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HMRC v Fisher: the transfer of assets abroad regime—beating the house

Introduction

Developments in the world of the transfer of assets abroad (ToAA) regime do not come around that often. Yet, like London buses, two developments arrived in 2023 as bookends to the calendar year. First, in January, HMRC published a new section of its International Manual covering the regime, updating and replacing draft guidance that was issued in 2013 but, until last year, never finalised.[1] Then, in December, the Supreme Court handed down judgment in *Revenue and Customs Commissioners v Fisher* (*Fisher*).[2] That decision, which marked a second reversal and final victory for the taxpayers, is the focus of this article and an important case for practitioners advising on these rules.

The ToAA code, which now forms the Income Tax Act 2007 (ITA 2007) Pt 3 Ch.2, is an anti-avoidance regime which has been in force, in one form or another, since 1936.[3] Despite the regime's longevity, it has been the subject of relatively few reported cases (and there have been legislative amendments introduced subsequent to many of the cases). As a result, there remains a significant degree of uncertainty as to how the legislation is to be interpreted and applied, which the *Fisher* decision may now help to allay.

Overview of the ToAA legislation

In the words of Lady Simler in *Hoey v Revenue and Customs Commissioners*, the ToAA code is a "highly complex and potentially penal" set of provisions.[4] Some of the complexity is the

[93] *Royal College of Nursing* [1981] A.C. 800 at 822.
[94] *DCM (Optical Holdings) Ltd v Revenue and Customs Commissioners* [2022] UKSC 26 at [34]; [2022] S.T.C. 1900.
[*] Barrister at Devereux Chambers, London.
[1] HMRC, International Manual, "INTM600000—Transfer of assets abroad" (9 April 2016, updated 21 February 2024).
[2] *Revenue and Customs Commissioners v Fisher (Fisher)* [2023] UKSC 44; [2023] S.T.C. 1938.
[3] Finance Act 1936 (FA 1936) s.18 and Sch.2.
[4] *Hoey v Revenue and Customs Commissioners* [2022] EWCA Civ 656; [2022] S.T.C. 902 at [201].

result of the gateway conditions that must be met in order for the regime to apply in the first place. For the ToAA charging provisions to be engaged, income must have become payable to a person abroad (that is, a non-UK resident person) as a result of a "relevant transfer".[5] The term "relevant transfer" is defined as a transfer of assets and/or one or more "associated operations"; the latter term is defined very broadly so as to cover potentially any action taken in relation to the assets that have been transferred.[6]

If the ToAA regime is engaged, a series of charging provisions may then apply, the principal one being ITA 2007 s.720. This provision, together with its predecessor, the Income and Corporation Taxes Act 1988 (ICTA 1988) s.739, which applied until 6 April 2008, was the focus of the Supreme Court's decision in *Fisher*.

It was agreed by the parties in *Fisher* that the issues before the Supreme Court were not affected by any differences between the versions of the ToAA regime as enacted in ICTA 1988 and ITA 2007, respectively.[7] Although the decision in *Fisher* refers throughout to the provisions of ICTA 1988, save where necessary, the writers will refer in this article to the provisions of the current legislation, ITA 2007.

The ITA 2007 s.720 imposes an income tax charge on a United Kingdom (UK) resident individual who has "power to enjoy" the income of a person abroad as a result of a relevant transfer and/or one or more associated operations.[8] The paradigm case in which ITA 2007 s.720 is engaged is where a UK resident individual transfers income-producing assets to a non-UK resident company of which they are a shareholder; in such a case, the individual is subject to an income tax charge by reference to the income arising to the non-resident company. It has long been established law that ITA 2007 s.720 applies only to a "transferor", and since 1981 there has been a separate limb of the ToAA regime which applies to "non-transferors" (often referred to as the "benefits charge"). The *Fisher* decision related to the transferor charge under the ToAA regime.

Importantly, the charges under the ToAA code are effectively switched off insofar as a taxpayer is able to rely on the so-called motive defences set out in ITA 2007 ss.736 to 742A. The relevant motive defence in *Fisher* is now found in ITA 2007 s.739. That defence applies to pre-5 December 2005 transactions and is made out where either of two requirements is met. The first is that the avoidance of UK tax was not the purpose, or one of the purposes, of the relevant transfer in question.[9] The second is that the relevant transfer was a bona fide commercial transaction and was not designed for the purpose of avoiding UK tax.[10] As will be discussed below, while the motive defence formed one of the key issues addressed by the tribunals below and Court of Appeal in *Fisher*, it was of more limited relevance to the issues considered by the Supreme Court.

[5] ITA 2007 s.716.
[6] ITA 2007 s.719.
[7] *Fisher* [2023] UKSC 44 at [7].
[8] ITA 2007 ss.720 and 721.
[9] ITA 2007 s.739(3).
[10] ITA 2007 s.739(4).

Summary of the facts

Despite the legal complexity, the facts of the *Fisher* litigation are reasonably straightforward. Stephen and Anne Fisher, together with their son Peter Fisher (who we will refer to together as the Fishers) were each minority shareholders in, and directors of, a UK company called Stan James (Abingdon) Ltd (SJA). Together, the Fishers held a majority of the shares in SJA. The fourth and final minority shareholder in SJA was Peter's sister, Dianne Fisher, who was UK non-resident at all material times and therefore not subject to the ToAA code.

SJA operated a UK bookmaking and telephone betting (telebetting) business. During the late 1990s, many of SJA's competitors migrated their operations to Gibraltar so as to avoid having to charge UK betting duty on telephone bets placed by their UK customers. In the UK tax year 1999–2000, SJA decided to follow suit by selling its telebetting business to a separate company incorporated and resident in Gibraltar called Stan James Gibraltar Ltd (SJG).

As was the case in relation to SJA, each of the Fishers were minority shareholders in SJG but together controlled a majority of the shares, with Dianne being the other minority shareholder. Following the sale of SJA's telebetting business, HMRC assessed each of the Fishers to income tax by reference to SJG's profits under the ToAA regime for the years 2000–01 to 2007–08. In other words, HMRC sought to charge each of the Fishers to tax on a portion of the profits arising to SJG, on the basis that income had arisen to a person abroad as a result of a transfer which they had—indirectly—made.

Case history

The Fishers initially appealed HMRC's assessments to the First-tier Tribunal (FTT).[11] The FTT dismissed both Stephen and Peter's appeals, holding that they were caught by ITA 2007 s.720. However, the FTT found that Anne's EU rights as an Irish citizen had been disproportionately restricted by HMRC's application of the ToAA code and, as such, a conforming construction had to be applied so as to widen the motive defence. As a result, Anne's appeal was allowed.[12]

Both the Fishers and HMRC appealed and cross-appealed, respectively, to the Upper Tribunal (UT).[13] The UT held that the Fishers were not caught by ITA 2007 s.720 because the transfer of SJA's telebetting business to SJG was effected by the company and not by the Fishers themselves, and so the Fishers were not the transferors for the purposes of the transferor charge. The UT further held that, in the alternative, had ITA 2007 s.720 applied, all three of the Fishers would have been able to benefit from the motive defence. The UT also decided, again in the alternative, that had ITA 2007 s.720 applied then not only Anne's but also Stephen's EU rights would have been unjustifiably restricted; on that basis, the UT decided that the FTT's conforming interpretation of the motive defence would also have benefitted Stephen.

By a majority, the Court of Appeal reversed the UT's decision in relation to Stephen and Peter—but not Anne—holding that both were caught by ITA 2007 s.720.[14] In relation to Anne, the Court of Appeal held that the UT had been right to find that she could not have been a

[11] *Fisher v Revenue and Customs Commissioners (Fisher)* [2014] UKFTT 804 (TC); [2014] S.F.T.D. 1341.
[12] *Fisher* [2014] UKFTT 804 (TC) at [12].
[13] *Fisher v Revenue and Customs Commissioners (Fisher)* [2020] UKUT 62 (TCC); [2020] S.T.C. 1218.
[14] *Revenue and Customs Commissioners v Fisher (Fisher)* [2021] EWCA Civ 1438; [2021] S.T.C. 2072.

transferor on the basis of the FTT's finding that she had "played no active part in the decision making" that led to the transfer of SJA's business.[15] A key finding in the Court of Appeal's decision was that an individual did not need to make a direct transfer to be within the transferor charge under the ToAA rules. Instead, it was enough for the individual to "procure" a transfer: this could include a minority shareholder who, in conjunction with other shareholders, "procures" that a company makes a transfer. Phillips LJ, however, provided an important dissenting judgment on this point, stating that he did not believe it possible that a minority shareholder could "procure" a transfer, simply by voting in favour of it.[16] The Court of Appeal further held that the Fishers could not benefit from the motive defence and that their EU rights had not been breached.

Stephen and Peter appealed to the Supreme Court, as did HMRC in respect of the Court of Appeal's decision in relation to Anne.

Supreme Court: issues under consideration

The focus of the Supreme Court's decision was on the gateway question as to whether the transferor limb of the ToAA was engaged in relation to the Fishers. In finding that the transferor charge did not apply, the majority of the issues with which the FTT, UT and Court of Appeal had wrestled fell away. As such, Lady Rose's judgment (with which Lords Reed, Hodge, Sales and Stephens agreed) is silent on various issues such as whether the Fishers would have benefitted from the motive defence had ITA 2007 s.720 applied, and whether the Fishers' EU rights were unduly infringed.

The Supreme Court focussed instead on two gateway issues:

1) Can an individual be taxed under ITA 2007 s.720 merely because they have power to enjoy the income of the person abroad, or must they also have made the transfer of assets (such a taxpayer being referred to as a transferor (Transferor))? (Issue 1)
2) If an individual is only caught by ITA 2007 s.720 if they are a Transferor, in what circumstances (if any) can an individual be treated as a Transferor where the transfer is in fact made by a company in which the individual is a shareholder? (Issue 2)

As will be clear, these two issues are inextricably linked and the second question flows naturally from the first. In considering the first issue, the Supreme Court revisited a discussion that had last been reopened (and shut) by the House of Lords in 1979 in the case of *Vestey v Inland Revenue Commissioners* (*Vestey*).[17] Following that decision, practitioners have generally considered this question to be closed; however, as will be discussed below, the Supreme Court's reconsideration of *Vestey* highlights that some ambiguity remains. That ambiguity is relevant to the second issue, which will be referred to as the "quasi transferor" question.

Issue 1: revisiting the House of Lords' decision in Vestey

As above, the question for the Supreme Court was whether ITA 2007 s.720 is engaged only in circumstances where the individual taxpayer effected the transfer of assets that resulted—whether

[15] *Fisher* [2021] EWCA Civ 1438 at [73]; *Fisher* [2014] UKFTT 804 (TC) at [337].
[16] *Fisher* [2021] EWCA Civ 1438 at [140]–[149], in particular at [145].
[17] *Vestey v IRC (Vestey)* [1980] S.T.C. 10; [1980] A.C. 1148.

in and of itself or in conjunction with one or more associated operations—in that individual having power to enjoy the income (that is, the income of the person abroad in question)? To put this question another way: does ITA 2007 s.720 apply only to Transferors?

As already intimated, *Vestey* itself reopened this question, which had previously been considered by the House of Lords in the case of *Congreve v Inland Revenue Commissioners* (*Congreve*) in 1948.[18] In that case, Lord Simonds' judgment, with which Viscount Simon and Lords Porter, Normand and Oaksey agreed, was that the version of ITA 2007 s.720 then applicable (Finance Act 1936 (FA 1936) s.18) could apply whether or not the taxpayer—Mrs Congreve—was a Transferor.

The matter came down to a question of statutory interpretation. The preamble to FA 1936 s.18 provided (emphasis added):

> "For the purpose of preventing the avoiding *by individuals ordinarily resident in the United Kingdom* of liability to income tax *by means of transfers of assets* by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows."

Section 18(1) then went on to provide that income arising to a person abroad would be deemed to be the income of "such an individual" who had "by means of" such transfer the power to enjoy that income.

The question addressed by the House of Lords in *Congreve* was whether "such an individual" should be interpreted as being limited to the person who had made the transfer referred to in the preamble. Lord Simonds' view was that the transfer in question, by means of which income became payable to a person abroad, need not be a transfer by the individual taxpayer, noting that:

> "it is to my mind clear, first, that in their ordinary grammatical sense the words 'by means of' do not connote any personal activity on the part of the person who is said to enjoy or suffer something by those means, and, secondly, that in their present context it is not necessary or legitimate in order to give a limiting sense to the words to read them as if they were followed by such words as 'effected by him'."[19]

Accordingly, following *Congreve* a transfer of assets made by any person could result in another individual being taxed under ITA 2007 s.720 provided that individual had power to enjoy the income of the person abroad in question.

This aspect of the ratio decidendi in *Congreve* was reversed by the House of Lords in *Vestey*. That case involved tax assessments issued under the version of ITA 2007 s.720 then in force (Income Tax Act 1952 (ITA 1952) s.412) to six separate beneficiaries of a discretionary trust, none of whom was a Transferor. The Inland Revenue maintained that the effect of the ToAA code was that each of these six beneficiaries was ostensibly liable to income tax on the entirety of the trust income. Importantly, ITA 1952 did not contain any statutory mechanism whereby the income of the person abroad—in *Vestey*, the trust income—might be apportioned between the taxpayers so as to prevent that income being taxed more than once. The Inland Revenue's

[18] *Congreve v Inland Revenue Commissioners (Congreve)* (1948) 41 R. & I.T. 319; 30 T.C. 163 HL.
[19] *Congreve* (1948) 30 T.C. 163 HL at 204–205.

view was that any duplication of tax could be cured by way of an extra-statutory concession. Rejecting this stance, the House of Lords held that the reference to "such an individual" in the legislation was in fact a reference to the individual who had made the transfers of assets in question, i.e. to a Transferor. Agreeing with Lord Wilberforce and Viscount Dilhorne, Lord Keith summarised the House of Lords' position stating that a narrower interpretation represented:

> "the natural and intended meaning of the words 'such an individual'… [and] the consequences which follow from attributing the wider meaning to the words … are so dramatically unjust … that I cannot think it to have been intended by Parliament."[20]

In *Fisher*, the Supreme Court considered whether *Vestey* might be distinguished. HMRC advanced two central arguments in this regard. The first was that the House of Lords in *Vestey* left open the possibility that an individual who was merely "associated with" the transfer of assets might be subject to the transferor charge; we address this further in the context of Issue 2 below.[21] The second argument was that the House of Lords had predominantly been influenced by their concern over the injustice that flowed from a wider interpretation due to the absence of an apportionment mechanism in ITA 1952. HMRC noted that that concern was no longer relevant as the ToAA code was subsequently updated to include such a mechanism; that provision is now found in ITA 2007 s.743.

The Supreme Court did not accept HMRC's argument and instead reaffirmed that the effect of the decision in *Vestey* was that ITA 2007 s.720 applies only to Transferors. The Supreme Court was persuaded by a number of arguments in this regard. First and foremost, Lady Rose found that the "linguistic considerations" as to the "natural meaning" of the wording in the statute formed the primary basis for the House of Lords' decision in *Vestey*.[22] Secondly, it was noted that HMRC's argument was "fatally undermined" by the fact that in the aftermath of *Vestey*, the ToAA regime had been updated to include a new charging provision that was designed to apply to individuals other than Transferors (the beneficiary charge now found in ITA 2007 s.731); the introduction of that provision would have made no sense if ITA 2007 s.720 had been intended to apply to non-Transferors.[23] Thirdly, the Supreme Court noted that the House of Lords in *Vestey* had also been persuaded by the fact that the ToAA code contained a provision stating that "references to individuals include their spouses or civil partners".[24] Lady Rose noted that she "struggle[d] to see the point of [this] spousal extension if everyone who has the power to enjoy the income can be charged regardless of whether they are a transferor or not."[25] Fourthly, Lady Rose noted that ITA 2007 s.720 is a penal provision which can result in an individual being taxed on all of the income of a non-UK resident person, even if the individual only has the power to enjoy part of the income, or if only part of the income is traceable to the relevant transfer of assets (a principle established by the House of Lords in *Lord Howard de Walden v Inland Revenue Commissioners*).[26] Whilst it may be appropriate for the legislation to have punitive consequences

[20] *Vestey* [1980] A.C. 1148 HL at 1197–1198.
[21] *Vestey* [1980] A.C. 1148 HL at 1178.
[22] *Fisher* [2023] UKSC 44 at [43] and [56].
[23] *Fisher* [2023] UKSC 44 at [59].
[24] ITA 2007 s.714(4).
[25] *Fisher* [2023] UKSC 44 at [60].
[26] *Lord Howard de Walden v Inland Revenue Commissioners (No.1)* [1942] 1 K.B. 389.

for "those who were minded to throw the burden of taxation off their own shoulders on to those of their fellow citizens" by transferring assets to non-UK residents, Lady Rose appears to have taken the view that the "penal and harsh" outcome of ITA 2007 s.720 cannot have been intended for someone who merely has the power to enjoy the income (but did not make any transfer of assets).[27] She found that this was "a strong pointer towards limiting the scope of the charge to the transferor".[28]

Issue 2: the "quasi transferor" question

Having affirmed the House of Lords' decision in *Vestey* that ITA 2007 s.720 is a charge on Transferors, the Supreme Court in *Fisher* considered the matter of "quasi transferors", posing two subsidiary questions, as follows:

> "[I]s it ever possible for someone other than the owner and legal transferor of the assets to be treated as a transferor for the purposes of [what is now] section [720 ITA 2007]? If so, in what circumstances (if any) do the shareholders of a company which transfers its assets count as transferors?"[29]

The Supreme Court noted that the origins of the quasi transferor question were to be found in the High Court decision in *Congreve*, in which Wrottesley J noted that:

> "a person who *by an agent* transfers his assets would not on that account escape the operation of the Section [that is now section 720 ITA 2007] … [and] a person who, by owning all or practically all of the capital of an investment company, *is able to bring about* such a transfer as is referred to in the Section, is, for the purposes of such a Section, a person who has avoided tax by means of a transfer."[30]

Although the Court of Appeal in *Congreve* reversed the first instance decision as to the scope of what is now ITA 2007 s.720 by holding that the charge applied to non-Transferors, the Court of Appeal did agree with the above formulation. It noted in this regard that were Wrottesley J's narrower interpretation of the charging provision accepted, the taxpayer Mrs Congreve would nonetheless have been caught by what is now ITA 2007 s.720 on the basis that "the transfers and associated operations in question by all the companies concerned were procured by [her] acting through her agent".[31]

In *Fisher*, the Supreme Court wrestled with what exactly was the principle that was decided by *Congreve* in this regard. Lady Rose noted that in the Court of Appeal decision in *Fisher*, Newey LJ had suggested that part of the Court of Appeal's alternative basis for finding against the taxpayer in *Congreve* was that Mrs Congreve could have been treated as having procured transfers by a company in which she held only 65% of the shares.[32] Lady Rose respectfully disagreed with this reading of *Congreve*, noting that the alternative basis for the Court of Appeal's

[27] *Fisher* [2023] UKSC 44 at [57]–[58].
[28] *Fisher* [2023] UKSC 44 at [58].
[29] *Fisher* [2023] UKSC 44 at [63].
[30] *Congreve v Inland Revenue Commissioners* [1946] 2 All E.R. 170 at 183, emphasis added.
[31] *Congreve v Inland Revenue Commissioners (Congreve)* [1947] 1 All E.R. 168 at 173.
[32] *Fisher* [2023] UKSC 44 at [71]; *Fisher* [2021] EWCA Civ 1438 at [41].

findings in *Congreve* was in fact that Mrs Congreve had procured that transfers be made by her *father* as opposed to by any company in which she was a shareholder. Furthermore, Lady Rose noted that in the same decision Cohen LJ had expressly stated that "execution by a company could not be said to be execution by [an] individual", even if that individual were a majority shareholder in that company, noting in summary that:

> "a shareholder does not 'procure' the transfer of assets by [a] company simply by owning all or most of the shares."[33]

Taken together, what emerges from the Supreme Court's decision in *Fisher* is that the ratio of *Congreve* appears to remain good law insofar as it states that (what is now) ITA 2007 s.720 is engaged in circumstances where the taxpayer has procured the making of a transfer by another person. However, the ratio of *Congreve* did not include anything to the effect that a shareholder in a company might automatically—absent of anything more—be treated as having procured a transfer by that company.

Having considered *Congreve*, Lady Rose moved to consider whether a shareholder in a company should be treated as a Transferor in relation to a transfer by that company on some other basis. As noted above, HMRC argued that the House of Lords' decision in *Vestey* had left the door open for an individual to be treated as a Transferor by reference to a transfer that they were "associated with".[34]

In Lady Rose's view, there were various good reasons to avoid such a construction. In particular, any such approach would be fraught with uncertainty and would give rise to more questions than it answered. The crux of the problem was identifying "what was needed in order for a shareholder to become a [T]ransferor".[35] Particular scenarios would seem to pose especial difficulties. In what cases might a minority shareholder be deemed a quasi transferor? What of the thousands of minority shareholders in a Plc (a point remarked upon by Philips LJ in his dissenting judgment at the Court of Appeal stage)?[36] What of a passive shareholder who abstains or "cannily votes against" a proposed transfer in the knowledge that it will go ahead—should they nonetheless be deemed to be a Transferor by virtue of having "procured" that transfer or because they are "associated with" that transfer?[37]

Lady Rose noted that at times, counsel for HMRC, Mr Ewart KC, appeared to argue that clear answers to such questions were unnecessary and that the ToAA code would discourage tax avoidance more effectively "if taxpayers are unable to know whether they would be caught or not."[38] This contention was not well received by the Supreme Court, which considered that the argument was not a legitimate one and that it was akin to the unconstitutional approach that the House of Lords had criticised in *Vestey* as being unjust. In summary, Lady Rose noted that she "agree[d] with [counsel for the taxpayers] Mr Afzal's submission in response when he said that the law cannot be left in some unclear state 'just to scare people'."[39]

[33] *Fisher* [2023] UKSC 44 at [72]; *Congreve* [1947] 1 All E.R. 168 at 173.
[34] *Vestey* [1980] A.C. 1148 HL at 1178.
[35] *Fisher* [2023] UKSC 44 at [75].
[36] *Fisher* [2021] EWCA Civ 1438 at [146].
[37] *Fisher* [2023] UKSC 44 at [73]–[75].
[38] *Fisher* [2023] UKSC 44 at [76].
[39] *Fisher* [2023] UKSC 44 at [76].

Accordingly, following the judgment of Cohen LJ in the Court of Appeal in *Congreve*, Lady Rose held that no shareholder in a company—whether having a majority or minority shareholding—is to be treated as a Transferor by reference to that company merely by virtue of their status as a shareholder. In this regard, the Supreme Court was persuaded that had Parliament intended that transfers by companies should automatically be imputed to their individual shareholders so as to render those shareholders Transferors, it would have provided for some mechanism by which to define such a Transferor, perhaps by reference to the notion of "control", which concept was commonly used in other UK tax regimes but is conspicuously absent in the ToAA provisions.

A number of these issues were previously considered by Walton J in *IRC v Pratt*, as a result of which the term "quasi transferor" was coined.[40] That case concerned assessments under what is now ITA 2007 issued to three individuals who were directors of and minority shareholders in a company that transferred assets (UK land) to a Bahamian company. Walton J considered it an accepted principle that an individual who procures that a transfer be made by another a person should be treated as a "quasi transferor". However, finding against HMRC, the court held that in a scenario where there are ostensibly multiple transferors who transfer a single asset, what is now ITA 2007 s.720 can only be engaged if it is possible to identify the precise percentage share of the transferred asset that has been transferred by each purported transferor.

In *Fisher*, HMRC again argued—as they had done in relation to the breadth of *Vestey*—that the difficulty perceived by Walton J no longer applied as it had been cured by the introduction of an apportionment mechanism that prevents duplication of tax charges: what is now ITA 2007 s.743. The difficulty for HMRC in this regard is twofold. First, ITA 2007 s.743 does not serve to quantify an individual taxpayer's liability; rather, the provision is intended to ensure that tax is not imposed twice in circumstances where two or more taxpayers are liable to income tax in respect of the same income of a person abroad. Second, Lady Rose noted that unless a transfer effected by multiple purported transferors can be split into a series of separate distinct transfers each with its own Transferor, the motive defence may not be effective in sparing a Transferor from tax despite that particular individual not having any tax avoidance motive.

A "lacuna in the legislation"?

Notwithstanding that the Supreme Court's decision sided firmly with the taxpayers on the two key questions identified above, one interesting additional takeaway from the judgment is that, on its face, it highlights an apparent "loophole" in the ToAA regime. As Lady Rose observed in her concluding remarks:

> "HMRC may protest that this [interpretation] leaves a lacuna in the legislation since all an individual needs to do is put the asset into a company and then get the company to transfer the asset abroad."[41]

In answer to that objection, Lady Rose gave three responses.

[40] *Inland Revenue Commissioners v Pratt* [1982] S.T.C. 756 at 792; 57 T.C. 1.
[41] *Fisher* [2023] UKSC 44 at [87].

First, the secondary "benefits charge" regime under the ToAA provisions is in point where the charge on Transferors does not apply. The provisions are complex but mean, broadly, that a non-Transferor will not escape a tax charge if they actually receive a benefit (income or capital) from the transferred assets in the UK.[42]

Second, the Supreme Court's decision does not entirely do away with the concept of a "quasi transferor". As such, a taxpayer who intentionally transfers assets into a UK company (whether existing or specifically established for the purpose of the transfer) that then transfers those assets to a person abroad will still likely be caught as a Transferor:

> "The interposition of the UK company would be regarded as a device, and the substance of the transaction would still be a transfer of those assets by the individual to a foreign entity."[43]

This could not be said to be the case on the Fishers' facts, given that SJA was a legitimate company which had been independently trading for many years, prior to the relevant transfer.

Third, and perhaps most significant, the Government are free to legislate to "fill th[e] gap in a fair, appropriate and workable manner",[44] if they do not consider that the secondary "benefits charge" does so adequately in its current form. We discuss the potential likelihood of this development in our concluding remarks below.

Final thoughts

This decision will of course be a welcome one for taxpayers as, given the Supreme Court's authority, this now establishes a precedent of placing some limits on HMRC's (often somewhat broad) application of the ToAA provisions. So, too, does it tie up some long running thorny issues of interpretation created by the previous case law in this area (although noting that some ambiguities still remain), as discussed above.

This is particularly true in the context of the question as to whether the actions of a company can be imputed to its shareholders, with the clear conclusion being that this should only be the case where there is obviously mischief afoot. This goes a long way towards quelling the reservations on the conclusion reached on this point in the Court of Appeal's earlier decision, as expressed by Philips LJ in his dissenting judgment,[45] and is surely the more sensible outcome.

Three interesting points of consideration, however, arise for the future.

The first, is whether the Government will look to legislate to "fill the gap" as anticipated in Lady Rose's summing up. Such an undertaking would, we anticipate, be fraught with challenges and as such, be practically difficult to achieve. Not least of these challenges would be where to start with amending already highly complex rules in a "workable manner", any changes to which would surely themselves then inevitably be the subject of further testing by the courts at a later stage.

The second, is whether the *Fisher* decision is indicative of a more general move by the higher courts towards construing tax legislation (outside of a purely ToAA context) in a narrower form,

[42] ITA 2007 ss.731–735C.
[43] *Fisher* [2023] UKSC 44 at [87].
[44] *Fisher* [2023] UKSC 44 at [87].
[45] *Fisher* [2021] EWCA Civ 1438 at [140]–[149].

to prevent uncertainty and the potential unfairness in its application that a broader construction might bring. This will need to be seen with time and will perhaps depend upon how penal the consequences of an alternative interpretation might be, along with the degree to which HMRC is perceived as exercising discretion in their application of the relevant legislation.

The third point, related to the above, is, as we have alluded to before in this Review,[46] whether the final ruling in *Fisher* will have any impact on the outcome of the decision in *Rialas v Revenue and Customs Commissioners* (*Rialas*),[47] the appeal of which, at the time of writing, has been stood out and not yet heard by the Court of Appeal. It remains to be seen whether *Rialas* will now be heard by that court.

The facts of the case were as described in our previous article but to recap briefly, involved Mr Rialas settling a trust (with a nominal amount and ultimately funded by a third-party loan). The trustees then acquired a non-UK resident company, which in turn acquired a 50% stake in a separate UK company, Argo, from Mr Rialas' business partner (prior to this, Mr Rialas and his partner each owned 50% of Argo's shares). HMRC argued that Mr Rialas, who was closely involved in the transaction, had "procured" the sale of his partner's shares in Argo, making him a Transferor under the ToAA regime. As such, Mr Rialas was deemed liable to tax on the dividends paid on the transferred shares following the transaction. The FTT took the position that as the taxpayer was unable to control to whom his partner sold his shares, HMRC were pushing the meaning of "procure" beyond its natural limits, with which the UT agreed.[48]

Whilst the facts of the case are markedly different to those in *Fisher*, the core issue is effectively the same: namely, when should an individual who has not personally made a transfer of assets abroad be treated as the Transferor for ToAA purposes. If the *Rialas* outcome has indeed been awaiting that of *Fisher*, it looks likely that the taxpayer will find himself similarly successful in that case; however, we can but watch that space.

Addendum

The above article was written prior to the 6 March 2024 UK Budget (the Budget) and as such, reflects the writers' views at that time. In the Budget it was announced that (presumably, though not expressly) following the Supreme Court's decision in *Fisher*, the Government intends to revise the ToAA legislation to deem an individual "participator" (including, a shareholder) in a close company (broadly, a UK-resident company which is under the control of five or fewer participators or any number of director participators), or a non-UK resident company equivalent, to be a "transferor" of assets transferred by that company. Consequently, such a person will expressly be within the scope of the ToAA charging regime. These changes are expected to take effect from 6 April 2024.

Whilst, at the time of writing, draft legislation has not yet been published, the Government intends to limit the application of these new rules to participators who will (i) have the power to enjoy the income arising abroad; or (ii) have received a capital sum as a result of the relevant

[46] In our previous article, Jennifer Smithson, Richard Giangrande, Alex Jones, "Fisher v HMRC and the transfer of assets abroad regime: all bets are off" [2022] B.T.R. 1.
[47] *Rialas v Revenue and Customs Commissioners (Rialas)* [2020] UKUT 367 (TCC); [2021] S.T.C. 186.
[48] *Rialas v Revenue and Customs Commissioners* [2019] UKFTT 520 (TC) at [65]; [2020] S.F.T.D. 106; *Rialas* [2020] UKUT 367 (TCC) at [48].

transactions. These new regulations are also subject to the motive defence (as discussed above). However, how these rules will apply in practice and whether these are indeed “workable” will need to be seen in time, as and when further details are published.

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