips LJ would therefore have dismissed the appeals in their entirety. Of course, the trouble with arguing that minority shareholders are not able to procure – even if they vote in favour – is that some careful fragmentation takes the taxpayers outside the scope altogether, because no single shareholder's vote would be decisive. The context here is a company controlled by two parents and their two children.

Was it necessary to have avoidance of actual income tax?

The taxpayers contended that for the transfer of assets abroad code to apply, there needs to have been avoidance of income tax as a result of the transfer – here the Fisher family were seeking to mitigate betting duty payable by the company. The House of Lords had considered this question in the case of IRC v McGuckian [1997] 1 WLR 991 and held the contrary – that no actual avoidance of income tax was required. The Court of Appeal saw no reason to disapply the rationale of McGuckian and seemed to state that although s 739 refers to income tax, the underlying objective of the legislation would be undermined if the section could only be in point if there had been income tax avoidance.

The motive defence

Given how potentially far reaching the transfer of assets abroad code is, the motive defence is intended as a means of taxpayer protection to provide some limits to its application; however, it is notoriously difficult to invoke and prove in practice.

It was accepted that the transfer was a genuine commercial transaction – the taxpayers were trying to keep up with their competitors. The Upper Tribunal had said that the avoidance of betting duty had simply been the means of achieving the main purpose, which had been saving the business. Regardless, the Court of Appeal opined that the tax saving or avoidance here was too pivotal and intertwined with the commercial rationale – it was impossible to separate the avoidance of betting duty and saving of the business – and thus it simply could not be said that the avoidance was not one of the purposes of the transaction.

Having a commercial driver is seemingly not sufficient to secure the motive defence where there is also a tax saving on the agenda. Any decision on this subject will be very fact specific and the decision is certainly vulnerable to an appeal.

The EU law defence

The court considered the previous CJEU case law on direct tax infringements, including a reasoned order of the CJEU dated 12 October 2017 in response to a reference from the Upper Tribunal in this case. The CJEU held that Gibraltar is, for the purposes of EU law, a part of the UK and not a separate member state or a third country. It also held that the fundamental freedoms of establishment and free movement of capital do not apply to a situation happening wholly internally within a member state; to say otherwise would compromise the fiscal autonomy afforded to each member state.

Conclusion

No doubt HMRC will be buoyed by the victory and potentially seek to apply the transfer of assets abroad provisions to more circumstances whereby individuals, holding shares in a company which transfers assets outside of the UK, could be said to have procured the relevant transfer.

The transfer of assets abroad code is intricately drafted and the court seems to seek to apply it in a way so as to ensure a fair outcome. It will be interesting to see if the Supreme Court comes to a different conclusion as to what would be fair in this context – one assumes an appeal will be forthcoming.