[2020] UKUT 0062 (TCC)

Income tax – anti-avoidance – transfer of assets abroad – s.739 ICTA88 – transfer of betting business by UK company to Gibraltar company – whether TOAA code applies to shareholders where no purpose of avoiding income tax – whether transfer can be imputed to shareholders as multiple quasi-transferors – whether all trading profit of transferee company assessable – whether motive defence available – whether TOAA code breached EU law – whether discovery validly made – appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Appeal numbers: UT/2015/0019
UT/2015/0020

BETWEEN

PETER FISHER
STEPHEN FISHER
ANNE FISHER

Appellants and Cross-respondents

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents and Cross-appellants

TRIBUNAL: THE HONOURABLE MRS JUSTICE ANDREWS DBE

JUDGE KEVIN POOLE

Sitting in public at The Rolls Building, London on 13-15 and 18 March 2019

Philip Baker QC and Rory Mullan, instructed by James Cowper LLP for the Appellants and Cross-Respondents

David Ewart QC, Oliver Conolly and Barbara Belgrano, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents and Cross-Appellants

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DECISION

INTRODUCTION

1. This is an appeal and cross-appeal from the decision of the First-tier Tribunal ("FTT") (Judge Raghavan and Mrs Sadeque) of 14 August 2014 [2014] UK FTT 804 (TC) ("the Decision") concerning 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"). The FTT found that the appellant taxpayers, Stephen and Anne Fisher and their son Peter, who were shareholders and/or directors of both companies, were to be treated as "quasi-transferors" of the business so that the provisions of the tax anti-avoidance code on transfer of assets abroad ("the TOAA code") applied to them, and they were subject to charge under section 739 of the Income and Corporation Taxes Act 1988 (and its successor) on the profits made by SJG.

2. The FTT also found that although the avoidance of corporation tax or other income tax was not a purpose of the transfer, and the transfer and any associated operations were bona fide commercial operations, as a matter of domestic law the taxpayers could not avail themselves of either limb of the so-called "motive" defence under section 741 because the transfer was designed for the main purpose of avoiding liability to pay betting duty. In the case of Anne Fisher, an Irish national, because the TOAA code restricted her rights of freedom of establishment, the legislation had to be interpreted so as to conform to EU law. This meant the references to "tax avoidance" in the legislation had to be interpreted as restricted to situations in which tax was avoided by artificial means. As that was not the case here, Mrs Fisher could avail herself of the motive defence and was not liable. However, as English nationals, her husband and son could not benefit from the narrower conforming interpretation.

THE FACTUAL BACKGROUND

3. The FTT set out the background facts at paragraphs [16] to [95][1] of its decision and made its findings in relation to the decision to transfer the telebetting business to Gibraltar at paragraphs [334] to [370]. For the purposes of this appeal and cross-appeal the following summary will suffice.

4. Stephen Fisher and his wife Anne are and were at all material times resident and ordinarily resident in the UK. Their son Peter ceased to be resident in the UK in 2004. Their daughter Dianne was non-resident at all material times.

5. The Stan James betting business was built up over a number of years, and from 1988 onwards was run through SJA, whose sole directors and shareholders were the four members of the Fisher family. The business consisted, over time, of one or more betting shops in the UK, the taking of bets over the telephone ("telebetting"), and more recently, internet betting.

6. Stephen Fisher dealt with the shops and administration and had overall responsibility for the company. He and Peter were responsible for the day-to-day running of the business and formulating future planning, and they provided the majority of input to decisions. Dianne worked on accounts administration for the telebetting side of the business. Anne Fisher had virtually nothing to do with the business from 1996 onwards. She played no active part in SJA's decision-making. She entrusted her responsibilities to her husband and son and was happy to go along with their decisions.

7. Initially each betting shop took its own telebets, but in 1992 SJA centralised its telebetting operations. It subsequently developed its own call centre software. In 1994 Peter became solely responsible for the telebetting business, which was becoming increasingly

[1] Unless the context requires otherwise, references to paragraphs are to those paragraphs in the Decision.

important. In 1996, SJA bought a new building to expand this strand of the business. By 1999 telebetting accounted for a major part of SJA's business, and it had outgrown those premises and was planning to move.

8. Betting duty was charged on bets placed with SJA in accordance with the Betting and Gaming Duties Act 1981 ("BGDA"). In 1999, UK betting duty was charged at a rate of 6.75% on the amount staked. On horse racing bets an additional levy of 1% had to be paid to the Horserace Betting Levy Board. It was common practice for bookmakers to incorporate the betting duty into the price that they charged, or the odds that they offered their customers. Typically, the bookmaker would levy a surcharge of 9% on each bet, which he would use to account for the duty, and keep the balance. Alternatively, the customer might be given the option of having the 9% deducted from their total returns, meaning that, for example, for every £100 wager only £91 was placed, thereby reducing any winnings. On certain types of bet, the bookmaker might decide not to levy a surcharge, as SJA did for forecast and tricast bets. In such event, the bookmaker would bear the cost of the duty.

9. In 1999 a small minority of SJA's customers (approximately 3%) were disproportionately responsible for 55 to 60% of its turnover. They would place between 25 and 50 bets per week and reinvest the winnings. For such individuals the 9% surcharge was particularly relevant, as it had a cumulative effect of reducing the amount they could bet, and thus the number of bets they could make. Other than making sure that they were using a reputable bookmaker, there was little customer loyalty. If customers could bet more cheaply, they would switch.

10. Until 2001, general betting duty was charged under section 1 of the BGDA on any bet *"made with a bookmaker in the United Kingdom otherwise than by way of pool betting or coupon betting.*" It was legally possible for a bet to be placed by a UK customer overseas without a liability for UK betting duty arising. However, whilst it was not unlawful for overseas bookmakers to accept bets placed abroad by UK customers, the regime made it difficult for them to attract a UK customer base. They were prohibited from advertising in the UK and from sharing resources with an entity based in the UK. Section 9 of the BGDA provided that:

> (1) Any person who –
>
> (a) conducts in the United Kingdom any business or agency for the negotiation, receipt or transmission of bets to which this section applies, or
>
> (b) knowingly issues, circulates or distributes in the United Kingdom, or has in his possession for that purpose, any advertisement or other document inviting or otherwise relating to the making of such bets, or
>
> (c) being a bookmaker in the United Kingdom, makes or offers to make any such bet with a bookmaker outside the United Kingdom,
>
> shall be guilty of an offence.
>
> (2) Except as mentioned in subsection 3 below, this section applies to –
>
> …
>
> (b) all bets made with a bookmaker outside the United Kingdom (whether or not made by way of pool betting or coupon betting).

11. In 1997 SJA decided to set up a branch office in Gibraltar. The decision was prompted by the acquisition of a loss-making postal betting operation which was taking bets on German football games. SJA decided that this business might be run profitably from an offshore jurisdiction which charged little or no betting duty. Stephen and Peter Fisher eventually settled on Gibraltar, which had a regulatory framework which allowed them to trade and charged only

1% betting duty. On or around 1 October 1997 Peter Fisher met the Gibraltarian Finance Minister, and it was decided that a branch could be used.

12. Stephen and Peter Fisher met with representatives of HM Customs & Excise ("HMCE") before the decision was implemented. They stipulated that there should be no UK advertising and that controls should be put in place by SJA to ensure that UK residents could not use the service. SJA agreed to this. The branch's Gibraltarian betting license became operational on 1 April 1998. It took bets from non-UK customers over the telephone. Initially it had only 6 employees.

13. After the branch was up and running, HMCE queried whether a separate legal entity was required. That appeared to be a change of position. There was an exchange of correspondence on the subject between HMCE, Stephen Fisher, and SJA's accountants James Cowper, with the latter expressing the view that duty would not be payable where a bet was placed with the Gibraltar branch by a person outside the UK.

14. On 2 November 1998 HMCE wrote to James Cowper in these terms:

> "General betting duty is charged on off-course bets made with a bookmaker in the United Kingdom… "Made" must refer to the bookmaker entering into a wagering contract. Where the contract is made is a question of fact… In this case your client appears to have two places of business, one in the UK and one in Gibraltar. The latter has effectively been established as a separate trading entity. Having established a separate branch in Gibraltar it will be a question of fact as to whether punters are placing bets with that branch. Any such bets placed with that bookmaker will not incur a liability to general betting duty.
>
> For the sake of completeness I would point out that there are restrictions relating to overseas betting. These are contained in section 9 of [the BGDA] You may wish to bring these to your client's attention if he is not already aware of them."

It was Stephen Fisher's understanding that when the bet was not struck in the UK it was not liable to duty, and that the place where the bet was struck and where the contract was concluded depended on where the bet was entered into the database. Despite the inconsistency of HMCE's approach, he was concerned about their apparent suggestion that the directors of SJA were breaking the law if they operated the business in Gibraltar through a branch.

15. In March 1999 the established bookmaker Victor Chandler, which was a direct competitor to SJA with a similar sized operation, moved its entire telebetting business to a company incorporated in Gibraltar for that purpose. The move was widely reported and caused shockwaves throughout the UK betting industry. Once UK resident customers came to find out that it was possible to place a bet in Gibraltar and to pay a lower surcharge of only 3%, they flocked to take advantage of this option. Victor Chandler's competitors reacted swiftly by taking steps to move their UK telebetting operations overseas. Within 9 months, there was no major telebetting operator left in the UK.

16. By July 1999 it had become clear to Stephen Fisher that advances in technology meant it was no longer going to be possible for the UK government to prevent overseas bookmakers from taking bets from UK customers on terms which undercut those offered by UK bookmakers. In practical terms, unless there were changes to the rate of duty payable in the UK, the only way in which to save the business would be to move it to Gibraltar. As vice-chairman of the bookmakers' trade association BOLA, Stephen became involved in lobbying for changes to the rate of duty. He also discussed with Peter the reality that they would have to

take bets from UK residents in Gibraltar. On 7 July 1999 Stephen Fisher wrote to HMCE informing them that:

> "we are unable to continue our voluntary undertaking not to accept business from UK residents at our Gibraltar office… Our moving to Gibraltar will not only mean the loss of £3.5 million in GBD, but also a decline in horserace levy, corporation tax, income tax contributions and the loss of 45 jobs. We strongly urge you to convey our feelings to your Minister…"

17. Stephen Fisher 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 was incorporated in Gibraltar on Peter's instructions. On 3 August 1999, the four members of the Fisher family acquired all the shares in SJG between them. Stephen and Anne Fisher each owned 47 shares (approximately 37.9% of the issued shares) and Peter and Dianne Fisher each owned 15 shares (approximately 12.1% of the issued shares). Peter Fisher was appointed as a director on 2 August 1999.

18. Meanwhile, in mid-July 1999 the High Court had ruled that Victor Chandler's advertisement of its Gibraltar operations on teletext was lawful. That decision was reversed by the Court of Appeal in February 2000, but in the intervening period Victor Chandler's competitors, including SJA, also used teletext to advertise their operations in Gibraltar. The branch began to accept bets placed by UK based customers. The business of the branch expanded to such an extent that it had to engage more staff, mainly to operate the telephones. More telephone lines and computers had to be installed. By the time of the transfer of the business there were 22-24 staff in the Gibraltar office.

19. In August 1999 James Cowper, of behalf of SJA, sought advice from specialist tax counsel (David Oliver QC) on the implications of the High Court judgment and whether it could apply to SJA given that, unlike Victor Chandler which had incorporated a separate company, it operated through a branch in Gibraltar. Leading counsel referred to the statutory prohibitions in s.9 of the BGDA and expressed the view that in order to be sure of compliance, it was desirable to achieve as clean and clear a separation as possible between the UK aspects of SJA's betting operations and those conducted offshore. The most efficacious structure would be to conduct the offshore betting operations through a corporate entity entirely separate from the UK company. He went on to warn that if SJA continued to operate under its present structure and extended its operations to UK residents, it would expose SJA and its directors to serious risks of infringement of the s.9 provisions and criminal sanctions, which include both fines and imprisonment.

20. Initially it was intended just to 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. A consultation was arranged on 20 January 2000 which sought further advice from Mr Oliver QC, inter alia on draft sales and management agreements between SJA and SJG. It was decided that the whole of SJA's telebetting business would be transferred to SJG with effect from 29 February 2000. Separate advice was taken from Kevin Prosser QC on the direct tax implications of the proposed structure of the transfer. Independent valuers were instructed to value the business to be transferred, and lawyers in the UK and Gibraltar were instructed to effect the transfer.

21. On 3 February 2000 Dianne Fisher resigned as a director of SJA. On 24 February 2000 at an extraordinary general meeting of SJG, the company's share capital was increased to 50,000 shares of £1. Dianne Fisher was appointed 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. As at the date of

the transfer of the business, Stephen and Anne Fisher each still held just less than 38% of the shares of SJA and Peter and Dianne each held just over 12%; as regards SJG, Stephen and Anne each held 26% of the issued share capital and Peter and Dianne each held 24%.[2]

22. The agreement giving effect to the sale and transfer of the business between SJA and SJG was signed in early March 2000 by Stephen Fisher as duly authorised director on behalf of SJA, and by Peter Fisher as duly authorised director on behalf of SJG. The sale took place at the market value determined by the independent valuers. The business sold by SJA included the telebetting operation located at its premises in Abingdon, and the Gibraltarian branch. Apart from book debts and cash, the transferred assets included a database of 30,000 names, a teletext facility, and four Freephone numbers. SJG commenced trading on 1 March 2000 and went into profit almost immediately. Between 25 and 30 staff and their families were relocated from SJA's operations in the UK to work for SJG. SJA's existing customers would have to call a new Freephone number and open a new account to bet with SJG.

23. SJG paid all taxes to which it was subject under the law of Gibraltar. From 2003 onwards it developed internet betting and gaming platforms. In the course of 2003, SJG became the parent company of SJA (acquiring 51% of its issued share capital). In February 2009 it was re-registered as Stan James Plc. SJA continued with its other business streams until October 2001 when the UK betting duty regime changed. It then became possible for UK bookmakers to compete with offshore bookmakers in taking telebets. Subsequent to the change, SJA re-established its own UK telebetting operation. In December 2008, Peter and Dianne bought out their parents' shares in SJG.

24. Anne, Stephen and Peter Fisher were assessed by HMRC as liable to income tax on the profits of SJG for the years of assessment from 2000-2001 to 2007-2008 inclusive, on the basis that the TOAA code applied so that they were subject to charge under section 739 of the Income and Corporation Taxes Act (ICTA) 1988 and section 720 of the Income Tax Act (ITA) 2007. The amount of the charge in each case was based on an apportioned allocation between tax years of SJG's profits (which were accounted for on a calendar year basis) and allocation between Anne, Stephen and Peter by reference to their respective shareholdings in SJG (such that only 76% of SJG's apportioned profit was allocated to them under s.739). It was common ground that although the ITA 2007 applied for 2007-8, the changes to the legislative provisions were immaterial to the outcome of the appeal or cross-appeal. Therefore, like the parties and the FTT, we shall refer only to the applicable provisions of the 1988 Act.

THE TOAA CODE

25. Section 739 of ICTA 1988 provides, so far as material, as follows:

> **739 Prevention of avoidance of income tax**
>
> (1) Subject to section 747(4)(b), the following provisions of this section shall have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom.
>
> (1A) nothing in subsection (1) above shall be taken to imply that the provisions of subsections (2) and (3) apply only if –

[2] These are the holdings recorded at [70] and [93] and reflected in the parties' skeleton arguments; we take the reference in [198] to the respective holdings in the companies being the other way around to be a simple typing error.

> (a) the individual in question was ordinarily resident in the United Kingdom at the time when the transfer was made; or
>
> (b) the avoiding of liability to income tax is the purpose, or one of the purposes, for which the transfer was effected.
>
> (2) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts.
>
> (3) Where, whether before or after any such transfer, such an individual receives or is entitled to receive any capital sum the payment of which is in any way connected with the transfer or any associated operation, any income which, by virtue or in consequence of the transfer, either alone or in conjunction with associated operations, has become the income of the person resident or domiciled outside the United Kingdom shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts.

26. The TOAA code applies to treat an individual ordinarily resident in the UK as being in receipt of income which accrues to another person who is resident abroad, and taxable on that income, if the individual concerned has a power to enjoy that income. The charge will apply even if the individual neither receives the income nor derives any benefit from it, and ultimately might never do so. In the present case, most of the income on which Stephen, Anne and Peter Fisher have been charged to tax was reinvested in the business of SJG.

27. Subject to the application of the so-called "motive defence", s.739 ICTA 1988 applies to impose a charge to income tax on an individual ("the Transferor") who transfers assets, and who by virtue of or in consequence of that transfer, either alone or in conjunction with associated operations, has power to enjoy any income of a person resident or domiciled outside the UK which would be chargeable to income tax if it were received by the Transferor in the UK. Whilst the "person" resident abroad can be a company, s.739 only applies to Transferors who are individuals and to transfers made by that individual. It cannot apply to impose a charge on any person who is not a Transferor: *Vestey v IRC (Nos 1 and 2)* [1980] AC 118.

28. The motive defence is set out in section 741 ICTA 1988 which provides, so far as relevant, as follows:

> Section 739… shall not apply if the individual shows… either
>
> (a) that 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) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation.

29. These provisions have their origins in section 18 of the Finance Act 1936 which provided as follows:

> 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: –
>
> (1) where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of the person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts:
>
> Provided that this subsection shall not apply if the individual shows … that the transfer and any associated operations were effected mainly for some purpose other than the purpose of avoiding liability to taxation.

30. The proviso was replaced, and the motive defence was recast by the provisions of s.28 of the Finance Act 1938. The provisions of those two statutes were then consolidated in s.412 of the ITA 1952, with the two alternative limbs of the motive defence being set out for the first time in subsection (3). There was a minor amendment to s.412(1) in the Finance Act 1969 to meet a perceived deficiency in the drafting.

31. The next iteration was in section 478 of ICTA 1970, which retained the preamble and the structure of its predecessor. S.45 of the Finance Act 1981 introduced a power to charge non-transferors, such as beneficiaries under a discretionary trust, where the settlor has transferred income-yielding investments to an offshore trust. At the time of the transfer to SJG, the source of that power was s.740 of ICTA 1988. That section was not deployed in the present case and did not feature in the argument before us or the FTT.

32. Despite their long history, there is remarkably little case law on the interpretation of these provisions in their various iterations.

THE DECISION OF THE FTT

33. The FTT dealt with the taxpayers' appeals as follows: –

(1) They allowed Anne Fisher's appeals for all material periods;

(2) They dismissed Stephen Fisher's appeals for 2000-01 to 2004-05 and for 2007–08, but allowed his appeals for 2005–06 and 2006–07 on the basis that the discovery assessments for those two periods purportedly made pursuant to section 29 of the Taxes Management Act 1970 were not validly made;

(3) They dismissed Peter Fisher's appeals for 2000–01, 2003–04, and 2004–05, and allowed his appeal for 2002–03 on the basis that the assessment for that year was out of time. HMRC have not appealed the decision concerning the 2002–03 assessment.

THE ISSUES ON THIS APPEAL AND CROSS-APPEAL

34. The issues that require determination on this appeal and cross-appeal fall under 4 broad heads:

(1) Was the TOAA code engaged in this case?

(2) If so, was the "motive" defence in section 741 ICTA 1988 available to these taxpayers?

(3) Does the TOAA code breach EU law?

(4) So far as Stephen and Anne Fisher are concerned, did HMRC have enough information to know that there was an insufficiency of tax before the relevant enquiry windows shut in respect of the tax years 2005-06 and 2006-07?

Issue 1 – Was the TOAA code engaged?

35. The Fishers have raised three arguments that the TOAA code does not apply:

(1) there was no avoidance of income tax such as to engage section 739 in the first place;

(2) the transfer was made by SJA and not by any of the Fishers. It is not possible to impute that transfer to the Fishers as "quasi-transferors" either collectively or individually by virtue of their directorship or shareholding in SJA;

(3) the charge, if it applies, should be limited to such income as arose as a consequence of the transfer (or associated operations) and should not attach to all profits earned by SJG, particularly those derived from new aspects of the business which developed after the transfer.

(1) Can section 739 apply in a case where there is no avoidance of income tax?

36. The FTT found as a fact that the setting up of SJG and the transfer of the business to it were not for the purposes of avoiding income tax. Indeed it is difficult to see how the transfer at market value of the business assets of a trading company (which is not liable to pay income tax) to another trading company (which is also not liable to pay income tax) could avoid a liability to pay income tax. At all relevant times the Fishers, as shareholders, remained liable to a charge to income tax on any distributions from either of those companies by way of dividend. They were never liable to pay income tax on the profits earned by SJA.

37. The purpose referred to in s.739(1) is not the purpose of the transaction, but the purpose that Parliament intended the provisions of that section to achieve, i.e. to prevent someone from avoiding a liability to income tax which, *ex hypothesi* would otherwise have arisen, by means of a transfer of assets to someone outside the UK (and, implicitly, to deter them from attempting to do so). Since the avoidance of income tax is the express purpose for which section 739 exists, and tax legislation should be construed purposively, particularly if it has potentially penal results, the argument that it does not apply to a scenario in which income tax was not avoided and could not have been avoided has some attraction.

38. This was the argument advanced by Mr Baker QC on behalf of the taxpayers. The basis of the argument is that it is implicit in the terms of s.739(1) that s.739 only applies at all in the case of individuals who seek to avoid liability to income tax by transfers of assets (with or without associated operations).

39. This appears to be the first time this argument has been explicitly advanced in the reported cases, most of which have been concerned with situations in which avoidance of income tax has quite clearly been involved. It is therefore quite understandable that arguments in those cases about the existence (or otherwise) of an avoidance purpose have been addressed to the availability of the motive defence under s.741 rather than to the applicability of s.739 at all by reference to s.739(1).

40. The closest the authorities have come to considering the point was in *IRC v McGuckian* [1997] 1 WLR 991 (a case involving the predecessor provisions of s.478 Income and Corporation Taxes Act 1970, couched in almost identical terms). In that case however there was a clear purpose on the part of the taxpayer to avoid income tax. In seeking to establish whether he had been successful in that purpose in spite of s.478, the crucial question (as

explained by Lord Browne-Wilkinson at 995H) was whether the payment made to an overseas trust (of which the taxpayer and his wife were beneficiaries) as a result of the complicated arrangements involved was (as the Crown argued) a payment of an income nature or (as the taxpayers argued) a payment of capital.

41. In considering that question, one of the arguments put forward by the taxpayer was that an entirely different anti-avoidance provision (s.470 of the same Act) applied so as to deem the income of the overseas trust to be his wife's income and consequently to make him liable to income tax under that section on the transactions undertaken[3], which meant that there was no avoidance of income tax for s.478 to "bite" on. His submission, based on the words in the preamble to s.478, "For the purpose of preventing the avoidance by individuals ordinarily resident in the United Kingdom of liability to income tax…" was that "section 478 does not apply unless tax has *in fact* been avoided".

42. In addressing this argument, Lord Browne-Wilkinson (as well as wryly observing that it had, as the taxpayer's counsel had frankly conceded, "no ethical merit") said at 997H that there was "no warrant" for it, because the words of the preamble:

> "…refer not to the intention of the transferor of the assets or the effect of such transfer but to the intention of Parliament in enacting the section. That parliamentary intention is certainly relevant in construing the section. But the words of subsection (1) make it clear that the actual avoidance of tax is not a precondition to the application of the section. The income is deemed to be the income of the United Kingdom resident "whether it would or would not have been chargeable to income tax apart from the provisions of this section." It is therefore clear that section 478 can still apply even though the effect of the transfer of assets abroad would not have been successful in avoiding United Kingdom income tax."

43. Lord Steyn (at 1002H) addressed the same argument as follows:

> "I would reject the argument that it is a condition precedent to section 478 applying that there must be proof of an actual avoidance of tax liability. Such a construction treats section 478 as a power of last resort and it substantially emasculates the effectiveness of the power under section 478. Nothing in the language or purpose of section 478 compels such a construction. Properly construed the opening words of section 478 merely provide that there must be an intention to avoid liability for tax. The sensible construction is that section 478 can be applied even if there are other provisions which could be invoked to prevent the avoidance of tax."

44. Lord Clyde, by way of introductory words to his brief speech, said this at 1005H:

> "My Lords, the assessment to tax here was made under section 478 of the Income and Corporation Taxes Act 1970. The opening few lines of that section set out the purpose to be served by the enactment. That purpose is the prevention of avoidance by individuals ordinarily resident in the United Kingdom of liability to income tax by means of certain kinds of transaction. It is not required that the transaction itself should be carried out with that purpose. The statute is simply expressing the purpose of the section, not the substance of the transaction."

45. Mr Ewart QC seizes on these three statements and argues they demonstrate that even before the enactment of s.739(1A) it was clear that s.739 can apply in spite of the absence of any actual avoidance of income tax. We consider that overstates the position. It was accepted

[3] The relevant events predated the independent taxation of wives, though the Inland Revenue were in any event out of time to raise an assessment on the taxpayer under s.470.

in *McGuckian* that the taxpayer had a tax avoidance purpose in carrying through the transactions: he did not even seek to argue that the motive defence was available to him (see 995H). The comments of all three of their Lordships were addressed to the very specific question of whether the effect of s.470 was to deprive s.478 of any effect. It is easy to see why they reached the view they did. But we do not consider their comments should be regarded as having the broader application for which Mr Ewart argues.

46. However, s.739(1A) (which was not in force for the purposes of the *McGuckian* case) must now also be considered. Mr Ewart argues that it does not affect his preferred analysis arising from *McGuckian* itself, though we found his explanation of its intended effect in the light of that analysis somewhat difficult to follow. Mr Baker seeks to explain it as "intending only to make it clear that there was no requirement on HMRC to prove a purpose of avoiding income tax", whilst pointing out that nothing had been done to amend the wording of s.739(1), whose expressed purpose should continue to be applied to the overall interpretation of the provisions.

47. We do not find s.739(1A) an easy provision to interpret in the context in which it appears. We were referred to the explanatory notes issued by the Inland Revenue with the clause when it was first introduced, which after explaining the background to the TOAA code, said the following:

> The new provision
>
> 9. The new subsection (1A)(a) ensures that the provisions apply where the individual is ordinarily resident at the time when he has the power to enjoy the income, whether or not he was ordinarily resident when the transfer of assets took place. If that were not the case, the legislation would for example apply to (i) below but not to (ii):
>
> (i) an expatriate intends to return to the UK as an ordinary resident, and makes a transfer of assets – with a view to avoidance of UK tax – a few days after arriving in the UK; and
>
> (ii) another expatriate in precisely the same circumstances, makes the identical transfer a few days before arriving here.
>
> 10. Subsection (1A)(b) makes clear that the provisions apply where the purpose of the transfer is to avoid any form of direct taxation. If that were not the case, the legislation would apply to (i) below but not to (ii):
>
> (i) an individual transfers assets with the purpose of avoiding income tax; and
>
> (ii) another individual makes an identical transfer, which has the effect of avoiding income tax, but the purpose is to avoid capital gains tax and/or inheritance tax.
>
> 11. The provisions of both limbs of subsection (1A) confirm the Inland Revenue's long standing practice in interpreting the present statute.
>
> 12. Aspects of the legislation are currently under consideration by the courts in the case of Commissioners of Inland Revenue v Willoughby.

48. With respect, we do not see how s.739(1A)(b) can be read in conformity with the content of paragraph 10 of the Notes; however an examination of the facts and arguments in the case referred to, *IRC v Willoughby*, does offer some illumination.

49. At the time of the issue of the Notes, *Willoughby* had been decided by the Court of Appeal, but was still under appeal to the House of Lords. In the Court of Appeal judgment (at [1995] STC 143), it is clear that there were two main areas of dispute.

50. The first main area of dispute was whether s.739 could be applied in a situation where the relevant transfer had been effected before the taxpayer became ordinarily resident in the UK. It was held that it could not. Subsection (1A)(a) is clearly intended to reverse this decision for the future, even if the House of Lords were to uphold the Court of Appeal's decision on the point (as it in fact did at [1997] 1 WLR 1071).

51. The second main area of dispute was whether the motive defence was available to the taxpayer. The situation here was very different from that in *McGuckian*. The taxpayer had not embarked on a complex series of transactions with a view to avoiding income tax. He had simply bought a particular type of insurance bond issued by an offshore insurance company which allowed for the income of the underlying investments to be rolled up free of UK income tax until a charge potentially arose at a later date. Many such bonds existed, and the Inland Revenue did not object to 98% of them; however the bond selected by the taxpayer had a particular feature which they did consider objectionable, namely the ability for the taxpayer to select the underlying investments in which the fund was invested. They regarded this as effectively little more than the taxpayer running his own offshore investment portfolio, beyond the reach of UK income tax on the income from it, by using an artificial wrapper.

52. The issue before the Court was therefore whether the motive defence was available to the taxpayer. In the decisions of both the Court of Appeal and the Special Commissioners, however, the main discussion around the point was the extent to which "deferral" and "avoidance" overlapped. The Special Commissioner clearly had some difficulty with this question, observing first that Lord Brightman in the House of Lords in *Furniss v Dawson* [1984] STC 153 at 159 appeared to have drawn a very sharp contrast between the two when he said "My Lords, the transaction which we are called upon to consider is not a tax avoidance scheme, but a tax deferment scheme"; however the Special Commissioner went on to hedge his bets, concluding at the end of a somewhat disjointed discussion that "deferring liability to income tax can constitute the avoiding of liability to income tax for the purposes of s 739" (as reproduced in the Court of Appeal's judgment at [1995] STC164h). This finding was not appealed. The only question before the Court of Appeal was whether the Special Commissioner was right, on the facts, to find that in the present case the deferral of tax which the taxpayer benefitted from did not amount to the avoidance of tax. The Court agreed with the Special Commissioner, its reasoning summed up as follows (at 183e):

> "I do not see why the choice of an offshore bond or policy, for the taxation of which Parliament has made express and recent provision, should be regarded as tax avoidance at all. The tax is not avoided it is deferred. Moreover it is deferred to an event which Parliament has prescribed not to a time of the taxpayer's choice…
>
> The genuine application of the taxpayer's money in the acquisition of a species of property for which Parliament has determined a special tax regime does not amount to tax avoidance merely on the ground that the taxpayer might have chosen a different application which would have subjected him to less favourable tax treatment."

53. It is clear that the application of the motive defence in any particular case will always be a matter for determination on the facts by the tribunal or court hearing the case, however in the Court of Appeal judgment, in the reasoning on the first main issue before it, reference was made back to the reasoning of the House of Lords in *Vestey v IRC (Nos. 1 & 2)* [1980] AC 1148 (considered in more detail under "Issue 1(2)" below), where a narrow view of the application of s.412 Income Tax Act 1952 (the predecessor legislation in almost exactly the same terms as s.739) was decided to be appropriate, as set out in the following passages from the speeches of the various Law Lords:

(1) Lord Wilberforce (with whom Lord Salmon agreed) at 1174H and 1176D:

> "There are undoubtedly two possible interpretations of section 412, particularly having regard to the preamble.
>
> The first is to regard it as having a limited effect: to be directed against persons who transfer assets abroad, who by means of such transfers avoid tax, and who yet managed when resident in the United Kingdom to obtain or to be in possession to obtain benefits from those assets. For myself I regard this as being the natural meaning of the section."

He then went on to examine all the consequences of giving section 412 an extended meaning, finding that it involved "results which are arbitrary, potentially unjust, and fundamentally unconstitutional". He went on to identify his preferred interpretation as follows:

> "The alternative which is supported by the language is to suppose that the section was intended by Parliament as a limited section, attacking, with penal consequences, those who removed assets abroad so as to gain tax advantages while residing in the United Kingdom…"

(2) Viscount Dilhorne at 1183A:

> "Cohen LJ with whose judgment Lord Simonds agreed on all points treated the words "such an individual" in subsections (1) and (2) as meaning an individual ordinarily resident in the United Kingdom. Their meaning does not appear to have been debated in the House. A possible meaning appears to me an individual ordinarily resident who has sought to avoid liability to income tax by means of a transfer abroad. If that was their meaning, then the scope of section 412 is limited."

He went on to conclude at 1183E that "such an individual" in s.412 meant "an individual who has sought to avoid tax by the transfer of assets abroad."

(3) Lord Edmund-Davies at 1195H:

> "In my judgment, the words "such an individual" appearing in subsections (1) and (2) hark back to the opening words of the preamble, namely to individuals whose purpose is the avoidance of liability to tax, and do *not* refer simply to any individual "ordinarily resident in the United Kingdom.""

(4) Lord Keith of Kinkel at 1197G:

> "Thus I consider that the natural and intended meaning of the words "such an individual" in section 412(1) is that they indicate not merely an individual ordinarily resident in the United Kingdom, but an individual so resident who has sought to avoid liability to income tax by means of such transfers of assets as are mentioned in the preamble."

54. It can be seen that the general thrust of all these comments is that the section should only apply to individuals ordinarily resident in the United Kingdom who have (in the words of Lord Keith) "sought to avoid liability to income tax by means of such transfers of assets as are mentioned in the preamble". We read nothing into the fact that most of their Lordships referred to "tax" rather than "income tax" as they were only purporting to summarise the meaning of the provisions as they interpreted them and there was no live issue in that case around the difference between income tax and any other tax.

55. Thus it is easy to see how the unanimous judgment of the Court of Appeal in *Willoughby* readily gives rise to the suggestion that what is now s.739 simply does not apply to a situation in which the transferor did not have a purpose, in making the transfer, of avoiding income tax.

As we see it, the intention behind s.739(1A)(b) was to head off that potential argument, so as to ensure that the purposes of the transferor (both in relation to the transfer itself and also in relation to any associated operations) are only relevant and fully examined in the context of the motive defence in s.741.

56. For these reasons, we consider that s.739 is capable of applying even in a situation where the taxpayer was not seeking to avoid income tax by making the relevant transfer. We accordingly find in favour of HMRC on this issue.

(2) Is it possible to impute the transfer by SJA to any of the taxpayers?

57. Whilst "*an associated operation*" can be carried out by *any person* (see s.742), and therefore by a company, s.739(2) of ICTA 1988, which imposes the liability, expressly applies to "*an individual*" who fulfils the requirements of s.739(1). Moreover, as mentioned at [27] above, s.739(2) requires that the "individual" subject to the charge is also the transferor of the assets. That was decided in *Vestey*, referred to in the discussion of Issue 1(1) above, which concerned the predecessor provisions in s.412 of the ITA 1952.

58. In *Vestey,* two members of the taxpayers' family settled certain overseas properties on trustees abroad on discretionary trusts. The income from the properties was to be accumulated into a fund which, after a prescribed period would be split into two funds (corresponding with two branches of the family). The income from those funds would in turn be accumulated, and after a further period the trustees had the power to make capital payments from the accumulated funds to members of the two relevant classes of beneficiaries. The taxpayers were among the discretionary beneficiaries. Neither of the settlors had any rights to enjoy the income from the overseas trust. The Revenue sought to apply s.412 to the beneficiaries.

59. The House of Lords refused to follow its earlier decision in *Congreve v IRC* [1948] 1 All ER 948 that the section applied whenever there was a transfer of assets to a person outside the jurisdiction and the taxpayer had the "power to enjoy" the income from them, even though the person sought to be taxed (or their spouse/civil partner, to whom the word "individual" expressly extends) was <u>not</u> the transferor of the assets. Their reasons for doing so emerge clearly from the passages from *Vestey* cited in *Willoughby* and set out at [53] above. Having considered dicta in earlier cases identifying the mischief against which the section was directed, Lord Wilberforce rejected the argument that the section must have been directed against cases where an individual transfers his or her assets abroad for the benefit of a child or grandchild, observing at 1177F-G:

> "I find in the section, if directed at transferors, and benefits taken by them, an ample and powerful anti-avoidance instrument and I feel not only no need, but a great reluctance, in view of the wording used, to extend it against any beneficiary, child, or grandchild, or descendant."

60. One of the policy reasons given by Lord Wilberforce for preferring the narrower construction was that "prevention of avoidance is the stated objective. But there may be many cases, of which this is one, in which no tax is avoided by the person sought to be charged." He pointed out that if the settlement had been made in England with English trustees, "not a penny of tax could, at the relevant time, have been levied on any of the beneficiaries" and observed that this seemed to show that the mischief at which the section was directed was a more limited one. This and other arguments, together with the linguistic, persuaded him that the better interpretation of s.412 was not that accepted in *Congreve* but "one limiting its operation and charging effect to the transferors of assets." (page 1175E-G). Lord Wilberforce's approach highlights the unfairness that could arise if the statute were applied in circumstances, such as the present, in which the transfer of the assets had no bearing upon the income tax liability of the individual(s) concerned. It supports an interpretation that would avoid such a result.

61. In the present case, the transfer of assets was not made by an individual. It was made by a company, SJA. Those assets, which were assets of a business, and any income derived from them, always belonged to the company, not to its directors or shareholders, and the company paid corporation tax on its profits from the business. The situation is comparable to that in *Vestey*, as at the time of the transfer there was no possibility of any member of the Fisher family being liable to pay income tax on those profits. If SJA had sold its business to another English company in which the Fishers acquired a shareholding, they would not be taxed on the profits made by the buyer any more than they would have been charged income tax on the profits of SJA prior to the transfer. They would only ever be taxed on any dividends declared by SJA and paid to them as shareholders from surplus funds available for distribution (*after* providing for corporation tax). This suggests that an interpretation of the statute which gives rise to the penal consequence of their being made liable to pay income tax on the whole of the profits from the business of SJG over a potentially unlimited period, is too wide. It does not address the mischief at which the statute was directed.

62. Can the actions of SJA be imputed to its shareholders or directors? Normally the answer to that question would be no. It is a fundamental principle of English company law that a company has a separate persona from its shareholders and has separate rights and liabilities: *Salomon v A Salomon & Co Ltd* [1897] AC 22. That principle applies even if the company is owned and controlled by one individual, which was not the case here, but was the case in *Congreve*. There appears to be no material distinction between the position of the settlors in *Vestey* and the position of the shareholders in SJA. The circumstances in which the court will be prepared to "pierce the corporate veil" and attribute the acts of a company to its controller (or controllers) are rare. In the absence of express statutory provision, the established circumstances involve fraud or other criminal conduct, or the deliberate setting up of the company in order to circumvent a pre-existing liability, see the illuminating distillation of the principles in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34 by Lord Sumption JSC especially at paragraphs [34] and [35].

63. On the face of it, and in consequence of the decision in *Vestey*, s.739 does not apply if the transferor is a company. That does not mean that a taxpayer could avoid the operation of s.739 by simply transferring his income-producing assets to a UK company prior to the transfer of the same assets by the company to a foreign company or individual. The interposition of the UK company would be regarded as a device, and the substance of the transaction(s) would still be a transfer of those assets by the individual to the foreign entity. Alternatively, the transfer by the UK company might be treated as an "associated operation," which can be carried out by anyone. Likewise, if a UK company was deliberately set up to circumvent a liability to income tax, that scenario might be treated as falling within one of the recognized exceptions in *Prest v Petrodel*. But that is not this case. SJA was a bona fide company which had been trading for many years.

64. Despite this, HMRC contends that it is possible to treat Stephen, Peter and Anne Fisher as "quasi-transferors" because as directors and/or shareholders they "procured" SJA to make the transfer. This is a gloss on the statute which is nowhere to be found in the language used by the legislature. It is derived from an aspect of the decision in *Congreve v IRC* which Walton J said in *IRC v Pratt* [1982] STC 756 was apparently not overruled by the House of Lords in *Vestey*. The expression "quasi-transferor" was coined in *Pratt* to describe a person who "procures" the transfer.

65. *Congreve* concerned an elaborate series of transactions which were specifically designed to avoid liability to income tax. At the time when it was decided, companies, as well as individuals, paid income tax. The assets initially transferred abroad were 93,000 shares owned by Mrs Congreve's father in a UK company, H, which had an issued share capital of £100,000.

He transferred 60,000 of those shares to a Delaware corporation in consideration of the issue of the entire share capital of the latter, which he then gave to his daughter. He also made a gift to her of 5,000 shares in H. Thereafter a Canadian company was incorporated which acquired the Delaware company's shares in H in exchange for most of the shares in the Canadian company and some debentures. The Delaware company (wholly owned and controlled by Mrs Congreve) then went into liquidation, leaving her with its controlling interest in the Canadian company. Mrs Congreve sold the Canadian company her 5,000 shares in H in return for more debentures. Her father then sold the Canadian company the balance of his shares in H. The upshot was that Mrs Congreve ended up as beneficial owner of practically all the issued share capital in the Canadian company, which now owned all the 93,000 shares in H that her father had originally owned. She had only personally made one transfer of 5,000 shares, but she ended up with the power to enjoy the whole of the income of the Canadian company, to which most of the 93,000 shares in H had been transferred by the Delaware company. A further series of transactions followed by which the shares in H were transferred to an English company, M, in which Mrs Congreve held all the share capital. M, having divested itself of the shares in H, and acquired other foreign investments, subsequently moved its residence offshore and there received income which Mrs Congreve had power to enjoy. It was that income that was made subject to the charge to tax.

66. Cohen LJ (delivering the judgment of the Court of Appeal) said that even if the preamble to the statute connoted activity by the individual concerned, "*we think this condition would be fulfilled if the execution of the transfer were procured by the individual concerned, even though it was not actually executed by him or his agent*". That would have been enough to found liability in *Congreve* because it had been found as a fact by the Special Commissioners that the execution and performance of the transfers and associated operations by all the companies concerned were procured by Mrs Congreve, acting through her father as agent.

67. When *Congreve* reached the House of Lords, the extension of the ambit of the section to someone who "procured the transfer" appears to have been conceded. At page 953A Lord Simonds referred to an argument by the taxpayer's counsel that the preamble should be interpreted to mean that the transfer should be "effected by him [the taxpayer] or by his procurement", commenting that:

> "it was reasonably apprehended that to read the section as excluding a case where an individual did not himself transfer assets but procured their transfer by another would be to ignore the substance of the legislature's intention".

He then rejected that interpretation of the preamble as too limited.

68. The finding that Mrs Congreve would have been liable in any event because she procured the transfers (or associated operations) by companies that she controlled was not the main basis on which that case was decided, though the Court of Appeal had indicated it would have been prepared to do so; the House of Lords did not consider the argument to be relevant in view of its finding that it was not necessary for the relevant transfer to have been made by the individual sought to be taxed under s.739. In *Vestey*, Lord Wilberforce at p.1174 identified the proposition that s.412 applies to cases where the person sought to be taxed was not him/herself a transferor as the "main ratio" of *Congreve*. Lord Edmund Davies quoted the passage in Lord Simonds' judgment at [1948] 1 All ER 952-953, ending with:

> "if there has been such a transfer as is mentioned in the introductory words, and if an individual has by means of such transfer (either alone or in conjunction with associated operations) acquired the rights referred to in the section, then the prescribed consequences follow"

and described this at p. 1192 as the "true *ratio decidendi*" of both courts in *Congreve*. So did Viscount Dilhorne at p.1182G. Lord Keith said at p.1197F:

> "the House also accepted an argument that in any event certain transfers had been organised or brought about by the taxpayer herself, but this ground, though capable of supporting the correctness of the actual decision on liability to tax, was plainly a subsidiary one."

69. The question of "procurement" did not arise on the facts in *Vestey*. The taxpayers' case in *Vestey* was that *Congreve* should be affirmed as correctly decided on the subsidiary ground (that Mrs Congreve had procured the transfer), or confined to its specific facts, see the summary of their counsel's argument at 1159F, and 1160F, and Viscount Dilhorne's formulation of their case at 1182B. In the event, *Congreve* was overruled on the question of statutory construction. Nothing was said in the speeches in *Vestey* to disapprove the subsidiary ground for the decision in *Congreve*, and indeed Lord Keith's observations (and those of Viscount Dilhorne at 1185C) indicate that, on the facts, the case may have been correctly decided on that basis. However, in *Vestey* it was assumed that the individual who stood to benefit was actively seeking to avoid his or her liability to income tax by means of the transfer. In *Congreve* that was undoubtedly the situation. It is understandable why it would be accepted that such a person could not circumvent the statute by making someone else carry out the transfer. Nothing said in *Congreve* or in *Vestey* would justify putting a gloss on the interpretation of the statute to bring within its ambit someone who is not seeking to avoid a liability to income tax and whose income tax position is unaffected by the transfer. Indeed, the decision in *Vestey* was premised on the basis that Parliament did not intend such individuals (in that case, the innocent beneficiaries) to be brought within the ambit of the charging provisions.

70. In the context of tax avoidance, it is well established that the Court has the power to look behind the form of a transaction or series of transactions and consider its substance. In *IRC v Pratt* [1982] STC 756 at p.793a, Walton J identified the real question as being whether, notwithstanding that the transfer was made by one person, "was the reality of the matter that somebody else was the real transferor"? We agree that this is the right question. That formulation fits the language of the statute and the approach to its construction adopted in *Vestey*. The statute requires that the individual has done something positive to transfer that asset. Walton J then went on to say that to answer that question, nobody had so far produced a better suggestion than that of "procurement" and that whilst it may not be completely apt, it was far nearer an apt definition than anything else that had so far been suggested. In our view, the concept of "procurement" is not particularly apt, it is not a word that appears in the statute, and if were to be adopted then it would be necessary to take great care to define its boundaries. As Walton J pointed out in a later passage in his judgment, at 796g, "procure" necessarily assumes an ability to procure the other person to carry out the transfer. He observed that in the context in which it was used in *Congreve* the meaning of "procure" was obvious enough:

> "Because she could, by the exercise of her voting strength in the company, get it to do whatever she wanted, Mrs Congreve was a quasi transferor".

71. The idea that someone who is instrumental in the transfer of assets being made by some other person falls within the ambit of the statute conflicts with the interpretation of the statute that was adopted in *Vestey*, which is that s.412 (and its successor) does not apply to circumstances in which the individual who stands to benefit from the transfer was not him/herself a Transferor (or spouse/civil partner). Indeed, as was recognised in *Vestey*, the fact that the legislation contains a specific provision extending the word "individual" to the spouse or civil partner of the individual taxpayer points away from a construction that the actual transferor can be a *different* individual (let alone a company).

72. As Walton J rightly pointed out in *Pratt* at p.796j, however widely one construes the wording of the statute, there is nothing in it which equates the substance of a person "being associated with" or "having a hand in" a transfer, (expressions used by Lord Wilberforce in *Vestey*) with that person himself making the transfer. The same objection can be taken with equal force to "organised", "brought about," "engineered", "caused" or even "procured" if any of those expressions is used to describe a situation in which the actual transferor is not in any sense acting for, induced by, or under the control of, the individual taxpayer in making the transfer of the assets. There must be some proper basis for ascribing the acts of the person transferring the assets to the individual concerned and treating him as being as responsible for the transfer as if he had carried it out himself. If the individual has no influence over what the actual transferor does with the assets, there is no good reason why he should be treated as being the "real" Transferor. It does not follow that in all cases in which the individual plays some part in the actual transferor's decision-making he should be treated as having made the transfer himself. The less influence the individual has, and the more people involved in the decision to transfer, the harder it becomes to do so.

73. We acknowledge the force of the argument that the purpose of the statute would be substantially undermined if it did not apply in circumstances in which an individual was the architect of an income tax avoidance scheme, but the mechanics or formalities of the transfer were implemented by someone else acting on his direction and for his benefit. Whilst in most situations in which that scenario would arise, the person executing the transfer will be acting as an agent or nominee for the individual concerned, one can conceive of other contexts in which that individual might be in a position to direct the transferor to make the transfer – for example where the individual is a beneficiary and the transferor a trustee. In those types of situation, even if not technically an agent, the actual transferor would simply be the instrument or means by which the transfer was brought about by the individual. The transfer that the taxpayer initiated can therefore be attributed to him without placing any strain on the language of the statute. If the word "procure" is understood in that sense, there can be no objection to it. If the focus is on the identity of the person who really transferred the assets, it is possible to conceive of situations in which a transfer made by a company might be treated as having been made by an individual who controls it, the company acting as a mere agent or instrument, so as to bring him or her within the purview of s.739 (as the Court of Appeal considered was the case in *Congreve*). However, that situation is a far cry from this case.

74. The judicial gloss on the word "transfer" cannot apply to every transfer made by a company in which the individual concerned has a shareholding or is a director. The effect of applying s.739 to a situation in which the actual transferor is a company, and the individual is just one of the company's directors or shareholders, would be to widen the ambit of the section to such an extent as to depart altogether from the language used in the statute and the purpose it serves. HMRC contends that "procure" means to cause or bring about. It is not premised on ownership of all the shares in, or even the existence of a controlling interest in, a company transferor. The logical consequence of that argument is that *in any case* in which the transfer is effected by a company that transfer will be ascribed to any of its individual directors or shareholders who has "power to enjoy" income derived from the transferred assets, however minor their interest in the company, if that individual was among those responsible for the decision to make the transfer (or, worse still, someone who failed to prevent it happening when they had the power to do so). That would mean that even though s.739 only applies to "an individual", and even though the decision in *Vestey* made it clear that the individual taking the benefit from the transfer and the Transferor must be one and the same (subject only to the extension to spouses and civil partners), it should be interpreted so as to treat any director of a company which transfers its assets out of the jurisdiction to a company in which he has or

acquires a shareholding as if he were the Transferor of those assets, provided that he voted in favour of the transfer, (or, on Mr Ewart's submission, provided that he did not vote against it).

75. We reject that analysis. It ignores (i) the separate legal persona of the company (ii) the fact that a company could only *ever* make such a transfer if its board of directors resolved that it should (iii) the fact that the directors are officers and agents of the company, not vice versa and (iv) the obligations of directors to act in a company's best interests and vote accordingly. It is no answer to these objections to say that in most such cases the individual concerned would be able to rely on the motive defence. He should not have to. In any event, as Walton J pointed out in *Pratt*, the application of the defence causes real difficulties in a case of multiple transferors (or quasi-transferors). The analysis is also capable of producing anomalous and invidious results, for example, a shareholder who owns 99% of the shares but who is not a director, plays no part in the decision to transfer, and exerts no influence over the directors, could be treated as a quasi-transferor if he failed to use his voting power or go to court to stop the directors from transferring the assets. Alternatively, if such a shareholder could not be treated as a quasi-transferor because he played no part in the directors' decision, a shareholder who owns 1% of the shares but happens to be a director of the company, could.

76. Before turning to Mr Ewart's submission that it is possible to ascribe a single transfer by a company to multiple quasi-transferors, it is helpful to look at the position where there is only one taxpayer to whom HMRC wishes to ascribe the transfer by a company. The starting point in the analysis must be that s.739, on its face, does not apply to transfers made by companies. Of course, there is no reason in principle why, in a case in which an individual is responsible for effecting the transfer, the transfer should not be attributed to that individual simply because he uses a company, rather than another individual, as the means of executing it. Yet that analysis cannot apply to all company transfers in which a shareholder or director of the company has the power to enjoy income from the transferred assets. If that had been Parliament's intention it could easily have said so; instead, it used language confining the ambit of the charging provisions to situations in which there is a transfer of those assets by the individual to be charged. The position of non-transferors is catered for separately.

77. A company can only function if decisions are made and acts are carried out on its behalf by its directors, who owe it specific duties. Transfers of company assets by companies are made in consequence of decisions taken by their board of directors (and, sometimes, resolutions of their shareholders). One therefore cannot treat every case in which a company sells all or some of its assets to a foreign buyer as a case in which each of its individual directors is to be treated as the "real" Transferor of those assets in its place simply because they decided that it should sell them, and/or were involved in implementing that decision, irrespective of the size of the company. Whilst it is true in one sense that the directors of a company "procure" the company to act in a particular way, that is not the sort of behaviour that the expression "procure" was being used to describe in *Congreve*. It does not mean that the transfer is in substance and reality a transfer made by its directors (let alone by its shareholders). In fact, in making the decision and implementing it, the directors are acting on behalf of the company, and their actions are to be attributed to the company, not vice versa.

78. If one looks at the position of each individual in turn, as on its face the statute appears to dictate, and as Walton J decided in *Pratt* was the proper approach, (see p.795g) a director who is not a shareholder cannot be treated as being, in substance, the "real" Transferor of the company's assets, and a director who is a shareholder but who does not have a controlling interest cannot be treated as the "real" Transferor instead of the company, merely because he or she participated in the decision of the Board to agree to the sale, voted in favour, or took steps on behalf of the company to implement it. Parliament did not use language which permits of an interpretation which would enable the transfer to be treated as having been made by an

individual (let alone a group of people) who takes the decision on behalf of the actual transferor or acts on behalf of the actual transferor in bringing it about. Putting that gloss on the word "transfer" (or indeed on the concept of "procurement") could lead to injustice. For example, a director with a minimal shareholding in the transferring company could end up being taxed on profits of the transferee company indefinitely, even if he had no intention to avoid tax, and even if his duties as company director obliged him to vote in favour of the transaction as being in the company's best interests.

79. As for an individual shareholder who does have a controlling interest, there may be circumstances, as there were in *Congreve*, in which that person can be said to have used their control over the company to bring about a transfer in their stead, so that the transfer can properly be ascribed to that individual rather than to the company which made it. Absent circumstances which would justify lifting the corporate veil, there would still need to be something said or done by the individual which was separate from and influenced what was done by the company itself, acting by its directors - for example, where the individual in control gives instructions to the directors to implement the transfer.

80. The next question is whether s.739 applies to a case where there is a single transfer of assets abroad by a company, but the company's decision was not dictated or induced by anything said or done to it. Instead, the decision was made and implemented by a board of directors which included two or more individuals who collectively held a majority shareholding in the company, but individually did not. The more shareholders there are, the more difficult it becomes to ascribe an action of the company to each of them individually. Mr Ewart submitted that if two or more people were directors and shareholders in a company, and acted collectively to "procure" it to make a transfer, as was held by the FTT to be the case here, they should each be treated as quasi-transferors of the whole of the assets transferred, irrespective of the size of their individual shareholdings and irrespective of whether they collectively owned the <u>entire</u> share capital. That was the proposition which Walton J rejected in *Pratt*.

81. In *Pratt* the taxpayers were three of the eight directors in a company in which they neither individually nor collectively had a controlling shareholding. The Revenue contended that they were "quasi transferors" because they had concurred in the proposal and decision of the company to sell a parcel of land to a Bahamian company on the understanding that the shareholders in the vendor company would gain an unspecified "additional advantage" if planning permission were subsequently granted. The taxpayers ultimately became beneficiaries under discretionary foreign trusts set up using the proceeds of sale of some of the land by the Bahamian company. The taxpayers were unable to control how the company acted, and because the commissioners had made a finding of fact that they did not procure the company to make the transfer, the court could not go behind that finding. However, Walton J also grappled with the problems that arise in seeking to apply the language of the statute to a case of multiple transferors (or quasi-transferors), which was recognised as a difficulty by Lord Wilberforce, but had not arisen for decision in *Vestey* (or indeed in *Congreve*).

82. Walton J held that s.412 of the ITA 1952 did not apply in the case of multiple shareholders in a company, because there is nothing in the legislation to ascribe a percentage of the transfer to each shareholder, and it cannot be construed as visiting upon each shareholder, irrespective of the size of his shareholding, an indefinite liability to pay income tax on the income derived from 100% of the assets transferred. His primary reason was that the statute cannot be interpreted in a way which enables a single transfer of assets by a company to be ascribed to each one of its individual shareholders who acts collectively with other shareholders to bring about the transfer by the company of all those assets.

83. He conceived that there might be circumstances in which it would be possible to identify different portions of or interests in an asset (such as land) transferred jointly by more than one individual and attribute a portion to each of the individual transferors. In such cases, he said it would not be difficult to ascribe to each transferor a transfer of their respective interest in what was transferred. However, even if the interests of the individuals could be separately identified, if their respective interests do not add up to 100% of what was transferred, then they cannot have transferred 100% (or be treated as having done so). He said:

> "in a case of plurality of transferors, if it is impossible to separate out their separate interests so as to be able to say, "the first transferor transferred A% of the interest transferred, the second B% and so on, the series adding up to 100%, I do not think s.412 bites at all"".

84. We agree. The statute expressly requires the transfer of the assets to be made by the individual to be charged. Parliament is concerned to prevent that individual using the transfer of those assets to avoid his or her liability to tax to which he or she might otherwise be charged in respect of income derived from all those assets. Therefore, the individual must be personally responsible for the transfer of all those assets. He cannot be treated as personally responsible for transferring them, when he is not. We are not addressing a case in which the company is an agent, trustee, nominee or device. In the normal course of business, an act of a company in transferring its own assets cannot be treated as being "in reality" the act of one of its shareholders just because he or she participated in a collective decision by the board of directors that the assets should be transferred.

85. Even if a group of individual shareholders collectively have a controlling interest in a company and collectively bring about the transfer by the company of its assets, there is a fundamental conceptual difficulty in treating them as if they had each individually transferred all the company's assets. That is an especial difficulty if their collective shareholding does not even add up to 100%. Those individuals could never have been taxed on the income produced by 100% of the assets, so how is it possible to treat them as having used the transfer as a means of avoiding liability to tax on those assets or any part of them? It is not possible to consider their actions *collectively* in order to answer the question whether they "procured" the transfer, in the *Congreve* sense, and then treat them as if they had each *individually* brought about the transfer of the assets for the purpose of charging them to tax – especially when they could not have brought about the transfer if they acted alone. The language of the statute does not admit of the interpretation that the company was merely the instrument by which each of those individuals simultaneously brought about the transfer of all the company's assets.

86. In the present case, none of the Fishers was able to, or did, tell SJA what to do. None of them individually had a controlling interest in SJA. Stephen and Peter were collectively responsible as directors for giving effect to the transfer, but together they held only 50% of the shares which is not a controlling interest. In any event, in making the transfer they were acting on behalf of SJA, not vice versa. It is only if one adds Anne's shareholding that one gets to a controlling interest of 88% - but even then, the three of them did not own 100% of the share capital of SJA, because Dianne held the remaining 12%. On HMRC's case, each of Anne, Stephen and Peter would be treated as having transferred 100% of the business of SJA, not a smaller percentage of it – even though Peter only had a 12% shareholding at the time of the decision, and Anne played no active part in the decision making but was happy to entrust the running of the company to her husband and son. That result cannot be achieved on any proper interpretation of the statute. None of the Fishers, individually or collectively, did anything which would justify treating each of them as being the "real" Transferor of SJA's assets or treating SJA as a mere instrument or mechanism by which they each personally (and simultaneously) brought about the transfer of 100% of the assets.

87. Moreover, in finding that Anne Fisher "procured" the transfer because she entrusted her responsibilities as director to Stephen and Peter, and they were "acting under her authority," when they made their decisions as directors, the FTT misinterpreted "procure". It does not mean passively allowing someone else to do something. It does not mean being content that someone else should take a decision, or agreeing to go along with whatever they decide. It means doing something positive to bring something about, and in the specific context in which it is used in *Congreve*, it means exerting a controlling influence on a company to make it effect the transfer. Anne Fisher did nothing to transfer the company's assets. She did nothing to influence what Peter or Stephen did. She did not use her voting power to bring anything about. Peter and Stephen were not acting in any sense as her agents. We consider that irrespective of whether it is possible to ascribe a transfer by a company to individual shareholders or directors it was not possible to treat Anne Fisher as having transferred assets in this case.

88. In *Pratt*, Walton J went on to point out that if the statute applied in the case of multiple transferors or quasi-transferors, the same problem would arise as was identified in *Vestey* in the case of multiple beneficiaries, namely, that each individual would be liable to tax on the whole of the income earned by the transferee. Mr Ewart contended that Walton J's analysis no longer applies, given the introduction in s.744(1) ICTA 1988 of the statutory power to apportion taxation so as to avoid recovery of more than 100%, which did not apply when *Vestey* and *Pratt* were decided. That section provides that:

> "No amount of income shall be taken into account more than once in charging tax under the provisions of sections 739 and 740, and where there is a choice as to the persons in relation to whom any amount of income can be so taken into account –
>
> (a) it shall be so taken into account in relation to such of them, and if more than one, in such proportions respectively, as appears to the Board to be just and reasonable…."

The section was supposedly introduced to deal with the problem identified in *Vestey* of the absence of a power to apportion the charge between multiple discretionary beneficiaries; but it could equally apply to a situation in which the Transferor is not the only person who has a right to enjoy the income from the transferred assets (another person, for example being potentially chargeable under s.740). It does not assume there to be more than one Transferor of the same assets.

89. Mr Ewart's argument found favour with the FTT but, with respect, the tail cannot be allowed to wag the dog in this way. The introduction of a power to remedy a potential unfairness which would otherwise arise in consequence of the operation of the charging provisions of the statute, whereby tax would otherwise be payable on <u>all</u> the income of a non-resident transferee by each UK taxpayer among a group of people who has the power to enjoy some of that income (thus in principle allowing for multiple recovery of tax on the same income) cannot affect the <u>construction</u> of those primary charging provisions. The introduction of s.744(1) could not justify, for example, re-adopting the wider interpretation of the charging provisions that was accepted in *Congreve* and overruled in *Vestey*, simply because results described by Lord Wilberforce as "arbitrary, potentially unjust, and fundamentally unconstitutional" in the case of multiple beneficiaries under a trust, can now be ameliorated. The results of adopting HMRC's approach to construction in a case such as this remain arbitrary, potentially unjust, and fundamentally unconstitutional, not to mention inconsistent with the express legislative purpose.

90. S.744(1) says nothing about how the Transferor is to be identified. It addresses the potential consequences of the operation of s.739 and 740 if they apply to ascribe 100% of the

income to more than one individual, not how s.739 operates in the first place. It envisages that a situation might arise in which there would otherwise be double recovery, but it does not mandate it. S.744(1) affords no answer to Walton J's primary argument that there is nothing in the legislation to ascribe a percentage of a transfer of assets to each shareholder in a company, and without such a mechanism there is a fundamental conceptual difficulty in ascribing a transfer of all the assets to individuals whose collective interest in those assets falls short of 100%. The FTT's approach to the construction of s.739 extending to multiple "quasi transferors" results in the remarkable conclusion that each UK resident shareholder in SJA who also happened to be a director and who did not oppose the sale of the business would be potentially taxable on the whole of the income of SJG, but Parliament must have intended that result because double taxation could be avoided by some "just and reasonable" apportionment of the whole of that income amongst the individuals concerned. The difficulty with this proposition is highlighted by the present case. According to Mr Ewart's argument, s.739 provides that all SJG's profit is to be deemed to be the income of each of Stephen, Anne and Peter Fisher, but because there is "a choice as to the persons in relation to whom" that income is to be "taken into account", s.744 then allows for it to be apportioned amongst them; but HMRC have only sought to apportion 76% of SJG's income (clearly accepting that it would not be "just and reasonable" to apportion all of it, as the statute contemplates).

91. The FTT appear to have seen the force of the argument that s.744(1) does not help in identifying the real Transferor. However, they said, at [189], that the identification of a quasi-transferor depends on the facts and that it is not necessary to identify what that person's interest is in order to ascertain whether the transfer is to be imputed to them as the "real" Transferor. That misses the point, which is that one cannot legitimately impute a single transfer of 100% of assets by a company to each of multiple shareholders in that company merely by reason of the fact that those individuals collectively owned more than 75% of the shares and all of them happened to be directors. That objection would arise even if they had all taken an active part in the decision to transfer (which they did not). We have already addressed the position of Anne Fisher. Although Stephen and Peter as directors were instrumental in the transfer, they did not use a controlling interest in SJA to make SJA carry it out. They were just behaving as normal directors. There is nothing on the facts of this case which would justify treating the actions of the company in selling its business to SJG as effectively being the actions of any of the three taxpayers concerned, let alone to attribute the sale to each of them personally.

92. In any event, s.744(1) does not assuage the concerns expressed by Walton J in *Pratt* as to how the motive defence could operate in the case of multiple transferors. As he said, at 795e, where there is a single transfer, it was either made with the purpose or not with the purpose of avoiding liability to taxation. If there were two joint transferors and A had the purpose of avoiding tax, and B had a commercial purpose, then how could the purpose of the transfer be ascertained? Walton J rightly pointed out that B could not claim the benefit of the defence on the basis of his own innocent subjective intention because it is the purpose of the transfer, not of the transferor, that matters.

93. Mr Ewart submitted that just as a single transferor may have more than one purpose in effecting a transfer of assets, so too may multiple transferors. Even in a case where there is a single transferor it may be necessary to balance the different purposes and decide which is the main one. But that envisages that (as in the present case) someone who has been found to have had no motive, like Anne Fisher, or someone whose motive has nothing to do with tax avoidance, may still be deprived of the benefit of the motive defence because on an overall assessment of the motives of the transferors collectively, it is decided that the "main" purpose of the transfer was tax avoidance. That is indeed what the FTT decided in this case. In truth, as the decision made by the FTT illustrates, trying to apply the motive defence to a case in

which a single transfer is ascribed to multiple individuals as "quasi-transferors" could result in a blameless individual being denied the benefit of the defence because someone else had a tax avoidance motive in mind. That is a powerful reason for refusing to interpret the statute as extending to the situation in the present case.

94. The FTT accepted an argument by HMRC that the observations made by Walton J in *Pratt* about the difficulties of application of the motive defence were, strictly speaking, obiter, as they must have been aimed at the situation in which it was possible to identify the interests transferred. That is a misinterpretation of the judgment in *Pratt*. Walton J described s.412(3) as "[throwing] another spanner in the works, so far as the Crown's contention is concerned, when dealing with the case of a single transfer with multiple transferors". His remarks come in the context of dealing with that scenario, where the transfer of 100% of the assets is to be ascribed to each of two or more individuals even though their individual interests cannot be separated, and their collective interests fall short of 100%. Indeed, in a case in which it would be possible to separate out the individual interests, he envisaged that the charging section would be applied separately to each of the individual transfers or to each identifiable portion, see p.793j, and consequently only the motive(s) of the transferor (or quasi transferor) of the identifiable portion would be relevant to the motive defence for that person. His observations were part of the ratio in *Pratt*. Even if they had not been, there is no answer to the point he made.

95. We have concluded that the language of s.739 does not admit of the interpretation which found favour with the FTT. What happened in this case had no connection with the mischief against which the provisions of the TOAA code was aimed. If the assets had been transferred within the UK, or stayed where they were, the income tax position of the shareholders and directors of SJA would have been the same. There was no connection between the transfer of those assets abroad, and their liability to income tax. As the FTT found, avoidance of income (or corporation) tax was not the purpose, or even a purpose, of this transaction. That is enough to distinguish this case from the context in which the Court of Appeal in *Congreve* and the House of Lords in *Vestey* were willing to conceive that it would be possible to treat an individual as a "quasi-transferor". The transfer in this case was made by SJA and not by any of its individual shareholders or directors; 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 the assets. The FTT fell into error in treating acts by SJA's directors as acts "procuring" SJA to do something when in fact they were acts carried out for and on behalf of the company. It is not possible to impute the transfer to any of the taxpayers in this case as "quasi-transferors".

96. That is enough to dispose of this appeal and cross-appeal in favour of the taxpayers; but we shall go on to consider the remaining issues on the assumption that s.739 does apply.

(3) Did all the income of SJG derive from the transfer by SJA?

97. S.739(2) treats "any income" of the non-resident transferee as if it were the income of the Transferor if it is income which he or she has power to enjoy "by virtue of or in consequence of any such transfer, either alone or in conjunction with associated operations." In principle, therefore, there must be a connection between the transfer or associated operations and the income which the taxpayer has the power to enjoy. Mr Baker contended that the statute could not apply to income derived from wholly new commercial businesses developed by SJG after the transfer, or if it did apply, it could not apply to any income generated in consequence of factors independent of the transfer.

98. The FTT were not asked to determine quantum. They decided that in principle, income from new businesses developed by SJG would be chargeable under s.739 to the extent that it

derived from the transferred telebetting business or from "associated operations" as defined in s.742(1) of ICTA 1988:

> For the purposes of sections 739 to 741 "an associated operation" means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing whether directly or indirectly the accumulation of income arising from any such assets."

99. The FTT applied the correct legal test at [238] and found, on the facts, that the new business ventures were "associated operations" as they only got off the ground because income generated from the transferred telebetting business was used to finance them. In the case of the poker business, funds were used both from the telebetting business and profits from the internet/casino business which was itself an "associated operation" financed from the profits of the telebetting business. SJG did not borrow money from another source to set up these new ventures. The FTT said that the position was no different than if the decision had been taken to apply the profits from the telebetting business to investing in shares in an internet betting company or poker gambling company. We can see no error in that analysis.

100. Nor do we accept that the FTT failed to take into account the fact that income arising from a new aspect of the business owes much to the expertise, business acumen and development input of those running SJG. They said, at [246], that the level of profits generated might be attributable all kinds of factors, including the work or skill of individuals such as directors or employees, but that does not make a difference to the income to be taken into account for charging purposes. We agree.

101. Mr Baker contended that the FTT wrongly failed to take into account the definition of "assets" and "transfer" in s.742(9)(b) and (c) of ICTA 1988 and the decision in *IRC v Brackett* [1986] STC 521 that a contract of employment is an asset and entering into a contract of employment was a transfer of assets. He argued that the transfers of the contracts of employment of various individuals previously working for SJA were all separate transfers of assets from the transfer of the underlying business, and that these transfers were not associated operations. Income attributable to those transfers should therefore be left out of account.

102. We do not regard this argument as taking matters any further. As the FTT pointed out, all businesses derive their income from the efforts and business acumen of those who run them but that does not mean the income generated by the business must be attributed to their work (or to the transfer of their contracts of employment to SJG) rather than to the capital used to get the new business ventures off the ground. If the income generated by SJG's telebetting business had been invested in income-yielding stocks and shares, the amount of income produced from the investments could be attributed to some extent to the skill and acumen of the relevant fund managers, but that would not sever the link between the income and the original sum invested. Mr Baker pointed out that the business of an ongoing trading company differs from an investment business, and the development of new lines of business can eventually transform the business into something completely new which bears no resemblance to the one that was initially transferred. Whilst that is so, ultimately the question whether there is a sufficient nexus between the transfer (or associated operations) and the income to bring it within the charging provisions is a matter of fact and degree and the FTT were in the best position to evaluate whether the income from the new businesses was too remote.

103. Accordingly, if it were relevant we would have found in favour of HMRC on this issue.

Issue 2 – Is the motive defence available?

104. Because of the view we have taken on Issue 1 (see [96] above), the motive defence becomes irrelevant. However, in case we are wrong in that view, we now consider the applicability of the motive defence in the present case.

Summary of the FTT's reasoning

105. To come within the motive defence under s.741, a taxpayer must show one of two things:

(1) that 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

(2) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation.

106. In the present case, given the unchallenged finding of the FTT that the "bona fide commercial transactions" requirement is satisfied, the Appellants before us only relied on the second limb of the defence. Much of the FTT's analysis was however applied to elements of both limbs, so it is necessary to consider that analysis in full.

107. The FTT considered the motive defence in [248] to [546] of the Decision. After an initial outline of some of the arguments which had been put forward by the parties, at [256] to [286] it considered a number of legal issues on the defence, culminating in a number of propositions which it set out in a summary of its approach to the motive defence at [287]:

> From the above, we summarise the following propositions in relation to the motive defence:
>
> (1) The test is subjective. (*Carvill*)
>
> (2) Evidence of a person's reactions to what is said to them and circumstances as well as what they say their purpose is may be relevant. (*Philippi*)
>
> (3) It is not enough to show a tax avoidance effect.
>
> (4) Knowledge that less tax is paid does not equate to a tax avoidance purpose (but knowledge is a pre-requisite to having a purpose).
>
> (5) Awareness of tax aspects does not equate to having a tax avoidance motive. (*Willoughby*)
>
> (6) The mere fact of taking tax advice does not mean there is a tax avoidance motive. (*Beneficiary v IRC*)
>
> (7) Picking a lower tax route over a higher tax route does not equate to tax avoidance (but equally does not preclude tax avoidance). (*Brebner/Willoughby*).

The parties did not dispute this list of propositions, indeed HMRC said the FTT had "correctly summarised" them.

108. The FTT went on to say (at [288]) that it was only if the taxpayer had a "narrow" subjective purpose "specifically to avoid tax" that the motive defence would not be available; a wider "tax-related purpose" would not exclude the defence. Accordingly it went on at [289] to explain its view that a tax mitigation (as opposed to a tax avoidance) purpose would not exclude the defence.

109. It then considered the potential complications arising out of the fact that there were multiple quasi-transferors, observing that the statutory enquiry was into "the purpose for which the transfer was effected", not the purpose of any one individual transferor. It concluded (at [296]) that:

> It is easier to determine that purpose where there is one individual who has transferred but if two individuals have transferred jointly there is no less of a transfer which has been effected. The task remains to determine what the purpose or purposes of the transfer was. It is not that it is impossible, just that it is not as easy as if there was only one person doing the transfer and one person's subjective motive to consider.

110. In the light of this, the FTT went on to examine the purposes of each of the three taxpayers before "reaching a view on what this tells us about the purpose for which the transfer was made".

111. Before doing so, however, it considered the limits of the concept of avoidance of tax. In particular, it was guided by the approach taken by Lord Nolan in *Willoughby*, when he said:

> The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability"

112. Essentially, the FTT considered two main arguments around this issue. First, considering the restrictions imposed in relation to offshore bookmakers taking duty-free bets from UK customers, the FTT said this (at [315] to [316]):

> [315] If we pose the question what were the economic consequences that Parliament intended to be suffered by a taxpayer qualifying for having its betting duty reduced or eliminated the answer would be that the economic consequences which were to be suffered would be to forego attracting customers in Great Britain through solicitation and advertising. In relation to taking bets from customers in Great Britain no economic consequences were indicated by the regime because it was, we think, envisaged that the criminal offence would dissuade the situation arising where an overseas bookmaker was accessing customers in Great Britain in the first place…
>
> [316] The situation whereby British punters could be enticed to bet with an overseas bookmaker, while legal in the absence of advertising in Great Britain or some kind of foothold there of the overseas bookmaker (e.g. through the sharing of resources with a British bookmaker) was not one which was in line with the general scheme of the legislation. On the contrary, taking bets abroad from punters in Great Britain so that betting duty was not liable *[sic]* would, we think, amount to avoidance of betting duty.

113. In other words, as the business was continuing to be reliant on customers resident in Great Britain for much of its income, it was not incurring the "economic consequences that Parliament intended to be suffered" by overseas (duty-free) bookmakers (i.e. exclusion from the British betting market) and the transfer of the business therefore amounted to tax avoidance (the tax in question being the betting duty that would have been charged on the bets if made with a bookmaker in Great Britain).

114. The FTT then went on at [320] to reject the Appellants' argument that there was no avoidance because the business would have folded if it had not been moved to Gibraltar, with the result that no betting duty would have been payable in any event. This was on the basis that "although the telebetting business was dwindling it still continued. As a result there were some UK customers who would have bet in the UK, but were enabled by the setting up of SJG to not bet in the UK. Betting duty that would otherwise have been payable in respect of those bets was not paid."

115. Second, the Appellants had argued that the economic burden of the betting duty, if payable, fell not on the business but on the punters; the business was merely the collection agent. Therefore, any avoidance that might be occurring was avoidance of a contractual

surcharge imposed on the punters rather than avoidance of the duty itself. The FTT decided (at [332]) that even if this was correct, it did not matter as there was "nothing to suggest from the way s.739 and s.741 are drafted that avoidance of liability to taxation should exclude situations where someone is liable but has passed the economic burden on to another."

116. The FTT then went on to examine (at [340] to [397] and [433] to [450]) the factual background it considered to be relevant in reaching a decision as to whether Stephen and Peter Fisher respectively had a tax avoidance purpose relating to betting duty in procuring the transfer of the business. The FTT discussed Stephen Fisher's subjective purpose (at [398] to [431]), deciding (at [432]) that "in making the transfer Stephen Fisher had a purpose of avoiding betting duty". In reaching that conclusion, the FTT set out its essential reasoning at [409] to [411]):

> [409] Here then is the nub of the issue. Stephen Fisher says his purpose was to save the business and not to save tax.
>
> [410] We do not agree. We do not see how it is possible on the facts to say on the one hand that the purpose was to save the business but not to save betting duty.
>
> [411] To say that he only had the purpose of saving the business and not of saving betting duty would, we think, require his mind to be consumed with wanting to save the business yet at the same time to be oblivious to the betting duty related threat to business survival and the betting duty related means by which the business was to be saved. That level of mental compartmentalisation simply does not tally with the facts of what Stephen Fisher did know, including his knowledge as shown by the answer he gave in cross-examination and with how he behaved.[4]

117. When specifically addressing the clash between "saving tax" and "saving the business" as the "ultimate purpose", the FTT said this (at [416]):

> [416] Saving the business may have been the ultimate purpose, but in our view it does not follow that the means which further that ultimate purpose are precluded from being purposes in their own right. It is unlikely that a person wants to reduce taxes or avoid taxes as an end in itself. An intention to reduce, or avoid taxes could virtually always be reformulated as an intention to maximise profits, to reduce losses, or indeed to stop a business going under. If it were right that the issue was whether someone's ultimate or underlying purposes was avoidance of tax it would be a very narrow scope of transfer which would be captured because it is unlikely to be the case that all someone was interested in was not paying the tax for the sake of not paying the tax rather than the beneficial consequences of that (or beyond that the purposes they might have in mind for using the financial benefit).
>
> [417] Equally where someone has been found to have a purpose which is non-tax related (such as the one in *Carvill* of looking for a neutral territory to attract business from reinsurance brokers) that too could no doubt be restated as having an ultimate purpose of increasing profitability. Stating that a business person has made a transfer because they want to increase profit, minimise losses, or save their business is stating what self-evidently any business person

[4] It had been put to him that he had to structure his business in such a way that the customer did not have to pay tax. In response, he said: "I had to structure the business in way that the customer would place his bets with me. I could not structure the bet – I could not stand the tax in the UK. I have got two options: close the business or find somewhere else to carry on. Legally carry on. What am I going to do? I am going to look for the opportunity… I had to look somewhere where we could legally trade, where customers were going to bet with us because the duty was lower than the UK."

> would want to do. This is a further reason why it cannot have been intended that the inquiry is as to a person's ultimate purpose because it would not serve to distinguish between cases where that result arises for reasons of tax and those where it does not (such as in *Carvill*).
>
> [418] It cannot be the case that just because tax avoidance will likely have an ultimate object of financial benefit that the tax avoidance by which that objective is achieved is then ignored.

118. In effect, the FTT was saying that however clear a "non-tax avoidance" underlying purpose to a transaction or series of transactions, if avoidance of tax formed any part of the arrangements then that tax avoidance must be regarded as being at least one of the purposes of the transaction(s). Hence its decision at [432] referred to at [116] above which, it must be appreciated, refers only to the first limb of the motive defence.

119. At [433] to [450] the FTT set out some further findings of fact in relation to Peter Fisher's position, followed by a discussion at [451] to [460] which concluded, at [461] that "avoidance of betting duty was one of the purposes [of Peter Fisher] in making the transfer". This was based on essentially the same reasoning as for Stephen Fisher (summarised above), and again was referring only to the first limb of the motive defence.

120. At [462] to [506], the FTT considered whether avoidance of corporation tax or income tax was a purpose of either Stephen or Peter Fisher, concluding that it was not. This conclusion is accepted by HMRC and we consider it no further.

121. At [507] to [515], the FTT considered whether Ann Fisher should be regarded as having any purpose in relation to the transfer, concluding that as a matter of fact she had no such purpose and that none should be imputed to her on the basis set out in *Burns*.

122. However, based on the fact that Stephen Fisher's and Peter Fisher's "motives point in the same direction", the FTT found (at [517]) that the avoidance of betting duty was one of the purposes for which the transfer was made and the incorporation of SGJ was performed. Accordingly, the first limb of the motive defence could not apply.

123. The FTT then went on to consider the second limb of the motive defence. It was satisfied that the transfer and associated operations were "bona fide commercial transactions" (a conclusion which HMRC have not appealed), but it said this about whether they were "designed for the purpose of avoiding liability to taxation":

> [533] We have specifically considered whether it is the case that although betting duty avoidance was one purpose of the transfer (as we have found above) it was not the main purpose. Our conclusion however is that it was the main purpose.
>
> [534] There was simply no other reason (that was not a consequence of the betting duty avoidance purpose) for the transfer. It is inconceivable the transfer would have gone ahead were it not for the betting duty being lower in Gibraltar.
>
> [535] The purpose the appellants rely on as the main reason for the transfer was survival of the business. But this is in the context of betting duty avoidance being the means for survival. We doubt whether in examining whether an avoidance purpose was the main purpose one can go as far as relying on the consequence of a tax avoidance reason. It cannot be the intention of the legislation that someone who looks beyond the tax avoidance to the consequences of that can be allowed to supplant those consequences as their main purpose. If it were, such consequences would virtually always operate to stop a tax avoidance purpose being the main purpose. Except in the

theoretical case where the goal for which the transfer was designed was to avoid tax for the sake of it without any concern for the benefits that would bring, this part of the motive defence would for practical purposes always be available.

124. Accordingly the FTT found that the second limb of the motive defence could not apply, whilst acknowledging (at [543]) that if it was wrong in its conclusion that the transfer was designed with the main purpose of betting duty avoidance in mind, then the second limb of the motive defence would have succeeded.

Arguments for the Appellants

125. Mr Baker attacked the FTT's conclusions in respect of the motive defence along six broad lines:

(1) First, there was an irreconcilable conflict between the fact that the motive defence requires an identification of the purpose or purposes of the transfer and the fact that no subjective intention could be ascribed to the actual transferor (SJA) and each of the purported quasi-transferors could have had entirely different purposes (and, in the present case, one of the quasi-transferors had no purpose at all).

(2) Second, he questioned whether betting duty is "taxation" for the purposes of the motive test in s.741. Citing the apparently broad view of "taxation" in *Sassoon*, he pointed out that the judgement of Scott LJ specifically limited it to an (admittedly wide) range of taxes and duties which might have been "within the Revenue's mind"; but betting duty (being a duty of excise which, at the relevant time, was under the care of the Commissioners for Customs & Excise and not the Commissioners of Inland Revenue) fell outside that range. In addition, whilst accepting that *Sassoon* was binding on the FTT and us, Mr Baker reserved the right to argue before a higher court that it was wrong.

(3) Third, he took issue with the FTT's identification of the transactions as giving rise to avoidance at all (within the meaning of that word as explored in the authorities). The clearest statement of that approach with which he took issue was that set out at [316], referred to at [112] above, which ended with the statement that "taking bets abroad from punters in Great Britain so that betting duty was not liable would, we think, amount to avoidance of betting duty." Essentially, he was arguing that by arranging matters so that bets were taken by SJG under the handicap of the various restrictions laid down by Parliament, the most that could be said was that liability to betting duty had been legitimately mitigated rather than avoided.

(4) Fourth, he took issue with the FTT's conclusion that any avoidance of tax was a main purpose behind the arrangements. This was firstly because the economic burden of the betting duty fell on the punter and not SJA, therefore it could not properly be said that SJA was avoiding the duty. To the extent it might be relevant, it was not enabling the punters to avoid the duty either, since they would in any event place their bets with overseas bookmakers (who would not be charging the duty). In short, the punters were going to bet duty-free with an overseas bookmaker in any event and Peter and Stephen Fisher chose to transfer SJA's business in order to retain the custom of those punters in a way which observed the statutory restrictions on overseas bookmakers. Their purpose in doing so was to save the business (the FTT had accepted (at [416]) that the "ultimate purpose" had been to save the business) and all that had been done was to carry out an admittedly genuine commercial transaction in way which minimised the resultant betting duty liability (which could not properly be characterised as avoidance, according to the *dicta* of Lord Upjohn in *Brebner)*. A distinction needed to be drawn between the real "purpose" of the transactions (the saving of the business) and the means by which that

purpose was achieved (the restructuring so that bets could be taken without incurring betting duty).

(5) Fifth, he pointed out that in the absence of any motive at all on the part of Anne Fisher, HMRC's argument would effectively deprive her of any motive defence, which could not be right.

(6) Finally, he submitted that the transfer and associated operations were not "designed for the purpose of avoiding liability to taxation" because that phrase connoted some requirement for part of the structure to be put in place in order to avoid a tax charge that would otherwise arise; that was not the case here, as no taxation could arise on bets taken by overseas bookmakers in any event. Furthermore, the FTT had been wrong to find (at [535]) that the Fishers' avowed main purpose (of saving the business) was effectively "trumped" by the avoidance of betting duty (as the means by which that purpose was achieved), so disqualifying them from any reliance on the second limb of the motive defence.

Arguments for HMRC

126. Mr Ewart responded to these six arguments, in broad terms, as follows:

(1) So far as multiple quasi-transferors were concerned, since there was a single transfer (whether with or without associated operations) involved, if a number of different people had acted together to procure it (or them) then there must be a common purpose to be discerned, at least as to whether avoiding tax was a purpose of it (or them). It was a matter of weighing up the collective views of the individuals procuring the transfer and any associated operations – a process which the FTT had done here.

(2) He argued that avoidance of betting duty was clearly avoidance of taxation.

(3) He argued that the FTT had been right to find that there had been avoidance, and for the right reasons. As the Vice-Chancellor had said in *Victor Chandler* at [7], Parliament's "main purpose" of the restrictions in s 9 BGDA was "to protect the revenue". Anything done to defeat that purpose was in his submission avoidance rather than mitigation.

(4) As to whether any avoidance was a "main purpose" of the transactions, he argued that the FTT's analysis was correct. Every tax avoidance scheme had as its ultimate purpose the saving of money, and this was conceptually no different. If Mr Baker's argument were taken to its natural conclusion, it could be used to provide a motive defence for the most egregious of tax avoidance schemes.

(5) As to the position of Anne Fisher, he argued that the FTT had been correct to decide that as she had no motive, that was simply one less potential motive to weigh up in the overall assessment of the purposes of the transfer and associated operations.

(6) Finally, as to the application of the second limb of the motive defence ("not designed for the purpose of avoiding liability to taxation"), applying the interpretation set out in *Carvill* that the purpose to be considered here was the "main purpose", this essentially took us back to the earlier discussion about the difference between "means" and "purpose" touched on above; the FTT had found the avoidance of tax to be the "main purpose" of the design of the arrangements, and he supported the FTT's reasoning on that issue set out at [123] above.

Discussion

Method of application of motive defence in case of multiple quasi-transferors, including the position of Anne Fisher

127. First, it is worth pointing out that the practical application of the motive defence in cases such as the present is explored under "Issue 1(2)" above; the difficulties which it would give rise to form part of the reasons why we consider s.739 cannot be intended to apply to multiple quasi-transferors at all.

128. But if we must attempt to apply the motive defence in such a situation, then Walton J in *Pratt* made it clear (at 795 f-g) that the purpose to be examined is "not 'the transferor's purpose in effecting the transfer' but 'the purpose for which the transfer was effected'". The FTT interpreted this as requiring an enquiry into "what each of the Appellants knew, thought and intended at the relevant time" (see [334]) and "taking into account the subjective intentions of each of the quasi-transferors" (see [514]). Having carried out that enquiry, the FTT concluded that in making the transfer, Stephen Fisher had "a purpose of avoiding betting duty" (see [432]) and that for Peter Fisher, "the avoidance of betting duty was one of the purposes" (see [461]). Anne Fisher "did not have a motive" (see [515]), which meant that "there is one less individual to consider". On that basis, the FTT said that "Stephen Fisher's and Peter Fisher's motives point in the same direction. Anne Fisher did not have a motive." As a result, it found at [517] that "avoidance of betting duty was one of the purposes for which the transfer was made and for which the associated operation of incorporating SJG was performed."

129. As an attempt to make sense of provisions which are in our view not intended to be relevant in situations such as the present, we do not fault the FTT's general approach nor, therefore, its conclusion. It follows that we agree Anne Fisher's lack of any purpose would not deprive her of a motive defence – if one is available, it would be equally available to all three quasi-transferors by reference to the overall purpose for which the transfer (and any associated operations) were found to have been effected.

Was there avoidance of betting duty?

130. The concept of avoidance is a slippery one. Even in the context of the "Disclosure of Tax Avoidance Schemes" legislation, no attempt has been made to define it (the legislation focusing instead on the more generalised concept of an "advantage" in relation to tax and the so-called "hallmarks" of an offending arrangement).

131. The most helpful statement of principle in the judicial exploration of the concept of "avoidance" is that contained in *Willoughby*, where Lord Nolan summarised and then endorsed the Crown's submissions in the following way:

> "Tax avoidance was to be distinguished from tax mitigation. The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. Where the taxpayer's chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation), it follows that tax avoidance must be at least one of the taxpayer's purposes in adopting that course, whether or not the taxpayer has formed the subjective motive of avoiding tax.
>
> My Lords, I am content for my part to adopt these propositions as a generally helpful approach to the elusive concept of "tax avoidance," the more so since they owe much to the speeches of Lord Templeman and Lord Goff of

> Chieveley in *Ensign Tankers (Leasing) Ltd v Stokes* [1992] 1 A.C. 655, 675C-676F, 681B-E. One of the traditional functions of the tax system is to promote socially desirable objectives by providing a favourable tax regime for those who pursue them. Individuals who make provision for their retirement or for greater financial security are a familiar example of those who have received such fiscal encouragement in various forms over the years. This, no doubt, is why the holders of qualifying policies, even those issued by non-resident companies, were granted exemption from tax on the benefits received. In a broad colloquial sense tax avoidance might be said to have been one of the main purposes of those who took out such policies, because plainly freedom from tax was one of the main attractions. But it would be absurd in the context of section 741 to describe as tax avoidance the acceptance of an offer of freedom from tax which Parliament has deliberately made. Tax avoidance within the meaning of section 741 is a course of action designed to conflict with or defeat the evident intention of Parliament."

132. In order to decide whether those transactions amounted to "a course of action designed to conflict with or defeat the evident intention of Parliament", it is necessary first to ascertain what was the intention of Parliament in imposing betting duty and the associated "Prohibitions for the Protection of the Revenue" in s.9 BGDA.

133. First, and most obviously, it is clear that Parliament's intention in imposing betting duty was to ensure that the duty was incurred only on bets taken by a bookmaker in Great Britain and not on bets taken by an overseas bookmaker.

134. Second, as was stated by Sir Richard Scott V.-C and Chadwick LJ in *Victor Chandler* at 1298H and 1306H, the "main" or "obvious" purpose of the s.9 prohibitions was to "protect the revenue derived from betting within the United Kingdom". It clearly was not Parliament's intention to prevent overseas bookmakers from taking duty-free bets from punters in Great Britain – the only way of achieving that would have been to make it illegal for a punter in Great Britain to place a bet with an overseas bookmaker, and Parliament did not attempt to do so. Therefore it must be assumed that Parliament's intention was to ensure that the competitive position of bookmakers in Great Britain should be preserved as far as possible by means of the s.9 prohibitions, so as to minimise the loss of revenue, whilst allowing punters in Great Britain to bet duty-free with overseas bookmakers who observed the prohibitions. Thus in general terms an overseas bookmaker with no connections in Great Britain which took bets from punters there whilst complying with the s.9 prohibitions could not be said to be "avoiding" (or even mitigating) betting duty in Great Britain, its activities would simply fall outside the scope of that duty.

135. If SJG had been established as an entirely independent business without taking over any of the assets of SJA (including its customer lists and telephone lines) then this analysis would in our view clearly have applied to it. The more difficult question is whether, in the circumstances of the present case, the analysis is materially different. In a situation where existing customers in Great Britain have been dealing with a bookmaker in Great Britain but arrangements are then made for those existing customers instead to be serviced by a bookmaker outside Great Britain, we consider that it is. If the course of dealing with such customers had carried on unchanged, betting duty would have been due on their bets; it is difficult and, in our view wrong, to characterise as anything other than "avoidance" arrangements such as those at issue in these appeals which are made in order to ensure that future dealings with those customers will be free of duty. Clearly this analysis applies only in respect of the pre-existing customers, but if a set of transactions have such an effect then it is correct to apply the label of "avoidance" to them.

Is betting duty "taxation"?

136. In the light of the comments of the Court of Appeal in *Sassoon*, we have no hesitation in confirming that it is. Whilst specifically addressing the particular submission that "taxation" was limited to income tax and surtax, Scott LJ commented that in context (similar to that of the present case) a "liberal interpretation in favour of the Crown" was required for the word "taxation". We see no reason why that liberal interpretation should not extend to betting duty. The fact that betting duty would at the time have been under the care and management of the Commissioners for Customs and Excise and not the Commissioners for Inland Revenue does not affect this view.

Were the relevant transactions designed for the purpose of avoidance?

137. The live issue before us 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).

138. The bulk of the analysis of the FTT was addressed to the first limb of the motive defence – the question of whether avoidance was "the purpose or one of the purposes" for which the transfer and any relevant associated operations were effected. It had no difficulty reaching the conclusion that saving betting duty was "one of the purposes" of effecting them (see [432], [461] and [517]). It is instructive to note that in doing so, it considered the sale of the business from SJA to SJG to be the relevant "transfer" (which must be right) and the only relevant associated operation to be that of incorporating SJG (and specifically not the subsequent associated operations of changing the share rights in SJG ([516] and [518]-[520])). Also, although it had previously (at [240] to [247]) found the subsequent establishment of the internet, casino and poker businesses to be "associated operations" in the context of considering whether the income from those businesses should fall within the scope of s.739(2), it does not appear to have considered that the avoidance of betting duty was a purpose of those associated operations, a view which we agree with and which could be highly relevant to the quantum of any liability (to the extent it arises in respect of those businesses) if our view on the various other issues is wrong.

139. Having conducted the bulk of its analysis by reference to the first limb of the motive defence, the FTT then went on to consider (from [533]) its second limb and the question of whether the avoidance of betting duty was "the main purpose[5]" of the transfer (in this context, they made no reference to any associated operations, as they had in relation to the first limb of the defence). It recorded that the parties had not argued before the FTT there was any distinction between "the purpose of the transfer" being avoidance and "the transfer being designed for the purpose" of avoidance (the latter being the statutory wording). Before us, Mr Baker cast doubt on that approach, urging that there was a particular significance in the use of the word "designed" (see below).

140. Ultimately, the FTT found that avoidance was the main purpose of the transfer, giving its reasons at [534] to [535] (set out at [123] above).

141. In effect, therefore, the FTT was saying that once a tax avoidance purpose was established, it could not as a matter of law be "trumped" by any greater or underlying purpose for the avoidance that a taxpayer sought to establish in order to avail himself of the second limb of the motive defence.

142. Mr Baker argued this was incorrect. Referring to the analysis of the Special Commissioner in *Carvill* at [89], he submitted that:

[5] The FTT adopted the approach taken in *Carvill* of interpreting the reference to "purpose" in the second limb of the motive defence as calling for an enquiry into the "main purpose".

(1) we should be examining the "main purpose of the design", not the "main purpose of the transfer"; and

(2) we should take account of Lord Pearce's statement in *Brebner* that although "an object of the carrying out of the broad scheme… was a tax advantage", that did not preclude the operation of the second limb of the motive defence in that case.

143. In the light of the FTT's finding at [421] that Stephen Fisher "genuinely believed that the move was necessary to save the business" and its tacit acceptance (in [535]) that the Appellants' "main reason for the transfer was survival of the business", he submitted, we should therefore find the second limb of the motive defence to be made out.

144. Mr Ewart argued that a taxpayer could always claim a wider economic motivation (whether it be simply making more money or, as here, saving a business altogether) to justify tax avoidance; if that line of argument were to be accepted then the second limb of the motive defence would always be available and the TOAA code would be rendered completely ineffective. This was effectively the FTT's reasoning.

145. We prefer the Appellants' argument. Parliament has legislated for two potential motive defences. The first requires a taxpayer to establish that there was no tax avoidance purpose at all for the relevant transactions; the second, only available where the relevant transactions were "bona fide commercial transactions", requires the taxpayer to establish that the transactions were not "designed for the purpose" of avoidance; as was observed in *Carvill*, it is implicit in this that tax avoidance may result from the transactions (as it did in *Brebner*) without disqualifying the taxpayer from benefiting from the second limb of the defence. If the FTT's analysis were correct, the existence of any tax avoidance purpose at all would always disqualify a taxpayer from reliance on the second limb of the motive defence, rendering it pointless and effectively overruling *Brebner*. This cannot be right. There is a qualitative difference between a situation in which a taxpayer voluntarily enters into a tax avoidance arrangement in order to save tax and a situation in which a taxpayer is effectively forced to restructure in the same tax-efficient way as its competitors in order to secure the survival of the business.

146. We therefore consider the FTT fell into error when it reached the conclusion that notwithstanding the transactions being designed for the purpose of saving the business, the second limb of the motive defence was not available to the Appellants because the means of saving the business was through the transactions giving rise to the tax avoidance in the first place. As was quite clearly apparent at the time, the punters in Great Britain were rapidly migrating their business to bookmakers outside Great Britain by reason of the high domestic rate of betting duty. SJA's business was clearly doomed unless it followed its competitors. Therefore, to the extent betting duty avoidance was involved in the transactions, it was simply the means of achieving the main purpose of saving the business, for which main purpose the transactions were designed.

147. It follows that even if we are wrong on the other issues before us, the second limb of the motive defence would be available to the Appellants. This view is based on the FTT's assessment of the subjective purposes of the transactions and the very particular, one might say extreme, facts of this case.

148. The point is driven home when the factual chronology is examined closely. The FTT reached its conclusion on the basis that the main purpose of "the transfer" alone (without including any associated operations) was tax avoidance (see [533]). It is common ground between the parties that the "transfer" for present purposes was the sale of the business of SJA to SJG, which took place in early March 2000 (see [79] of the Decision). Immediately prior to the transfer, SJA was already operating out of a branch in Gibraltar and had been taking bets

there from residents of Great Britain since shortly after 7 July 1999[6] (see [57]). The business sold "included a telebetting operation located in the UK at SJA's Abingdon premises and a Gibraltarian branch. It consisted of a database of 30,000 names (of which 11,867 had placed a bet in the previous three months), a teletext facility, and four Freephone numbers." ([81]). By the time of the transfer, SJA was already taking a very large volume of bets from punters in Great Britain through its own Gibraltar branch[7]. All this took place before there was any decision about transferring the business from SJA to SJG[8]. It is clear from the FTT's findings of fact about the advice obtained from David Oliver QC in August 1999 and January 2000 (at [345] – [349]) that the impetus behind the transfer of the business to SJG was the concern about exposure to criminal sanctions under s 9 BGDA, in particular Mr Oliver's advice that "…by far and away the most efficacious structure … is to conduct off-shore betting operations through a corporate entity entirely separate from the UK company…"; indeed the FTT found that Mr Oliver's advice "would not have suggested to Stephen Fisher and Peter Fisher that they were being over-cautious by proposing to use SJG to transact such bets *[i.e. bets with UK residents]*" (see [478]). Thus a rather different picture emerges from the FTT's findings of fact as to the real purpose of the transfer of SJA's business to SJG: SJA's Gibraltar branch had already been taking duty-free bets from punters in Great Britain for months (the course of action involving tax avoidance) but the transfer of the business from SJA to SGB was effected in response to concerns about exposure to criminal sanctions under s 9 BGDA (hardly a tax avoidance motive). Careful and detailed though it was, the FTT's analysis focused on the purpose of the overall "transfer" of customer business to Gibraltar to avoid betting duty rather than on the specific transfer of SJA's business to SJG. There is no suggestion in the Decision that the FTT considered the transfer of customers to SJA's Gibraltar branch over the period July 1999 to February 2000 to have been an "associated operation" with the actual transfer of the business in March 2000, and indeed its findings point to the opposite conclusion.

Issue 3 – Does the TOAA code breach EU law?

149. The issue before the FTT was whether the TOAA code infringes the Appellants' right of freedom of establishment (or the right of free movement of capital) with the consequence that it must be interpreted in a manner that would make it compatible with EU law.[9] Strictly speaking this issue only arises if we are wrong in our conclusion that the second limb of the motive defence is available to all three Appellants.

150. All measures which prohibit, impede or render less attractive the exercise of a fundamental freedom under the Treaty on the Functioning of the European Union ("TFEU") must be regarded as restrictions on that freedom. There is no need to prove that the legislation has actually inhibited someone from exercising a fundamental freedom. It is enough to show that the measure is capable of restricting its exercise: see e.g. Case C-311/08 *Société de Gestion Industrielle SA v Etat Belge* [2010] 2 CMLR 38.

151. Article 49 TFEU provides that: "within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of

[6] The decision of the High Court in *Victor Chandler*, declaring teletext advertising lawful, was handed down on 16 July 1999, the hearing having taken place on 8 July 1999.

[7] As the FTT recorded at [59], "[w]hen the branch started taking UK bets, there was a significant change. The branch went from having six members of staff to having about 22-24."

[8] Whilst the possibility of such a transfer was clearly in contemplation from August 1999, it was only on 10 January 2000 that a decision was taken to effect it (see [76] - [77]). Bets were being taken by SJA's Gibraltar branch entirely independent of this decision.

[9] Mr Baker contended that freedom of establishment was the primary freedom affected, but that this did not mean that free movement of capital was not also involved, citing Case C-628/15 *Trustees of the BT Pension Scheme v Revenue and Customs Commissioners* [2018] Ch 230 at [38] – [42]. However, as the FTT decision was based on freedom of establishment and Mr Baker concentrated his submissions on that freedom, we propose to do likewise.

another Member State shall be prohibited." The Court of Justice of the European Union ("CJEU") has held that this prohibition extends to restrictions on the freedom of a national of a member state to return to his state of origin to establish a business or provide services after having exercised his freedom of movement or freedom of establishment to work or provide services in another member state. The justification for this was succinctly stated in Case C-107/94 *Asscher* v *Staatsecretaris van Financien* [1994] ECR 1137 at para 32:

> "Although the provisions of the Treaty relating to freedom of establishment cannot be applied to situations which are purely internal to a Member State, Article 49 cannot be interpreted in a way such as to exclude a given Member State's own nationals from the benefit of Community law where by reason of their conduct they are, with regard to their Member State of origin, in a situation which may be regarded as equivalent to that of any other person enjoying the rights and liberties guaranteed by the Treaty.

152. The FTT addressed the EU law arguments at [547] to [839]. They concluded that the fundamental freedoms of freedom of establishment and free movement of capital are generally not engaged in relation to movements between the UK and Gibraltar because, for the purposes of EU law, a transfer between the UK and Gibraltar is to be treated as a transfer within the confines of a single member state. As British nationals, Peter and Stephen Fisher's fundamental rights were not engaged by the application of the TOAA code to such a transfer.

153. However, Anne Fisher is an Irish national whose Treaty freedoms, including the right to establish in a member state other than that of her origin, including any part of that state, were unaffected by her long-term residence in the UK. In reliance on *Government of the French Community and Walloon Government v Flemish Government* Case C-212/06 [2008] ECR 1-1693 ("*Walloon"*) the FTT held that her freedom of establishment in any part of the UK (including a different part from that in which she was currently living) was engaged. The provisions of the TOAA code which rendered her liable to a charge on the profits of SJG from its business carried out in Gibraltar and to pay income tax at a higher rate, when she would not have to pay such a charge if the same business was carried out in England and Wales, were liable to inhibit or dissuade the exercise of her freedom to establish a business in Gibraltar, which for these purposes is to be treated as if it were part of the UK.

154. The FTT held that the TOAA code was neither justified nor proportionate to any legitimate justification of fighting tax avoidance, as that concept is understood in European law. Accordingly, in Anne Fisher's case the legislation had to be interpreted as only applying to a transaction which was a wholly artificial arrangement to avoid the payment of tax, see. Case C-196/04 *Cadbury Schweppes plc* v *IRC*, [2007] Ch 30 ("*Cadbury Schweppes")* and Case C-112/14 *European Commission v United Kingdom* [2015] STC 591. Since the transaction was not of that type, and SJG was a genuine trading entity which paid tax on its profits in Gibraltar, Anne Fisher was not liable even if she could be treated as a "quasi-transferor" for the purposes of the TOAA code.

155. HMRC have appealed the conclusion reached in respect of Anne Fisher, on the basis that the FTT misunderstood the decision in *Walloon*. Peter and Stephen Fisher have appealed on the basis that the FTT was wrong to find that there was no breach of their rights under EU law.

156. It is well established that the Treaty rules governing freedom of movement or freedom of establishment for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by EU law and which are confined in all relevant respects within a single member state. The CJEU confirmed this fundamental principle in paragraph 33 of *Walloon*.

157. After the FTT decision, this Tribunal made a reference to the CJEU (Case C-192/16) for a preliminary ruling on the question whether, for the purposes of Article 49 TFEU (freedom of establishment), and Article 63 (free movement of capital) the UK and Gibraltar were to be treated as if they were part of a single Member State and if so, whether the consequence is that those Articles cannot apply save to the extent that they can apply to an internal measure. In its reasoned Order of 12 October 2017, the CJEU answered both those questions in the affirmative, in line with its previous decision on Article 56 (*The Gibraltar Betting and Gaming Association*, Case C-591/15)). It held, at paragraph 38, that:

> "the exercise of freedom of establishment or free movement of capital *by British Nationals* between the United Kingdom and Gibraltar constitutes, as a matter of EU law, a situation confined in all respects within a single Member State." *[Emphasis added.]*

In its earlier recital of the facts, at paragraph 9, the CJEU had expressly referred to the fact that Anne Fisher is an Irish national and that Peter and Stephen Fisher are British nationals and that all three were habitually resident in the UK. With that knowledge, it took care to make it clear that its ruling only applied to the exercise of the freedom of establishment or free movement of capital by British nationals. In paragraph 34 of its reasons the CJEU confirmed that in order for Article 49 to apply to a particular situation, there must be a foreign element.

158. Mr Ewart submitted that the freedoms guaranteed by EU law do not apply to Anne Fisher irrespective of her Irish nationality, because all the elements of the relevant transaction, namely the transfer of SJA's assets to SJG, are treated as being a situation confined within a single member state. He relied on Case C-134/94, *Esso Espanola SA v Comunidad Autonoma de Canarias* [1995] ECR 1-4223 in which a Spanish company with its head office in Madrid wanted to extend its activities to the Canary Islands (part of the Spanish territory). It sought to challenge a Spanish law which obliged any petroleum supplier who wished to establish in that territory to supply a specific number of islands within the archipelago, in order to ensure supplies throughout the national territory. The CJEU held that this situation was purely to do with the extension of the company's operations within the territory of a single member state and had nothing to do with any of the situations contemplated by Community law.

159. The CJEU ruling in the present case confirmed that the situation was to be treated as wholly internal if and to the extent that it concerned the exercise of a Treaty freedom by a British national. In the *Esso* case there was no reason to suppose that the legislation would have any collateral or incidental effect on trade between member states or inhibit the Treaty freedoms of nationals of other member states. However, as the decision in *Walloon* illustrates, there may be circumstances in which what appears to be an entirely internal matter may still engage the fundamental freedoms under the TFEU because it has the requisite foreign element. It will do so if it is capable of having a materially adverse impact on the exercise of those freedoms, which is a question of fact.

160. *Walloon* concerned a care insurance scheme which was introduced by the Flemish government. The scheme applied to persons who resided in the Dutch-speaking region of Belgium or in the bilingual region of Brussels-Capital, or who resided in another member state but worked in either of those regions. The latter category included Belgian nationals, because a national of one member state who goes to live in another member state but continues to work in the state of his own nationality is exercising free movement rights: Case C-212/05 *Hartmann v Bayern* [2007] ECR 1-6303. However, the scheme excluded Belgian nationals or nationals of other member states who worked in the Dutch-speaking region or in Brussels-Capital but lived in other areas of Belgium. The key issue was whether the provisions of the TFEU on freedom of movement and freedom of establishment were infringed or capable of being infringed by that exclusion.

161. The CJEU held that a distinction was to be drawn between Belgian nationals residing in other parts of Belgium who had not made use of their Treaty rights, on the one hand, and Belgian nationals who had made use of those rights, or nationals of other member states, such as, for example, a French national living in the French-speaking region of Belgium, on the other. It said, at paragraph 38, that community law clearly cannot be applied to the former category. However, individuals falling within the latter category would have a right to pursue economic activities anywhere in the territory of another member state and any measure which, although applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Community nationals of the fundamental freedoms guaranteed by the Treaty is potentially objectionable. It was enough to restrict freedom of movement that the challenged measure should benefit certain categories of persons pursuing occupational activity in the member state in question. The court pointed out, at paragraph 48, that migrant workers who faced the prospect of losing certain work-related benefits if they moved to a particular area of Belgium might be dissuaded from exercising their rights of freedom of movement. National measures which were capable of hindering the exercise of a fundamental freedom by making it less attractive may be allowed only if they pursue a legitimate objective in the public interest. In that case, no such objective was put forward as a justification for the measure under challenge.

162. Although the CJEU did not spell out why the provisions were capable of impeding the exercise of treaty rights by Belgian nationals who had already exercised the right of freedom of movement, the inability of such persons to claim that benefit if they were offered a job in the Dutch-speaking region, but wished to reside in another part of Belgium, was obviously a potential deterrent to returning from that other member state.

163. The first question which arose in the present case was whether the application of the TOAA code to render Anne Fisher liable to income tax on SJG's profits for an indefinite period in consequence of the transfer of the business from SJA to SJG was a measure capable of impeding the exercise of her right as an Irish national of freedom of establishment by setting up a business, SJG, in Gibraltar (which for these purposes is to be treated as if it were part of the UK). The FTT approached this question on the basis that her position was analogous to those nationals of other member states in the *Walloon* case who lived in areas of Belgium other than the Dutch-speaking region or Brussels-Capital. Mr Ewart contended that they were wrong to do so, because the decision in *Walloon* turned on the exercise of Treaty rights, and not on nationality. He submitted that when considering whether the measure was of purely internal application, a national of another member state who was living in an excluded area of Belgium for reasons unconnected with the exercise of Treaty rights, was in no different position from a Belgian national living in that area who had not exercised such rights.

164. It is true that the nationals of other member states with whom the CJEU was concerned in *Walloon* had exercised their rights of freedom of movement or freedom of establishment because they were working or had a business in the Dutch-speaking region or in Brussels-Capital, although they were living in other parts of Belgium. However, that factor played no part in the court's reasoning, let alone an essential one. Nationals of other member states who were still living outside Belgium were not adversely affected by the impugned measure, but that was only because an earlier challenge to the legislation had led to a change to extend the benefit to them. The Flemish government were bound to have lost that challenge, irrespective of whether such an individual had yet exercised his Treaty rights by accepting a job in the Dutch-speaking sector. The potential for deterrence in the case of a French national who had only ever worked in France, and who had not yet decided whether to accept a job in the Dutch-speaking region which would involve his moving to Belgium (and thus exercising his Treaty

rights for the first time) would be exactly the same as in the case of a Belgian national who was working in France or the Netherlands and considering taking up a similar job.

165. This demonstrates that in the case of a national of another member state, the fact that the freedoms guaranteed under the TFEU have not yet been exercised cannot have a bearing on whether the "internal" measure concerned is capable of impeding or deterring their exercise. It is completely irrelevant. So is that person's current place of residence. It would be absurd if a French person who stayed in France or moved to the French-speaking part of Belgium for the purposes of work could complain that his freedoms under the Treaty were restricted by the measure, but a French person who had moved to Belgium for other purposes (e.g. to study) but then wished to work or establish a business in a different area of Belgium could not raise that complaint unless they first moved back to France. The deterrent effect is the same, irrespective of where the national of the other member state happens to be living at the time when they are contemplating exercising their rights.

166. There is nothing in the decision in *Walloon* that supports any distinction being drawn between different groups of nationals of member states other than the state implementing the internal measure. The CJEU in that case confirmed that its decision applied to a national of another member state who had already moved to Belgium and was living in a non-qualifying area. The restriction was still capable of inhibiting the exercise of his Treaty rights, albeit that it would only apply if he decided that he wanted to work in the Dutch-speaking region or Brussels-Capital. That is why in paragraph 48 of its judgment the CJEU refers to "migrant workers pursuing or *contemplating the pursuit* of employment or self-employment in one of those two regions".

167. The distinction between Belgian nationals and other EU nationals that was drawn in the case of *Walloon* lay in the fact that a measure that might deter a Belgian national currently living and working in the French-speaking area from accepting a job in the Dutch-speaking area because he would have to move to the latter area in order to obtain a particular benefit, could not have an adverse impact on the exercise of that Belgian national's right to move to another EU member state for the purpose of work, or to establish a business in such a state. It would only have an impact on his ability to work or establish a business in a different part of his home state. The situation is different if he is already working outside his home state, because in that scenario, the measure is capable of adversely affecting his decision whether to return and take up a job or establish a business in his home state (or a particular area of it). It is that cross-border effect which provides the necessary foreign element.

168. Once that distinction is appreciated, it is plain that the FTT was right to decide that the ability of Anne Fisher, as an Irish national, to challenge the application of the TOAA code as an unlawful inhibition on her rights of establishment in a member state other than that of her nationality, did not depend on where she was living, how long she had been living there, or whether she had already exercised EU Treaty rights. It is irrelevant that the TOAA code would be inapplicable if Anne Fisher were ordinarily resident in Ireland or in another EU state. In *Walloon* the restriction on benefits only applied to those who lived in certain areas of Belgium.

169. The CJEU, when it made its reasoned Order in the present case, said nothing to suggest that nationals of other member states should be regarded as being in the same position as British nationals. On the contrary, it went out of its way to make it plain that its ruling applied only to the exercise by British nationals of the types of freedoms guaranteed by the Treaty within the territory of their own member state.

170. In any event, on the FTT's fact-findings Anne Fisher must have exercised her Treaty rights before the transfer of the business to SJG. They found that Anne Fisher and her husband Stephen, together with their late business partner James Houlder established the Stan James

betting business and operated it as a partnership "over a number of years" until Mr Houlder died in 1986 [16]. From 1988 onwards the business was operated through SJA. Anne Fisher's active involvement in that business ceased in 1996 [21].

171. Anne Fisher's unchallenged oral evidence before the FTT was that she first came from Ireland to the UK in 1963 to attend college. Her unchallenged evidence in her witness statement was that the Stan James business was established in the early 1970s. Irrespective of the fact that she had moved to England before the UK joined what was then the European Economic Community, by remaining in the UK and carrying on a business she established with her husband in a member state other than the member state of which she is a national, which "engaged in the actual pursuit of an economic activity through a fixed establishment for an indefinite period", Anne Fisher was plainly exercising her Treaty rights as an Irish national long before the transfer of the business from SJA to SJG. Even if she was arguably exercising a different freedom, such as the freedom to provide services, in the period when the partnership existed, at the very latest she exercised her right of establishment in the UK when SJA was incorporated. Her long-term residence in the UK did not dilute or extinguish her Treaty rights, or somehow equate her position with that of a UK national who had never exercised such rights.

172. The FTT rightly rejected the notion that if a person has lived in a different member state from their state of origin for long enough, when they set up a business (or propose to set up a business) there, they are not exercising their right of establishment from their member state of origin [634].

173. The FTT were right, in our view, to conclude that the TOAA code restricted Anne Fisher's rights of freedom of establishment, (irrespective of whether she had already exercised or was exercising those rights) by analogy with the position of the individuals from other Member States who were living in non-Dutch speaking areas of Belgium whose rights were inhibited by the internal restrictions in *Walloon*. We agree with their reasoning in [642] to [651]. Just as a French national living in the French-speaking sector of Belgium would have to move outside Belgium or into the Dutch-speaking area or Brussels-Capital in order to obtain the benefits in *Walloon*, Anne Fisher would have to move outside the UK or to Gibraltar in order to establish SJG's business without being made liable to pay income tax on SJG's profits. It is irrelevant that the TOAA code applies to all UK residents irrespective of nationality: in *Walloon* the measure applied without discrimination to people of all nationalities residing in certain areas of Belgium, but still unlawfully restricted freedom of movement and freedom of establishment.

174. So far as justification and proportionality are concerned, we agree with the comprehensive analysis of the justification and proportionality arguments carried out by the FTT at [652] – [672] and the conclusion it reached at [673]. HMRC sought to rely on the same arguments that the FTT rejected, namely, that the restriction of Anne Fisher's freedom of establishment in Gibraltar was justified by the balanced allocation of tax, fiscal cohesion and the prevention of tax avoidance.

175. The first two alleged justifications are not referred to in the grounds of appeal, and in any event are devoid of merit. The FTT dismissed them in commendably succinct terms at [656]. The CJEU has made it plain that the justification of the balanced allocation of taxation can only apply to measures intended to enable a member state to exercise its tax jurisdiction in relation to activities carried on within its own territory: Case C-311/08 *Société de Gestion Industrielle SA (SGI) v Etat Belge* [2010] 2 CMLR 38 at paragraph 60. The TOAA code applies to tax the Fishers on the profits derived from SJG's business activities in Gibraltar, which imposes its own fiscal regime. The fact that as a matter of EU law, Gibraltar is to be regarded as part of the UK for the purposes of the exercise of Treaty freedoms does not mean that activities carried

out in Gibraltar are to be treated as activities carried out within the UK for taxation purposes. In any event, that justification cannot be relied upon where the fiscal competence of only one Member State is in issue, see Cases C-327/16 and C-421/16 *Jacob v Minstre de Finances et des Comptes publics* [2018] 3 CMLR 401 at paragraphs 80-81. The need to maintain fiscal cohesion does not supply a justification in the present case, because, as the FTT pointed out, there must be a tax advantage which is offset by the tax levy which is sought to be justified and a direct link between the two: here there is no direct link to any corresponding tax advantage.

176. Mr Ewart realistically did not dwell on these arguments in his oral submissions. So far as the tax avoidance justification was concerned, he submitted that the type of considerations that arose in *Cadbury Schweppes* relating to the fact that different Member States may legitimately impose different levels of taxation, do not arise in a case in which the situation was treated as being internal to one Member State. However, as the FTT pointed out, that submission ignores the fact that the situation is not treated as being wholly internal so far as an Irish national is concerned. In any event, we agree with the point made by the FTT at [664] that there is no reason why the rationale that tax paid in one member state is equivalent to tax paid in another should not apply to a territory such as Gibraltar which lawfully imposes its own fiscal regime. If tax paid in a different member state can be equated to tax paid in the UK, why should tax paid in a territory that is regarded for these purposes as part of the UK, on activities carried out in that territory, not be treated as equivalent to tax paid in other parts of the UK on activities carried out in those areas? HMRC provided no rational explanation for the distinction they sought to draw. In any event, the purpose of the TOAA code was not to deal with the fiscal relationship between the UK and Gibraltar.

177. As the CJEU made clear in *Cadbury Schweppes,* particularly in paragraphs 61-69, quoted by the FTT at [657], if the impugned transaction reflects economic reality, despite the existence of tax motives, the objective pursued by freedom of establishment will have been achieved. Thus the fact that a national of another member state wishes to avail themselves of an advantageous fiscal regime by establishing their business somewhere that is treated as part of the UK, cannot be used as a justification for imposing penal tax charges upon them which would not apply if they established the business elsewhere in the UK, for example, Wales. (See also, in the context of free movement of capital, *European Commission v United Kingdom* at paragraphs 24-31).

178. Mr Ewart sought to rely upon the very recent judgment of the CJEU in Case C-135/17 *X Gmbh v Finanzamt Stuttgart* in which the court said, at paragraph 84, that in the context of free movement of capital the concept of "wholly artificial arrangement" could not necessarily be limited to the indications identified in *Cadbury Schweppes* that the establishment of a company does not reflect economic reality. The artificial creation of the conditions required in order to escape taxation in a member state improperly can take several forms as regards cross-border movement of capital. The court gave by way of example a scheme which had as its primary objective the artificial transfer of the profits made from activities carried out in a member state, to third countries with a low tax rate. However, those observations have no relevance to the situation in the present case. They do not support Mr Ewart's submission that as regards purely internal matters a member state should be entitled to enact legislation which casts its net wider than is necessary to catch wholly artificial arrangements.

179. The tax charge in the present case is unjustifiable because it does not target wholly artificial arrangements (however widely that concept is interpreted) but also transactions which could not possibly be described as constituting or involving artificial arrangements. This case involved a bona fide transfer at market value of an ongoing business from one company to another. As the FTT found, SJG is a genuine trading company which pays tax on its profits in accordance with the tax regime in force in Gibraltar. These measures seek to tax the Fishers on

the same profits, which are generated from activities carried on in Gibraltar. Making someone pay tax on profits from a genuine business that have already been taxed in the territory in question cannot be characterised as preventing tax avoidance, as that concept is recognised in EU law, and even if it could, it goes far beyond what might be regarded as proportionate to achieve that objective. The charge is disproportionate because it provides for all income arising from the transfer and associated operations to be attributed to a "quasi-transferor" irrespective of whether that person has actually received it. Those profits are then taxed at income tax rates rather than corporation tax rates, and as such are subject to a higher tax charge. The denial of the motive defence to someone like Anne Fisher is plainly disproportionate to any legitimate objective sought to be achieved.

180. HMRC did not seek to argue that, were we to reach that view, the FTT was wrong to apply the conforming interpretation of the legislation that it did (in accordance with its obligation to interpret legislation consistently with EU law to the extent that it is possible to do so, see *Vodafone 2 v Revenue and Customs Commissioners (No 2)* [2010] Ch 77.) We therefore dismiss HMRC's appeal in the case of Anne Fisher.

181. The position of Stephen and Peter Fisher is more complex. Mr Baker accepted that, as UK nationals, they do not enjoy any freedoms in respect of matters that are wholly internal to one Member State. However, he submitted that there was the requisite foreign element to engage Article 49 (and Article 63) because of the potential effect of the TOAA code on intra-EU trade.

182. We agree with the FTT that the fact that SJG took bets from punters in various member states apart from the UK and thus provided cross-border services, and the fact that SJG employed EU nationals of other member states, did not provide the necessary foreign element that would prevent the situation from being treated as "wholly internal" so far as Stephen and Peter Fisher are concerned. In Case C-339/15 *Criminal Proceedings against Vanderborght* [2017] 3 CMLR 1275, the CJEU confirmed that where customers cross a border from one EU member state to another in order to receive services, the Treaty freedom that is engaged is the freedom to provide services, not the freedom of establishment. Logically the same analysis applies where employees exercise their freedom of movement to work in a different member state; that factor does not engage the freedom of establishment of the company which employs them, let alone the freedom of establishment of its shareholders.

183. It is difficult to see how the application of the TOAA code to Stephen or Peter Fisher would have any impact on inter-state trade, on the exercise by SJG of its freedom to provide services to punters outside the UK, or on the freedom of movement of its employees from other EU states, but as the FTT pointed out, at [617] and [620], the case was not argued on that basis. Before us, the argument was put on the basis that "anything which discourages the establishment of SJG necessarily discourages what it does". As the FTT pointed out at [621] if that argument were to be accepted, it would render meaningless the concept of a wholly internal situation in relation to freedom of establishment. We agree.

184. Mr Baker did not pursue the argument that Peter Fisher's decision to go and live in Spain for a time before he moved to Gibraltar provided the necessary foreign element or meant that there was any relevant inhibition on his freedom of establishment (or the free movement of capital). That argument was comprehensively rejected by the FTT at [622] to [631]. Suffice it to say that the application of the TOAA code did not affect, and could not have affected, any freedom to establish a business in the UK from Spain, because Peter Fisher was not exercising that freedom. For the purposes of EU law he was establishing a business in one part of the UK from another part of the UK.

185. It was common ground between the parties that Gibraltar is in the unique position of being outside the UK for the purposes of the TOAA code, but treated as if it were part of the UK for the purposes of EU law. Mr Baker pointed out that if the Appellants had set up SJG in any EU member state, they could have relied on freedom of establishment and free movement of capital to defend themselves against a charge being imposed on them under the TOAA code. If they established SJG in a territory outside the EU (including any of the Channel Islands) and invested in it, they could rely on free movement of capital for the same purposes. In choosing Gibraltar, they chose the only territory in the world where a British national would be unable to rely on TFEU rights as a defence to such a tax charge. That may well be right, but however anomalous this situation may appear to be, Stephen and Peter Fisher still must establish that the application of the TOAA code *to them* restricts or is capable of restricting the exercise of Treaty freedoms by others in circumstances in which they have a right to require the impugned legislation to be disapplied or modified in order to remove that restriction.

186. If one person has EU rights and another person does not, the adverse impact of domestic legislation on the latter may inhibit, or even preclude the former from exercising those rights. The CJEU has held that in certain circumstances the person who does not have the rights or who is not exercising any Treaty rights may nevertheless take advantage of the existence of those rights to require that legislation to be disapplied or modified.

187. Mr Baker's primary submission was that Stephen and Peter Fisher are entitled to rely on the rights of Anne Fisher if their adverse tax treatment in respect of the consequences of the transfer of the business to SJG might deter or restrict the exercise *by her* of her Treaty rights. Irrespective of any adverse tax treatment that applied to her personally, Anne Fisher might be deterred from exercising her freedom to establish a business in Gibraltar by the imposition of the TOAA code on her husband and, at least initially, on her son.

188. The way in which this submission was initially framed in the Appellants' skeleton argument was on the narrower basis that the charge on Stephen and Peter Fisher indirectly impacts on Anne Fisher's right of establishment by discouraging their agreement to any transfer of the business to SJG. If they did not agree to the transfer, she would be unable to go ahead with it. If that had been the only way in which Mr Baker put the case, we would have rejected it. That submission depends on a flawed analysis of the underlying legal principles. There is no authority to support the proposition that if the likely *behaviour* of a person who is not exercising Treaty freedoms in reaction to a national measure which solely affects him, might deter or prevent the exercise of a Treaty freedom by an EU national, the other person is able to rely on the EU national's rights. The cases indicate that it is the operation or impact of the national measure itself which must be likely to inhibit or discourage the EU national from exercising the relevant Treaty freedom or freedoms. However, in the course of oral argument Mr Baker made it clear that he was putting the case on the wider basis that we have articulated in the preceding paragraphs.

189. Mr Baker particularly relied on Case C-80/12 *Felixstowe Dock and Railway Company v HMRC* [2014] STC 1489, ("*Felixstowe Dock*"). The case concerned the ability of a UK company to transfer losses for corporation tax purposes to another UK company to which it was linked by certain corporate ties. There was therefore no question of any cross-border surrendering of losses between companies resident in different member states. A group of companies, some of which were established in the UK and other states within the EU, had an ultimate parent whose seat of business was in Hong Kong. A UK company within the group, H, wanted to transfer its losses to another UK company, F, to offset against F's profits, but was unable to do so because the legislation required the link company to be a UK company. In that case the link company was a Luxembourg company, L (which was part of a consortium of

companies which owned the shares in H's UK parent company, some of which had seats outside the EU). L's own parent company also had its seat in Luxembourg.

190. The CJEU held that denying such relief to a subsidiary (F) in circumstances where the necessary corporate link between F and H was established, restricted the freedom of establishment. There was a difference in tax treatment between resident companies connected by a link company established in the UK and resident companies connected by a link company established in another member state. At paragraphs 21-24 of its judgment the CJEU held that this difference in tax treatment made it less attractive in tax terms to establish a link company in another member state. That finding was unaffected by the fact that neither the loss-making company H, nor the company to which it wished to surrender its losses, F, was exercising its freedom of establishment. The CJEU relied on its earlier decision in *Revenue and Customs Commissioners* v *Philips Electronics* Case C-18/11 [2013] STC 41, in which it had decided that for tax purposes a company may rely on a restriction of the freedom of establishment of another company which is linked to it, so far as such a restriction affects its own taxation. It stated that in order to be effective, the freedom of establishment must entail a right on the part of the affected companies to invoke it once they claim to be less well treated for tax purposes. Although F, the company which was paying more tax because it was denied the relief, was not exercising any Treaty freedom, it was entitled to rely on the restriction on L and to claim the tax relief.

191. Mr Ewart submitted that the key point in the *Felixstowe Dock* case was that the restriction on L's (or its parent company's) freedom of establishment directly affected F's own tax position and that this meant there was a close connection which justified granting F a right linked to, or derived from, L's Treaty rights. L had no status to complain about the restriction because the impugned measure did not affect its own tax situation. Whilst the application of the TOAA code to Anne Fisher meant that she had to pay more tax, that had had no impact on the tax position of Stephen or Peter Fisher. Likewise, the application of the TOAA code to Stephen and Peter meant that they had to pay more tax, but this did not directly affect Anne Fisher's tax position.

192. Mr Baker submitted that this was too narrow an approach, and that the decision in *Felixstowe Dock* was a reflection of an underlying principle that was applied in cases such as Case C 60/01 *Carpenter v Secretary of State for the Home Department* [2003] QB 416 and Case C 34/09 *Ruiz Zambrano v Office national de l'emploi* [2012] QB 265.

193. *Zambrano* related to non-economic rights, rights of citizenship. Mr Baker accepted that the case law on EU citizenship was not directly in point; he cited *Zambrano* as an illustration of a person being able to rely on the rights of another. The mother and father of two children who were Belgian citizens came from a country outside the EU. Belgium refused the parents a right of residence and a work permit. The compulsory departure of the parents from Belgium would inevitably deprive the children of their rights as Belgian citizens to move and reside freely within the EU, by forcing them to leave with their parents. Although the outcome of the case meant that the parents could not be forced to leave Belgium, that was because the children's rights would be negated if they were.

194. As Mr Ewart pointed out, the CJEU has made it clear that *Zambrano* is an exceptional case which only applies if the challenged measure deprives an EU citizen of the genuine enjoyment of the substance of the rights associated with their status, see e.g. joined Cases C-356/11 and C-357/11 *O v Maahanmuuttovirasto* [2013] 2 WLR 1093. Even if a non-economic right could be equated with the Treaty freedoms with which this case is concerned, Anne Fisher had not been deprived of her Treaty rights.

195. *Carpenter* provides more support for Mr Baker's submissions. It concerned a non-EU national who was married to a UK national who, whilst residing in the UK, exercised his freedom to provide services by travelling to other member states or providing those services across borders without travelling. The CJEU held that on the facts, his rights under Article 49 TFEU were restricted by immigration provisions refusing to grant his spouse rights of residence in the UK. His freedom to provide services could not be fully effective if he was deterred from exercising it by obstacles provided in his home state, such as the detriment to his right to family life under Article 8 ECHR caused by requiring his wife to leave the country. Mrs Carpenter was able to rely on the adverse impact on her husband's Treaty rights in order to claim that she should be granted a right of residence in the UK. However, the court made it clear that she was only able to do so because her husband was already exercising his Treaty rights (see paragraphs 28-31 and 46). If Mr Carpenter had simply lived and worked in the UK, there would have been no basis for making the claim.

196. *Carpenter* is not a case that purports to lay down any general principles, and it is clear from the judgment that it turned on its own facts. There is a vast and complex body of case law concerning spouses, partners and parents of EU nationals in the context of immigration and Article 8 ECHR, none of which is directly relevant to the issues in the present case. Cases such as *Carpenter* and *Zambrano* are exceptional because national measures in support of the legitimate objective of immigration control are rarely held to be disproportionate. *Carpenter* does, however, illustrate that as a matter of EU law, a person who cannot exercise Treaty freedoms may be regarded as having a sufficiently close connection to their EU national spouse or partner to be able, in certain circumstances, to challenge a national measure adversely affecting them which would inhibit or discourage the exercise of their spouse or partner's Treaty freedoms. The answer to the question whether the national measure would have that effect on Treaty freedoms (and if so, whether it is proportionate and justified) will necessarily depend on the facts.

197. The common factor in *Carpenter* and *Felixstowe Dock* is that there was a national measure which adversely affected someone who either had no rights under EU law, or who was not exercising their rights under EU law, but the application of that measure had a direct adverse impact upon the exercise of Treaty rights by another person, which was neither justified nor proportionate. The adverse impact could only be cured by disapplying the restriction. In *Carpenter* that resulted in the non-EU national being granted a right of residence; in *Felixstowe Dock* it resulted in the UK company being granted the tax relief. In neither case, however, did it result in the person who was not exercising Treaty rights being put on the same footing as the person who was. Nor did it confer a similar right upon them.

198. Mr Baker's argument in the present case depends on the fundamental proposition that the application of the TOAA code to Stephen and Peter Fisher would hinder, prevent or render less attractive Anne Fisher's exercise of her rights as an Irish national to establish a business in a place which is treated as being part of the UK, namely, Gibraltar. Therefore, the first question is whether it would hinder prevent or discourage the exercise of those rights or is capable of doing so. That is a factual inquiry. The second question is whether the inhibition on Treaty freedoms is justified and proportionate. That has already been answered in the negative. The third question is whether there is a sufficient nexus between the person to whom the TOAA code applies and Anne Fisher to justify his being able to rely upon the adverse impact on her Treaty freedoms. That is a matter of law. It is necessary to examine the position of Stephen and Peter separately.

199. Stephen Fisher is Anne Fisher's husband of many years. If these provisions are a disincentive to the exercise of her freedom of establishment if applied to her directly, as the FTT rightly decided they were, then it is difficult to see why they would not be just as much of

a disincentive if applied to her husband instead, or as well. Quite apart from the emotional deterrent, which would be considerable, making him liable to pay income tax on SJG's profits (and profits from associated operations) in Gibraltar for an indefinite period would be bound to adversely affect the family finances, irrespective of whether it would have any impact on Anne Fisher's personal tax position. The inability of HMRC to apply the TOAA code to Anne means that, at least in theory, a larger share of the profits of SJG could be attributed to Stephen (and Peter). Thus, the application of the TOAA code to Stephen Fisher would potentially have a direct economic consequence for Anne Fisher, providing an additional disincentive.

200. Moreover, if Stephen Fisher would have to move outside the EU or to Gibraltar to avoid the consequences of the application of the TOAA code to him, then Anne would have to move with him, or suffer a significant disruption to her family life. If one asks the question whether the application of the TOAA code to her husband was capable of discouraging a national of another member state from exercising her right to establish a business in Gibraltar, the answer is obviously yes. That would be the case irrespective of whether the TOAA code applied to Anne herself, with the same deterrent effect. It is unnecessary to prove that the disincentive was of a particular type, e.g. that it made the exercise of the freedom fiscally disadvantageous for Anne Fisher personally, or that the application of the TOAA code to Stephen Fisher actually deterred Anne Fisher from exercising those rights.

201. The fact that Stephen Fisher is a UK national is not significant in this context because the position would be exactly the same if he were a national of a non-EU state who was liable to pay the tax because he was ordinarily resident in the UK. In that scenario he would not have any Treaty rights, but there would still be a real disincentive to his wife to exercise her Treaty rights because of the detrimental impact that the TOAA code would have on her spouse's tax position (and on the family finances).

202. Given that the adverse impact on Anne Fisher's freedom of establishment is neither justified nor proportionate, the question which then arises is whether there is a sufficient basis in EU law for allowing Stephen Fisher to rely upon it. We consider that there is. Just as the restrictions on F's ability to claim tax relief was a disincentive to the establishment of a link company in member states other than the UK, the negative tax consequences for Stephen Fisher are a disincentive to Anne exercising her rights of establishment. Stephen Fisher's position can be equated with that of F in *Felixstowe Dock*. Just as in the case of L or L's parent company, there is no means for Anne Fisher to redress the situation herself. The only person with an ability to remove the restriction on her freedom of establishment is Stephen Fisher.

203. Whilst it is true that the negative tax treatment of her husband has no direct impact on Anne Fisher's own tax position the same was true of the Luxembourg companies whose freedom of establishment was adversely affected by the tax legislation in *Felixstowe Dock*. In that case, it was the direct impact on F's tax position and the economic implications of that for the group as a whole that provided the justification for finding a sufficient nexus to entitle F, the affected UK company, to take steps to remove the restriction on the freedom of establishment of group companies further up the corporate hierarchy. There is a direct analogy between the two situations; in *Felixstowe Dock* the person claiming the derivative right was the person whose tax position was adversely affected by the national measure which impacted on the EU company's freedom of establishment. In this case, the person in that situation is Stephen Fisher. Mr Ewart advanced no cogent reason why a company should be regarded as having some special status to challenge a tax measure which brings about that undesirable state of affairs and a person such as the adversely affected EU national's spouse, in an analogous situation, should not.

204. *Carpenter,* although decided in a different context, shows that a connection between spouses may be regarded as sufficient to entitle an individual to rely upon the adverse impact of a measure affecting them, on the exercise of Treaty freedoms by someone else. If the underlying principle should apply to companies and individuals alike, it is difficult to envisage any closer connection than that between spouses.

205. Thus, by analogy with *Felixstowe Dock,* Stephen Fisher should be entitled to require the removal of the further impediment to the exercise by his wife of her freedom of establishment caused by his disadvantageous tax treatment. It is the only way in which that obstacle can be removed. The simplest way to do that would be to adopt the same construction of the motive defence in his case as was adopted in the case of Anne.

206. For these reasons we disagree with the conclusion reached by the FTT that Stephen Fisher cannot rely on Article 49 TFEU.

207. Peter Fisher is a financially independent adult and his personal tax position would not have any direct impact on either parent's financial or tax position. If one of the remaining shareholders in SJA had been a UK national, ordinarily resident in the UK, and unrelated to Anne Fisher, there would be no reason to suppose that his or her adverse tax treatment as a quasi-transferor would be capable of acting as a real or sufficient impediment to Anne Fisher establishing the business in Gibraltar to be treated, in EU law, as a restriction on her Treaty freedoms. The only reason for differentiating between that hypothetical shareholder and her adult son is the blood tie.

208. Even if, for the sake of argument, we were to assume that the application of the TOAA code to Peter Fisher is sufficiently capable of acting as a disincentive to his mother establishing a business in Gibraltar because she would not wish him to suffer the adverse financial consequences of her doing so, (which cannot necessarily be inferred in the absence of evidence), in our view there is too tenuous a link to provide Peter Fisher with a viable argument that EU rights are engaged in his case. To do so would be to stretch the concept of derivative rights way beyond anything hitherto contemplated by the CJEU. The circumstances in which someone without Treaty freedoms, or who has such freedoms but is not exercising them, should be allowed to rely on someone else's Treaty freedoms must be strictly confined to cases in which there is principled justification for making that exception to the normal rule. Whilst we consider there is such a justification in the case of a spouse or civil partner there is no justification for extending the right to adult blood relatives. Therefore, we reject the submission that Peter Fisher is entitled to rely on Article 49 TFEU notwithstanding that the situation is treated as being internal to the UK so far as he is concerned.

209. Finally, we address the Appellants' contention that the FTT was wrong to decide that the Anne Fisher should be entitled to benefit from a conforming construction of the motive defence whereas Peter and Stephen Fisher cannot. Mr Baker complained that the FTT's interpretation created a carve-out for UK nationals transferring assets to Gibraltar. Unlike the distinction in *Vodafone 2*, which reflected the scope of the UK's Treaty obligations, this created an arbitrary and unprincipled distinction. The main obstacle to that argument, as the FTT recognised, is Case C-264/96 *Imperial Chemical Industries plc v Colmer* [1999] 1 WLR 108 where the CJEU stated, at paragraph 34:

> "Accordingly, when deciding an issue concerning a situation which lies outside the scope of Community law, the national court is not required, under Community law, either to interpret its legislation in a way conforming with Community law or disapply that legislation. Where a particular provision must be disapplied in a situation covered by Community law, but that same provision could remain applicable to a situation not so covered, it is for the

> competent body of the State concerned to remove that legal uncertainty in so far as it might affect rights deriving from Community rules."

210. We have concluded that in the case of Peter Fisher, there is no obligation to interpret the legislation in a way conforming with EU law, whereas in the case of his parents there is. Whilst the solution reached by the FTT may appear counter-intuitive, there is force in the point that adopting a conforming construction of the motive defence in all cases would mean that someone whose Treaty freedoms are unaffected, or who has no such rights, would be put on the same footing as someone whose Treaty freedoms are restricted (or who are entitled to rely on the restrictions on the Treaty freedoms of another person). The alternative would be to disapply the TOAA code in the case of those who can rely on EU law, which would lead to the same result.

211. Therefore, we consider that the conclusion reached by the FTT at [689], that the conforming interpretation will not apply to persons whose situation does not fall within the scope of EU law, is correct.

Issue 4 - Discovery Issue

212. There had been two issues before the FTT in relation to the validity of relevant assessments, but only one of them was contested before us. This concerned the validity of the assessments for 2005-06 and 2006-07 which were notified to Stephen and Anne Fisher. The FTT found these assessments to have been invalidly made.

The FTT's approach

Exploration of issues and law

213. The FTT's exploration of the relevant issues and the law commenced from [843] as follows:

> *"Issues*
>
> 843. As is well known in the field of direct tax s29 TMA 1970 provides a means of assessing tax where a loss of tax is discovered. The power to assess is subject to two alternative conditions being fulfilled. The whole of the section as it applied at the relevant time is set out below at [845] below. The condition relevant to this appeal is set out in s29(5) which relates to the information available to an officer (which the parties agree is a hypothetical officer rather than the actual one) by the time the enquiry window closes. Section 29(6) prescribes a list of the types of information (returns, accompanying documents, responses to enquiries etc.) which may be taken into account (which include inferences which may be drawn under s29(6)(d)(i)). The period over which the relevant categories of information in s29(6) may be taken account of, includes not just the year of assessment but also the two tax years preceding the year of assessment.
>
> 844. The specific issues which arise may be summarised as follows:
>
> (1) **Discovery**: Was there a discovery for the purposes of s29(1) TMA 1970? The appellants challenge HMRC's view as to when the requisite discovery was made and argue that the length of time between any purported discovery and the actual assessment means that the discovery was insufficiently new to count as a discovery for the purposes of the legislation.
>
> (2) **Applicability of condition in s29(5)**: The appellants argue the provision is not satisfied as an officer could reasonably be expected to be aware of an insufficiency in tax. This involves considering:

(a) Whether it is necessary for the officer be aware of the *amount* of tax loss before he or she can be taken to be aware of such insufficiency (as HMRC argue) or whether awareness simply that the amount of tax loss is more than zero is sufficient (as the appellants argue).

(b) The application of the condition to the particular facts of the case. This involves considering what, if any, inferences may be drawn under s29(6)(d)(i) from the information which was provided.

Law

845. Law on discovery assessments

"29 **Assessment where loss of tax discovered**

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) …

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

…

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

…

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer, whether in pursuance of a notice under section 19A of this Act or otherwise; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

(ii)…; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

(7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 804ZA of the principal Act.

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b)…."

214. After this summary, the FTT went on to set out the basic relevant facts at [846] to [869]. At [870] to [896] it dealt with the question of whether there had been a relevant "discovery", and decided that there had been. The Appellants do not dispute this conclusion.

Satisfaction of s.29(5)

215. The FTT then went on from [897] to consider whether the condition in s.29(5) was satisfied and found at [1001] that it was not satisfied in relation to Stephen and Anne Fisher in respect of the years 2005-06 and 2006-07 (i.e. it came to the view that the hypothetical HMRC officer could have been reasonably expected, on the basis of the information made available to him/her before the relevant time, to be aware of the situation mentioned in s.29(1)). Accordingly, it found those assessments to be invalid. This conclusion is disputed by HMRC.

216. In reaching this conclusion, the FTT started by deciding that it was "restricted to only putting the s.29(6) information before our hypothetical officer" ([900]). It also said (at [901]) it was "not in dispute that it is not enough that the hypothetical officer has enough information to cause him or her suspicion which might lead him or her to go to further enquiries".

217. The FTT then considered whether quantification of the insufficiency of tax needed to be possible before it could be said that the hypothetical officer should be fixed with "awareness" of the supposed insufficiency in the prior assessment. It decided this was not necessary, all that was needed was awareness of an unascertained shortfall (see [908]). However, it was still crucial to any discovery that the hypothetical officer should be fixed with awareness that there was a "power to enjoy" the relevant income during the relevant tax year and that there was relevant income to be enjoyed (see [910]). These matters needed to be considered separately in relation to each tax year (see [911]).

218. The FTT went on to identify the relevant documents falling within s.29(6) which would be put before the hypothetical officer, and apart from the respective returns themselves, it identified documents under four headings:

> (1) The consolidated accounts for SJG for the years ended 31 December 2003, 2004 and 2005, which were provided on 7 December 2007. The two pages at the end of these accounts provided SJG's single company profit figures (see [941]).[10]
>
> (2) A 16-page letter dated 25 June 2007 from Chris Oates of Ernst & Young.
>
> (3) Email exchanges dated 18 and 23 October 2007 between the relevant HMRC officer and the Fishers' accountants.
>
> (4) A 9-page letter dated 4 September 2008 from the Fishers' accountants to the relevant HMRC officer.[11]

219. As to the content of the returns, the FTT found the following (at [924] to [926]):

> "924. Stephen Fisher filled his returns in as follows.
>
> (1) He did not place a tick against the box in his 2005-06 return to the question:
>
> > "Have you or could you have received, or enjoyed directly or indirectly or benefitted in any way from, income of a foreign entity as a result of a transfer of assets made in this or earlier years?"
>
> (2) His 2006-07 return does contain a tick and an instruction to "see box 6.39" of the "Foreign Pages" which contains a reference to "S D Fisher Life Interest Trust".

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[10] SJG's individual company profits for the years ended 31 December 2006 and 2007 were not provided to HMRC until after the enquiry windows for both 2005-06 and 2006-07 had closed.

[11] This letter, having been sent after the enquiry window for the year 2005-06 had closed on 31 January 2008, could only be relevant to the 2006-07 assessment.

> (3) In the "white space" in Box 6.39 the following information was entered:
>
> > (4) "Mr Fisher is the settlor and life tenant of the S D Fisher Life Interest Trust, which is resident in the UK. It is dealt with at Nottingham Trust district at reference [reference number given]. All income and gains are included on Mr Fisher's Tax Return. Please note that the foreign pages show no income as although Mr Fisher is entitled to receive foreign dividends none were paid during the year ended 5 April 2007."
>
> (5) The word "Gibraltar" is typed on the first page of the foreign pages in the dividends section.
>
> 925. In relation to Anne Fisher the "yes" box to the question (at [924]) above was not ticked for her 2005-6 or 2006-7 returns.
>
> 926. For both Anne Fisher and Stephen Fisher for 2004-05, 2005-06 and 2006-07 there are no ticks in relation to the question 8 on Capital Gains "Did you dispose of other chargeable assets (the prior bullet refers to only or main residence) worth more than [£32,800 for 2004-05 / £34,000 for 2005-06 and £35,200 for 2006-07] in total?"

220. The FTT accepted the Appellants' submission that it was appropriate to consider all the relevant documents "in conjunction with each other for the purposes of assessing what the hypothetical officer would reasonably be aware of", saying that "in principle it is possible that the whole of the matter the officer is taken to be aware of amounts to something bigger than the sum of the individual parts" (see [917]). As part of the same approach, the awareness of the hypothetical officer should be "judged taking into account the particular circumstances of the case", in particular that "there was a long-running s.739 dispute" (see [962]). It therefore considered each of the above items separately (albeit in the overall context), then formed an overall view.

221. The FTT considered 2006-07 to be "more straightforward" and therefore dealt with it first.

222. Anne Fisher had not ticked the box in her 2006-07 tax return to indicate that s.739 was in point for her for that year. Stephen Fisher had ticked the box, but in the "white space" on the return he had referred only to his interest in the SD Fisher Life Interest Trust. Nonetheless, the FTT considered that the hypothetical officer "would, from the correspondence with the appellants' advisers, be aware that s.739 income was potentially in issue (even though no disclosure was made in the return)" (see [980]).

223. As to the SJG accounts for the years ended 31 December 2006 and 2007 (which were not actually supplied to HMRC by the Appellants' representatives until after 31 January 2009), the FTT found, in the light of the 2005 (and earlier) accounts disclosed to HMRC and an exchange of correspondence in February/March 2008, that the hypothetical officer would at 31 January 2009 "reasonably infer… that accounts showing SJG's individual profit figures existed for the year ended 2006 and year ended 2007" and "would reasonably be taken to have inferred the relevance of these accounts to an insufficiency in tax" (see [967]). Furthermore, the officer "would, we think, have reasonably inferred that there was information relevant to power to enjoy and information relevant to SJG's income in the accounts of SJG". All of this together would "amount to information which would allow the hypothetical officer to reasonably infer that the 2006 and 2007 accounts of SGJ were *relevant* to the insufficiency of tax. (It is not necessary for it to be inferred that they demonstrated an insufficiency of tax.)" (See [968]).

224. The FTT went on at [969] to [971] to reconcile this conclusion with the following statement of Arden LJ in *Langham v Veltema* at [51], "which might on the face of it suggest that the further information was not to be attributed to the officer until it was produced":

> ".. in circumstances such as this the valuation might not in fact support the figure in the taxpayer's tax return. In that event, in my judgment on the true construction of s 29(6)(d)(i) the inspector is not to have attributed to him the further information that he would actually have obtained if he had asked for that valuation, unless and until it is produced to him."

225. The FTT's method of achieving this reconciliation was set out at [970] and [971]:

> "970. This can we think be understood on the basis that if the taxpayer had said the value was a particular amount the officer could not be expected to infer that the valuation report might not support that amount until seeing it. As explained by the UT in *Charlton* at [80] its relevance to an insufficiency of tax could not be inferred unless there was some other information in the return which suggested that there was an insufficiency. (There is no reason to restrict this analysis to disclosures in the return. The principle would apply to all information disclosed in (a) to (c)).
>
> 971. We do not therefore understand the statement to be setting out any wider proposition that information in documents cannot be inferred unless and until the information is produced. Indeed if such a proposition were correct it would sit oddly with the idea that information can be attributed when only its existence and relevance are inferred and not the content of the information itself."

226. Having decided that the hypothetical officer would have inferred that 2006 and 2007 accounts existed which showed SJG's profit figures for those years and notes concerning Stephen and Anne Fisher's shareholdings in it, the FTT decided (at [980]) that those accounts would be "attributed to the information to be put before the hypothetical officer"; accordingly it concluded (as summarised at [1000]) the officer would be aware that:

> "(1) The appellants were arguing that the s741 motive defence was applicable to any s739 income.
>
> (2) Stephen Fisher and Anne Fisher continued to be owners of SJG shares (because this is mentioned in year end 2006 accounts and the year end 2007 accounts[12] were attributed to the hypothetical officer on the basis their existence and relevance could reasonably be inferred).
>
> (3) SJG had income in 2006-07 (similarly by attribution of the 2006 and 2007 accounts)."

227. Given this level of awareness, the FTT concluded that the condition in s.29(5) was not satisfied and accordingly the 2006-07 assessments on Stephen and Anne Fisher were invalid.

228. Turning to 2005-06, the FTT acknowledged (at [981]) that the position was made "more complicated" because there was no basis to attribute to the hypothetical officer any awareness of information contained in the SJG accounts for the years ended 31 December 2006 and 2007. The only accounts notionally available to him would have been the accounts for periods up to 31 December 2005 (i.e. covering only three quarters of the tax year 2005-06).

229. Building on its previous analysis, the FTT addressed this additional point as follows:

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[12] In order to make sense of this summary in the light of the previous analysis, we believe that ", which" should be inserted after "2007 accounts" in it.

(1) It decided (at [983]) that the notes in the 2005 accounts "would have been sufficient to mean that the hypothetical officer could reasonably be taken to be aware that Stephen and Anne Fisher had shareholdings in SJG for at least some part of 2005-06".

(2) It considered that the availability of profit figures for SJG (of £3,074,198) for a twelve month period which only overlapped with nine months of the 2005-06 tax year was still sufficient to make the hypothetical officer aware of an insufficiency of tax for the tax year 2005-06 (see [989]).

230. In reaching the latter conclusion, the FTT considered it persuasive to consider the converse situation, namely if the accounts had disclosed a significant loss for the first nine months of the tax year, but that loss had been more than cancelled out by significant profits in the last three months of the year. It said this (at [988]):

> "If we were to imagine the position were the reverse so that there were nine months worth of losses, (but it later transpired there was an annual profit giving rise to a tax insufficiency) the corollary of the above approach would be that it would not be clear that there was a loss for the tax year until the possibility that there could thereafter be three months of huge profit reversing the previous losses had been ruled out. HMRC's approach would mean the officer would be taken to be aware of a tax insufficiency and a subsequent discovery assessment to recover loss of tax in respect of the annual profit would be invalid because, despite information that there were nine months of losses, it could not be ruled out that an annual profit could have been made as a result of large profits in the remaining three months. That cannot be a result which is intended by the legislation."

231. In consequence, the FTT found at [999] that the hypothetical officer would have been aware of the following matters for the tax year 2005-06:

> "(1) The appellants were arguing that the s741 motive defence was applicable to any s739 income.
>
> (2) Stephen Fisher and Anne Fisher were owners of SJG shares and had power to enjoy.
>
> (3) SJG had income."

232. Given this level of awareness, the FTT concluded that the condition in s.29(5) was not satisfied and accordingly the 2005-06 assessments on Stephen and Anne Fisher were invalid.

HMRC's arguments

233. HMRC maintain that in reaching its conclusions, the FTT made the following errors (the first two in relation to 2005-06 and the other two in relation to 2006-07):

(1) First, the existence of known profits of SJG for the year ended 31 December 2005 provided no basis for the FTT to conclude that the hypothetical HMRC officer should be fixed with awareness that SJG had income in the tax year 2005-06.

(2) Second, the FTT was wrong to conclude that the hypothetical officer would have been aware that the Appellants were arguing that the motive defence was applicable to any 2005-06 income falling within s.739.

(3) Third, it was wrong to attribute to the hypothetical officer's awareness the contents of the SJG accounts for the years ended 31 December 2006 and 2007.

(4) Fourth, the FTT was wrong to conclude that the hypothetical officer would have been aware that the Appellants were arguing that the motive defence was applicable to any 2006-07 income falling within s.739.

234. Developing these arguments in turn, they argued as follows.

Awareness of income for 2005-06

235. HMRC essentially argued that the existence of profits for the first nine months of the tax year could not give rise to any "awareness" of overall profits for the whole tax year, especially for a business operating on such slim margins as SJG (the operating profit for the year was less than 1% of turnover). They also argued that any income would have to be computed on the basis of UK GAAP whereas SJG's profits had been computed on the basis of Gibraltar GAAP.

Motive defence being raised for 2005-06

236. In the Ernst & Young letter of 25 June 2007 referred to at [218(2)] above, it was certainly the case that the motive defence was being raised, but this was in the context of enquiries about earlier years and there was no suggestion in the letter that the motive defence was being relied on for 2005-06 (or indeed 2006-07). On the contrary, neither Stephen nor Anne Fisher had ticked the box in their 2005-06 returns to indicate that there was any potential s.739 income, meaning that there was no question of needing to rely on a s.741 motive defence. It was a necessary part of Anne and Stephen Fisher's case that the hypothetical officer should infer that their returns were simply incorrect on this point. Any liability to tax under s.739 needed to be considered on a year by year basis by reference to the relevant facts each year, and failure to tick the "s.739 box" was just as easily explicable by reason of there being no relevant income or no power to enjoy. The fact that the box had, in contrast, been ticked in previous years strengthened HMRC's case, rather than requiring the hypothetical officer to infer that a mistake had been made in the 2005-06 returns. Far from "clearly alerting" HMRC to any insufficiency, the 2005-06 returns indicated unequivocally that there was no s.739 issue.

Attribution of awareness of contents of SJG accounts for 2006 and 2007

237. HMRC argued that there was no basis in the correspondence referred to by the FTT for inferring the existence and contents of the 2006 and 2007 accounts of SJG. The relevant letter from the Appellants' representative was dated 20 March 2008 in response to HMRC's request for "SJG's non-consolidated accounts for all years after 2002", and the passage in it cited by the FTT (at [965]) was as follows:

> "The group accounts in your possession contain the amount of the Gibraltar company alone on the last 2 pages of the accounts. These pages are entitled "Detailed Profit & Loss – Company only.""

238. By the time of that letter (20 March 2008) or the closing of the 2006-07 enquiry window (31 January 2009), the SJG accounts for 2007 did not even exist (the copies in the FTT's bundle were dated 19 March 2010), so any suggestion that the existence of those accounts should have been inferred, let alone their contents, was misconceived.

239. Further, in respect of the 2006-07 year, the letter dated 20 March 2008 did not form part of the "s.29(6)(a) to (c) documents": it was not part of a tax return or claim (or accompanying documents) for 2006-07, nor was it produced or furnished by the taxpayers for the purposes of any enquiry into the 2006-07 year (there was no such enquiry). Nor was it part of the communications "for the purposes of" enquiries into the previous two tax years (see s.29(7)(a)(i)), as enquiries into those years "would not have involved requests for the 2006 and 2007 SJG accounts".

240. Finally, the FTT appeared to have inferred the relevance of the 2006 and 2007 accounts simply on the basis that they might disclose an insufficiency. This fell into "the error identified in *Charlton* of identifying a "general inference of something that might or might not shed light upon the taxpayer's affairs." There was nothing here equivalent to the insertion in *Charlton* of

a scheme reference number in a return (leading to a reasonable inference as to the existence and relevance of the AAG1 which would provide an explanation of the scheme used).

241. In summary, the FTT had effectively ignored the statement of general principle set out in *Charlton* at [79]:

> "the balance provided by s.29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s.29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s.29 when applying the test of reasonableness."

242. As a supplemental argument, it was submitted that "to the extent that *Charlton* is authority for the proposition that the *content* of information could be attributed to the hypothetical inspector on the basis of awareness of its existence and relevance, it was wrongly decided". It would be an "unacceptable consequence of this construction that even where a real HMRC inspector requests relevant information from a taxpayer, and that information is not provided, the hypothetical inspector is still deemed to be aware of that information where he is aware of its existence and relevance."

Motive defence being raised for 2006-07

243. The arguments here were essentially the same as for 2005-06 (see [236] above). The only material difference was that Stephen Fisher had ticked the box indicating s.739 income, but it was clear from the explanation given in the white space on his return that this disclosure related purely to an entirely separate matter and not to income of SJG.

Discussion

Introduction

244. The relevant line of authority here starts with *Veltema*. In that case, there turned out to be an insufficiency in the taxpayer's self-assessment to income tax because the value ascribed to a house which was transferred to him (and supported by a professional valuation) was subsequently found to have been too low. The Court of Appeal essentially resolved two questions. First, they confirmed that awareness or an inference of an actual insufficiency (though not necessarily its precise extent) was needed before HMRC would be shut out from making a discovery assessment – awareness or inference of circumstances suggesting a possible insufficiency was not enough. Second, they confirmed that s.29(6) provides an exhaustive list of the "information made available to an officer of the Board" for these purposes. They did not examine in detail the effect of s.29(6)(d)(i), though Chadwick LJ did say this at [47]:

> "The information contained in the return delivered on 30 July 1998 was that an asset had been transferred to the taxpayer and received by him as a benefit from his employment which was chargeable to tax. Further, it appeared from the return that the value placed upon the asset was £100,000. It could, I think, reasonably be expected that the inspector responsible for the taxpayer's affairs would infer, from that information contained in the return, that other relevant information existed. In particular, it could reasonably be expected that the inspector would infer that the value of £100,000 placed on the asset was supported by a valuation, written or oral. But he could not reasonably be expected to infer that the valuation, if it existed, would disclose a value other than £100,000. To put the point another way, the inspector could reasonably be expected to infer that information as to the value of the asset existed; but he could not reasonably be expected to infer that information as to a value in excess of £100,000 existed."

245. In other words, when considering what the “information” was whose “existence and relevance” could “reasonably be expected to be inferred” from the material actually supplied, Chadwick LJ clearly focused not on the content of the valuation itself but on the question of whether it disclosed an insufficiency of tax. Arden LJ went further, in saying this at [51][13]:

> “I agree with Chadwick LJ, for the reasons he gives, that the inspector could not be reasonably be expected to be aware that the valuation if it existed would disclose a valuation other than £100,000 or that it did not support that figure. However Chadwick LJ additionally expresses the view that the inspector could reasonably be expected to be aware of what he would have discovered if he had called for the information as to the value of the asset. On the facts of this case, the attribution of that knowledge does not produce any different results for the reasons that Chadwick LJ then gives. However this formulation is different from that set out in the first sentence of this paragraph. As I see it, section 29(6)(d)(i) does not attribute to the inspector information which is not reasonably to be inferred from information within s 29(6)(a) to (c). The matters set out in those paragraphs are all categories of information actually supplied by the taxpayer. The valuation was not so produced. Moreover, in circumstances such as this the valuation might not in fact support the figure in the taxpayer's tax return. In that event, in my judgment on the true construction of section 29(6)(d)(i) the inspector is not to have attributed to him the further information that he would actually have obtained if he had asked for that valuation, unless and until it is produced to him.”

246. In *Veltema,* the point was somewhat academic, as it was clear that the actual valuation whose existence and relevance could have been inferred would not, if supplied, have shown the existence of an insufficiency; it would have supported the figure inserted into the taxpayer’s return (subject to the immaterial point that the written valuation had been in a slightly higher figure and had been updated verbally to the figure inserted in the return). The pronouncements of the Court of Appeal must be read with that fact in mind.

247. The general principle behind the self-assessment regime, and the consequential underlying purpose of the discovery provisions was summarised by Auld LJ in these terms at [31] – [32]:

> “31.… It seems to me that its *[i.e. the self-assessment scheme’s]* purpose is to simplify and bring about early finality of assessment to tax, based on an assumption of an honest and accurate return and accompanying documentation by the taxpayer. This is subject to the exercise by the Inland Revenue of: 1) whatever routine or random checks that it sees fit to make as a form of "light monitoring" of self-assessment returns; 2) its statutory power of enquiry under section 9A where it considers it appropriate; and 3) in the absence of fraud or negligent conduct, subject to further scrutiny thereafter only in the event of newly discovered information and/or reasonably drawn inferences therefrom that the self-assessment was insufficient resulting in loss of tax.
>
> 32. If, as here, the taxpayer has made an inaccurate self-assessment, but without any fraud or negligence on his part, it seems to me that it would frustrate the scheme's aims of simplicity and early finality of assessment to tax, to interpret section 29(5) so as to introduce an obligation on tax inspectors to conduct an intermediate and possibly time consuming scrutiny, whether or not in the form of an enquiry under section 9A, of self-assessment returns

[13] This extract includes, and sets in context, the shorter extract from Arden LJ’s judgment given by the FTT (see [224] above).

> when they do not disclose insufficiency, but only circumstances further investigation of which might or might not show it….
>
> 33. More particularly, it is plain from the wording of the statutory test in section 29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of "the situation" mentioned in section 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency…"

248. In *Charlton*, the Upper Tribunal focused more specifically on the question of what information would be deemed to be available to the inspector under s.29(6)(d)(i) by inference from the material actually supplied. The facts in that case were quite different. The taxpayer had used a tax avoidance scheme which had been notified to HMRC under the DOTAS rules, and he had included a note of the scheme reference number on his return. There was a question as to whether the hypothetical inspector should have attributed to him knowledge of the contents of the form AAG1 (filed by the promoter with HMRC, explaining how the scheme was intended to work). The Upper Tribunal decided that the hypothetical officer would have been aware of the existence and relevance of that form. After considering *Veltema*, at [75] it specifically rejected the suggestion that it was authority for the proposition that "any document that could reasonably be assumed to exist [is] effectively to be treated as if it were before the hypothetical officer". It then went on to say this at [78] to [79]:

> "78. The correct construction of s 29(6)(d)(i) is that it is not necessary that the hypothetical officer should be able to infer the information; an inference of the existence and relevance of the information is all that is necessary. However, the apparent breadth of the provision is cut down by the need, firstly, for any inference to be reasonably drawn; secondly that the inference of relevance has to be related to the insufficiency of tax, and cannot be a general inference of something that might, or might not, shed light upon the taxpayer's affairs; and thirdly, the inference can be drawn only from the return etc provided by the taxpayer.
>
> 79. As we have described, the balance provided by s 29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s 29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s 29 when applying the test of reasonableness."

249. The Tribunal's comments on that point were not essential to its reasoning, however, as it made clear at [93] that even without the form AAG1 the hypothetical inspector should have been aware of the insufficiency.

250. In *Sanderson* (another case involving a tax avoidance scheme), much of the argument was around the slightly different issue of the relationship between the complexity and uncertainty of the relevant charging provisions and the degree of awareness to be imputed to the hypothetical officer – what Patten LJ described at [18] as "the level of awareness that the relevant information needs to create in order for the condition to bar the right to raise a section 29(1) assessment". The Court of Appeal did however specifically endorse the passages from [78] and [79] of *Charlton* set out above.

251. The underlying issue here is whether a hypothetical HMRC officer could (as the FTT found) have been reasonably expected, on the basis of the information made available to

him/her before the enquiry window closed, to be aware that the self-assessments of Stephen and Anne Fisher for 2005-06 and 2006-07 were or had become insufficient.

252. The "insufficiency" we are here concerned with is a liability to income tax under s.739. For such a liability to arise in respect of any particular tax year, a taxpayer must make a transfer of assets (with or without associated operations) by virtue or in consequence of which the taxpayer has, during that tax year, the immediate or future power to enjoy income of a non-resident person.

253. Therefore, before HMRC would be entitled to make an assessment, it must be shown that the hypothetical inspector did not (at the relevant date) have imputed awareness of one or both of the elements of a s.739 liability for the particular year, namely (i) a transfer of assets (with or without associated operations), by virtue or in consequence of which (ii) the taxpayer had power (forthwith or in the future) to enjoy income of a non-resident person. Clearly the second element itself requires both the existence of income for the non-resident person and the taxpayer's power to enjoy that income (forthwith or in the future), so if it can be established that the hypothetical inspector did not have imputed awareness of either the existence of the income or the power to enjoy, then there would be no bar to the making of an assessment.

254. The imputed awareness of the hypothetical inspector must be tested as at 31 January 2008 (in relation to 2005-06) and 31 January 2009 (in relation to 2006-07).

255. The list of information which is to be taken as being "on the desk" of the hypothetical officer, for the purposes of establishing his or her state of awareness is set out, exhaustively, in s.29(6) and (7).

256. There were no relevant "claims" under s.29(6)(b), no finding that any relevant "accounts, statements or documents" accompanied the returns from 2002-03 up to 2006-07, no enquiry into the 2005-06 or 2006-07 returns and no challenge to the FTT's finding (at [974]) that there was no relevant information whose existence and relevance were "notified in writing by the taxpayer to an officer of the board". For present purposes, therefore, the "information" on the desk of the hypothetical officer in respect of each of 2005-06 and 2006-07 was (a) that contained in the relevant return (or the returns for the previous two tax years), (b) that contained in any documents, accounts or particulars which had been "produced or furnished" by the taxpayers, for the purposes of any enquiry into the previous two years' returns, to the enquiring officer, and (c) information "the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above[14] could reasonably be expected to be inferred by an officer of the Board" from information falling within (a) or (b) above.

Finding on s.741 motive defence and its implications

257. As set out above, HMRC have taken issue with the FTT's finding that the hypothetical officer would have been aware, in relation to both years and both taxpayers, that "the Appellants were arguing that the s.741 motive defence was applicable to any s.739 income."

258. That finding appears to be based on the content of the Ernst & Young letter dated 25 June 2007: the FTT records at [938] that the letter "goes on to recount various HMRC arguments and to make various arguments on applicability of the s.741 defence."

259. It is unclear to us precisely what the FTT's finding is meant to contribute to its overall decision, given the FTT's own statement at [923] that "[o]ur focus therefore will be on whether the particular 's 29(6) information' would make our hypothetical officer aware of Stephen Fisher's and Anne Fisher's power to enjoy, and of SJG's profits for the relevant years." All we can infer is that by recording that the applicability of the motive defence was in issue, the

[14] i.e. the self-assessments of Stephen and Anne Fisher being or having become insufficient.

FTT was saying that it accepted HMRC were being told there was potential uncharged s.739 income (otherwise any reference to s.741 would be irrelevant).

260. However, in the same way that the Ernst & Young letter contained nothing "which would throw light on what the position was in relation to who the shareholders of SJG were in 2005-06 and 2006-07 and whether SJG was making profits" in the same years (see [939]), it seems to us that whatever the letter may have said about the applicability in earlier years of the motive defence would have been equally irrelevant to the question of whether s.739 income had arisen in 2005-06 or 2006-07 (as the FTT itself appears to have accepted at [978]).

261. We therefore agree with HMRC that the omission of any reference to relevant s.739 income (i.e. disregarding the reference to potential trust income) in both Stephen and Anne Fisher's returns clearly negates any suggestion that the hypothetical officer should be taken to have been aware of the existence of such income by reason of the continuing dispute about the applicability of the s.741 motive defence referred to in the Ernst & Young letter of 25 June 2007.

Findings on overseas income and power to enjoy

262. The main area of dispute between the parties was in respect of the extent to which awareness of both overseas income and power to enjoy should be imputed to the hypothetical officer by reference to the 2005, 2006 and 2007 accounts of SJG.

263. In relation to 2005-06, it is agreed that the SJG accounts for the year ended 31 December 2005 (but not 2006) would be included in the information before the hypothetical inspector. The question is whether the hypothetical inspector could reasonably be expected to have inferred from those accounts the information that (a) SJG had income for the tax year 2005-06 and (b) Stephen and Anne Fisher had power to enjoy that income. The FTT found that the hypothetical inspector could reasonably be expected to have inferred that they had power to enjoy, and HMRC have not challenged that finding. The question therefore is whether the hypothetical inspector could reasonably be expected to have inferred that SJG had income for the tax year 2005-06.

264. As summarised above, HMRC argued on essentially two grounds. First, they argued that the existence of profits for a twelve month period which only overlapped with the tax year by approximately nine months did not lead to a conclusion that there was "income" for the tax year. Their main objection was that any profit accruing during the first nine months of the tax year could easily be cancelled out by losses in the last three months, especially given that SJG was operating on wafer thin margins. Their second objection was that because SJG's accounts were prepared in compliance with Gibraltar GAAP rather than UK GAAP it was not possible to infer any amount of income calculated for UK tax purposes from those accounts.

265. The Appellants argued before us (though the point had not seemingly been raised before the FTT) that if the normal UK tax rules were followed, the profits of a trade for the purposes of income tax for the tax year 2005-06 would normally be calculated by reference to a basis period of 12 months ending with the accounting date of the trade in that tax year (in this case, 31 December 2005) (see s.198 Income Tax (Trading and Other Income) Act 2005). Thus, if seeking to identify how much "income" the taxpayers had power to enjoy in relation to the tax year 2005-06, it should be done by reference to the profit shown in the 31 December 2005 accounts. If that was wrong, then the FTT had been quite right to find that the accounting information up to 31 December 2005 was more than adequate to justify an inference that there was some income of SJG in 2005-06.

266. As to the point about the GAAP under which SJG's accounts had been drawn up, the Appellants argued this was misconceived. Whatever the basis under which the accounts were

drawn up, they showed significant profit and that was more than enough to alert the hypothetical inspector that there were profits for the year and, therefore, income in some amount which Stephen and Anne Fisher had power to enjoy.

267. As to the point about GAAP, we can dispose of this shortly. We agree with the Appellants. If the relevant "income" is trading profit and accounts are available which demonstrate the existence of trading profit, then the fact that those accounts may have been drawn up on the basis of different GAAP would not in our view affect the fact that the officer would be aware, by reference to those accounts, of the existence of income. There may be subsequent arguments about quantification of the relevant income, but we consider the comments of Moses LJ in *Lansdowne* at [69] and [70] to be relevant here:

> "… awareness of an insufficiency does not require resolution of any potential dispute… Awareness is a matter of perception and of understanding, not of conclusion."

268. As to the question whether the existence of "income" for the tax year 2005-06 ought reasonably to have been inferred by the hypothetical officer, we address first the specific "basis year" point raised by the Appellants before us.

269. It is common ground here that the "income" under consideration is the profit of SJG. As Lord Wilberforce observed in *Chetwode* at 253E, where one is seeking to ascertain the profits of a trade, "it is necessary to strike a balance, in respect of a period, before any taxable 'income' arises". That case made it clear that the focus should be on the taxable income of the relevant company. Until the company reaches the end of its accounting period, there is no balance struck and therefore no profit that can be attributed to it. In the present case, HMRC's assessments were based on a time apportioned allocation of SJG's profits for the two accounting years ended 31 December 2005 and 2006, following this approach. We can see no other basis for proceeding, and certainly no warrant for applying income tax principles to calculate (and allocate amongst the Appellants) a notional amount of income to SJG for the tax year 2005-06 calculated by reference to a basis period which had no application or relevance to it.

270. On this basis, of course, the hypothetical officer could not have established the existence of income without having the 31 December 2006 accounts of SJG available to him or her. Whatever time apportioned part of the 31 December 2005 profit might have been allocated, there would have been no way of knowing whether there would be a loss in 2006, a time-apportioned part of which could have eliminated the time-apportioned part of the 2005 profits.

271. The Appellants' main argument, both before the FTT and before us, was that "9 months of substantial profit was more than sufficient to enable the inspector to reach a conclusion justifying the making of a discovery assessment"; they referred to the following passage from the unanimous Court of Appeal decision in *Sanderson* at [23]:

> "The decision in *Lansdowne* confirmed that the officer was not required to resolve (or even be able to assess) every question of law (particularly in complex cases) but that where, as Moses LJ expressed it, the points were not complex or difficult he was required to apply his knowledge of the law to the facts disclosed and to form a view as to whether an insufficiency existed. That is a matter of judgment rather than the application of any particular standard of proof."

272. We do not consider this passage (including the surrounding text) provides any support for the Appellants' argument. It is, as Patten LJ made clear, concerned primarily with the argument about the extent to which a hypothetical officer ought to be expected to resolve issues of law. That is not this case. As the FTT decision illustrates, there are numerous difficult

issues of law in the case, but the question of whether income arose to SJG over the relevant period is not one of them; it is a question of fact (subject only to the "basis period" argument briefly and belatedly raised by the Appellants, which we have discounted above).

273. The Appellants argue that the hypothetical officer would be expected to extrapolate and infer the existence of a whole year's (apportioned) profit by reference to the (apportioned) profit made over the first nine months of the year. That cannot be a sustainable position. A company's profit over its accounting period can be dramatically affected by a great many issues apart from the "normal" uncertainties of its trading performance. Particularly for privately owned companies, decisions about Directors' remuneration, pension contributions, provision for contingent liabilities, inter-company transactions and numerous other matters render it impossible to predict with any certainty part-way through an accounting period whether a company will finally be found to have made a profit at all at the end of its accounting period, irrespective of the strength of its underlying trade. We therefore reject the Appellant's submission that the hypothetical HMRC officer could reasonably have been expected, prior to sight of the December 2006 accounts, to have been aware that SJG would have had income for the tax year 2005-06.

274. As to 2006-7, there is a different issue, namely whether knowledge of the contents of the 31 December 2006 and 2007 accounts should be imputed to the hypothetical officer. The FTT found that they could, based on the proposition that the existence of those accounts and their relevance to the question of whether there was an insufficiency would reasonably have been inferred by him/her on the basis set out at [223] to [225] above.

275. The difficulty with the FTT's approach to resolving this conflict is that it apparently ignores the purpose of the provisions identified in *Veltema* which the FTT itself (at [954]) acknowledged, as set out at [247] above. In our view it also pays insufficient regard to the comments of the Upper Tribunal in *Charlton* at [79] (set out at [248] above), endorsed by the Court of Appeal in *Sanderson*.

276. It is true that in *Veltema* at [48] Chadwick LJ expressed the view that the hypothetical inspector in that case could "reasonably have been expected to be aware of what he would have discovered if he had called for the information as to the value of the asset which then existed" (though this sits somewhat uneasily with his earlier statement at [47] that the hypothetical inspector "could not reasonably be expected to infer that the valuation, if it existed, would disclose a value other than" the figure which formed the basis of the taxpayer's return or, "to put it another way, the inspector could reasonably be expected to infer that information as to the value of the asset existed; but he could not reasonably be expected to infer that information as to a value in excess of £100,000 existed"). However, Auld LJ was clear that what the statute required was for the hypothetical inspector to be aware, by inference from the material before him, of "an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency" (see [33]); and Arden LJ was even clearer (in the passage set out at [245] above) that she thought Chadwick LJ had gone too far in the first passage quoted at the start of this paragraph, effectively saying it addressed the wrong question.

277. We regard the present case as another example of the situation Arden LJ was referring to. The content of the 2006 and 2007 accounts of SJG, when eventually produced, did not support the Appellants' tax returns. Officer Van Tinteren suspected that might be the case, and repeatedly asked for copies to be provided to her. They were not provided until after the enquiry window closed. Given the purpose of the regime identified above, it would be odd indeed if a real inspector could ask repeatedly for documents to be provided (as was the case here), the taxpayer could refuse or simply fail to provide them but the hypothetical inspector

would nonetheless have imputed to him or her full knowledge of the contents of those documents.

278. We therefore consider the FTT erred in holding (at [980]) that "the accounts containing the SJG income, and notes as to controlling shareholding for year end 2006 and 2007 would be attributed to the information to be put before the hypothetical officer" in respect of the tax year 2006-07.

279. Apart from the general point discussed above about the scope of the information to be imputed, there is also the fact (not seemingly touched on in the FTT decision) that the 31 December 2007 accounts of SJG were dated 19 March 2010, a date falling after the closing of the enquiry window for 2006-07; it is difficult to see how it can be justifiable to impute knowledge to someone of the contents of a document that does not even exist.

280. Irrespective of this last point, it follows that HMRC's appeal in relation to the validity of the discovery assessments notified to Stephen Fisher and Anne Fisher in relation to 2005-06 and 2006-07 should be allowed. Accordingly if we are wrong in relation to the other questions before us, those assessments would be upheld in principle.

DISPOSITION

281. In summary, therefore, we consider that the TOAA code was not engaged at all in this case, but that if it had been, the motive defence was available to the Appellants. It follows from this that the appeals are ALLOWED.

282. If we are wrong about this, we agree with the FTT that Anne Fisher is entitled to rely upon Article 49 TFEU to require the legislation to be given a conforming interpretation which would enable her to avail herself of the motive defence. However unlike the FTT we consider that her husband Stephen Fisher is also entitled to rely upon the adverse impact that any application of the TOAA code to him would have on the exercise of Anne Fisher's freedom of establishment, so that he too is entitled to benefit from the conforming interpretation. Peter Fisher, on the other hand, cannot rely on Article 49 or Article 63 TFEU directly or indirectly, in consequence of which he cannot benefit from the conforming interpretation. We would therefore disallow HMRC's appeal in respect of Anne Fisher, allow Stephen Fisher's appeal and disallow Peter Fisher's appeal on this basis.

283. If we were wrong to allow the appeals on the above basis, then we would have allowed HMRC's cross-appeal on the discovery issue in principle.

284. Any application for an order for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and, unless both parties agree that the costs should be the subject of detailed assessment, be accompanied by a schedule of the costs claimed sufficient to allow summary assessment of such costs as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

(Signed on original)

THE HONOURABLE MRS JUSTICE ANDREWS DBE
JUDGE KEVIN POOLE

Release date: 4 March 2020