TRANSFER OF ASSETS ABROAD PROVISIONS - *FISHER V IRC* - AN IMPORTANT RECENT DECISION

Robert Venables Q.C.[1]

1 Introduction

1.1 The Litigation

The scope of this article is part of the decision of the First Tier Tribunal in *Fisher & Ors v Revenue & Customs* [2014] UKFTT 804 (TC) (given by Judge Swami Raghavan and Mrs Shahwar Sadeque), to which I shall refer as "the Decision".[2] While the hearing had been concluded on February 6th 2013, the Decision was not given until 14 August 2014, no doubt, on account of the complexity, importance and difficulty of many of the issues. It extends to 1045 paragraphs. It covers, broadly:

(a) "domestic" aspects of the United Kingdom Transfer of Assets Abroad Provisions

(b) the effect of EU law on the Transfer of Assets Abroad Provisions and

(c) the validity of certain "discovery" assessments.

While the facts were complex, in essence, the Fisher family, father, mother, son and daughter, owned a United Kingdom incorporated and resident company

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2 While Stephen Brandon QC, Rory Mullan, Harriet Brown and Oliver Marre, barristers practising in the same Chambers as myself, appeared in the case, I personally was not involved. Hence, I believe I can write this article dispassionately.

("SJA") which carried on business in the United Kingdom as a bookmaker. As such, it was liable to account for betting duty, based on the amount of each bet, although the economic burden of the duty was, of course, passed on to its clients, the "punters".

Parliament in its wisdom had decided that betting duty was not exigible if the bookmaker was not resident or carrying on business in the United Kingdom, even if the punter was resident here. It had expressly enacted, however, that such bookmakers would commit a criminal offence if they engaged in certain forms of advertising in the United Kingdom. One might have thought - I did, and I still do!- that if such a bookmaker had ensured they complied with the conditions for non-taxability and ensured they did not breach the criminal law, then one could not begin to argue that their conduct in carrying on business abroad constituted "tax avoidance" as opposed to, at the most, tax mitigation. Certainly, their conduct could not be characterised as "a course of action designed to conflict with or defeat the evident intention of Parliament" - the words of Lord Nolan in giving the lead speech in *Commissioners of Inland Revenue v. Willoughby* (1997) 70 TC 57; [1997] 1 WLR 1071; [1997] 4 All ER 65; [1997] STC 995, in which the House of Lords unanimously agreed with a unanimous Court of Appeal that Professor Willoughby had not had "the purpose of avoiding liability to taxation" within the meaning of the Transfer of Assets Abroad Provisions.

By 1999, competitors of SJA began operating as bookmakers outside the United Kingdom, taking bets from United Kingdom punters. The Fishers, after vainly lobbying to try to secure a reduction in United Kingdom betting duty, decided, understandably, they had no choice but to follow suite or go out of business. They took advice from two eminent Silks, David Oliver Q.C. and Kevin Prosser Q.C. to ensure they kept the windy side of the law.[3] They decided they needed to transfer the relevant part of the business of SJA to a company incorporated, resident and carrying on business only outside the United Kingdom. SJG was thus incorporated in Gibraltar where it obtained a licence to carrying on its bookmaking activities. The shares in SJG were held by members of the Fisher family, although not in the same proportions as their holdings in SJA. On February 29th 2000, the relevant part of the business of SJA was duly transferred to SJG for a market value consideration.

What were the tax effects of the transfer, ignoring the Transfer of Assets Abroad Provisions? Clearly, no betting duty would be exigible. That is what Parliament had expressly laid down in the Betting and Gaming Duty Act 1981.

3 It is ironic that, so far as one can tell from the Decision, Kevin Prosser Q.C., in respect of whose advice the Appellants had waived privilege, was not instructed to advise on the Transfer of Assets Abroad Provisions. Nor did he think it appropriate to volunteer such advice. It would be fascinating to know what he would have advised.

No less income tax would be payable. Indeed, if profits were extracted by way of dividend, more would be payable, as the dividend, being from a non-UK resident company, would not benefit from a tax credit. (While there was a suggestion that there may have been an income tax avoidance purpose to the sale, that was rightly negatived by the First Tier Tribunal.)

Now it is true that SJA would pay less United Kingdom corporation tax on its profits than SJA would. Yet the First Tier Tribunal expressly negatived the sale being made for the purpose of avoiding any liability to corporation tax.

HMRC nevertheless assessed the United Kingdom ordinarily resident members of the Fisher family under the Transfer of Assets Abroad Provisions on the basis that, in effect, the income of SJG was to be treated as theirs for income tax purposes, even though they would have not been liable to income tax even if there had been no transfer! The appeals were against those assessments.

1.2 The Transfer of Assets Abroad Provisions

The Transfer of Assets Abroad Provisions are aimed at counteracting tax-avoidance by means of the "transfer" of "assets" "abroad". A fuller, but by no means exhaustive, account of them can be found in the thirty pages of Chapter 22B of my *Taxation of Trusts 2010* (published by Key haven Publications Ltd).

The Transfer of Assets Abroad Provisions were first introduced by Finance Act 1936. They were re-enacted in Income Tax Act 1952, Taxes Act 1970, and Income and Corporation Taxes Act 1988 and are now to be found in Income Tax Act 2007 Part 13 (Tax Avoidance) Chapter 2 (Transfer of Assets Abroad). They have been amended very many times over the years, so that great care needs to be taken in considering reported cases. Further, in *Vestey v Commissioners of Inland Revenue* (1979) 54 TC 503; [1980] AC 1148; [1980] STC 10; the House of Lords decided that one of its previous decisions, *Congreve v Commissioners of Inland Revenue* (1948) 30 TC 163, had been wrongly decided. Hence, it is dangerous to rely on decisions which themselves relied on *Congreve*.

I doubt whether any other anti-avoidance provisions have given rise to so many House of Lords decisions. Yet in recent years, there has been no decision of the House of Lords (or the Supreme Court) since I argued *R v Dimsey* [2001] UKHL 46 [2001]. Cross-appeals to the Upper Tribunal have already been entered as respects the Decision. It is not impossible that this is a case which may go higher still.

1.3 Scope of this Article

This article is limited to the first group of issues.[4] They to some extent overlap. They are:

> In order for the Transfer of Assets Abroad Provisions to apply, does income tax in fact need to have been avoided?
>
> Which individuals, if any, can be treated as a "transferor" where the actual transfer is made by a company?
>
> What is the scope of the motive defence?

There was also an issue as to whether income arising from a trade of SJG which was not transferred but commenced subsequently could in any event be caught. While that issue to some extent turned on the facts of the case, it did raise an important legal point. I shall thus offer some comments on it.

As will be seen, none of these issues is simple and some are compound.

I shall in this article cite the provisions of Income and Corporation Taxes Act 1988, as those are the ones contained in the Decision.

2. Does Income Tax Need to Have Been Avoided?

2.1 Legislative and Judicial History in Outline

Given that section 739 is headed "Prevention of avoidance of income tax" and that section 739(1) provides:

> "(1) … 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"

One might be forgiven for thinking that it would be a necessary condition for section 739 to apply that the person in question had attempted to avoid income tax (by means of transfer of assets by virtue or in consequence of which, either alone

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4 It should not be forgotten that the effect of EU law on the Transfer of Assets Abroad Provisions is not to be underestimated. That, however, is beyond the scope of what is already a necessarily long article.

or in conjunction with associated operations, income became payable to persons resident or domiciled outside the United Kingdom).[5]

That was a very useful test as it meant that the anti-avoidance provisions were by and large no more than a proportional response and simply counteracted the avoidance or attempted avoidance.

Matters were thrown into huge confusion, however, in 1997 by

(a) an amendment made to the Transfer of Assets Abroad Provisions by Finance Act 1997 and

(b) the decision of the House of Lords in *IRC v McGuckian*.[6]

Fisher is the first case in which the effect of those events has been addressed.

2.2 Finance Act 1997 Amendments

First, Finance Act 1997 section 81 inserted a new subsection (1A) into section 739 as follows:

> "(1A) Nothing in subsection (1) above shall be taken to imply that the provisions of subsections (2) and (3) apply only if-
>
> (a) …
>
> (b) the avoiding of liability to income tax is the purpose, or one of the purposes, for which the transfer was effected."

So if it was no longer a condition precedent to section 739 applying that the avoiding of liability to income tax was at least one of the purposes for which the transfer was effected, what was the new filter to be?

In Fisher, each of the parties contended for a extreme view. The Appellants argued that, although the avoiding of liability to income tax need not be one of the *purposes* for which the transfer was effected, still, it was necessary that income tax had *in fact* been avoided.

At the opposite end of the spectrum was the argument for HMRC which appears to have been - it is not articulated in the Decision - that section 739(1) was in effect

5 Prior to the decision of the House of Lords in *Vestey v Commissioners of Inland Revenue* in 1979, it had been considered that the "transferor", if not the taxpayer, must have had an income tax avoidance motive. It had been established in *Vestey* that the only person who could be caught by the predecessor of section 739 was a transferor who had that motive.

6 (1997) 69 TC 1.

redundant. It might, at the most, apparently tell us something about why Parliament had enacted the provisions but it was not in any way to control or limit the meaning of what followed. In other words, it was a potentially misleading waste of legislative space. Thus, the provisions would apply where there were present neither the purpose nor the effect of the avoidance by any individual ordinarily resident in the United Kingdom of any liability to income tax. The only limitation on the application of section 739 was contained in the motive defence, in section 741, but, in the state of the judicial authorities, it was not enough for the taxpayer to show that he had neither intended to avoid income tax nor indeed had any income tax been in fact avoided.

The Appellants' contention again had merit that the anti-avoidance provisions would be by and large no more than a proportional response and simply counteract actual avoidance of income tax, whether conscious or not.

The First Tier Tribunal rejected the Appellants' contention. In my view, a variant version of their contention could be formulated which would meet the objections of the First Tier Tribunal to their one-end-the-spectrum argument and on that view the Appellants ought to be successful in resisting the assessments. The alternative formulation would, of course, satisfy the requirement that it is no longer necessary that:

> "(b) the avoiding of liability to income tax is the purpose, or one of the purposes, for which the transfer was effected."

2.3 *IRC v McGuckian*

McGuckian concerned a complicated scheme executed in 1976 to avoid income tax on the payment of a dividend. Steps had been taken to ensure that entitlement to the dividend was vested in an offshore company as trustee of a trust under which the spouse of the taxpayer had an interest in possession. In 1978 the offshore company sold the right to the dividend, the taxpayer claiming that the proceeds were capital. The strategy worked on the basis that the decision of the Court of Appeal in *Paget v IRC,* given in early 1938, was still good law. While it technically was, the tax adviser had overlooked that the strategy in question had been blocked - by Finance Act 1938! By the time of the events with which *McGuckian* were concerned, it was to be found in section 470 of Income and Corporation Taxes Act 1970.

The taxpayer was assessed under the version of Transfer of Assets Abroad Provisions contained in Income and Corporation Taxes Act 1970 (in particular, section 470). This was perhaps an instance of a hard case (from HMRC's point of view) making bad law. As Lord Browne-Wilkinson said:

> "As Mr. Nugee[7] frankly conceded, these arguments had no ethical merit. The taxpayers are seeking to avoid liability under s 478 because, they say, they should have paid tax under s 470. The only reason they were not assessed under s 470 was because of the dubious stalling tactics adopted by their agent, Mr. Taylor, which prevented the Crown from learning in time of the existence of the settlement and therefore of the facts necessary to raise a s 470 assessment."

In other words, the defence was "Guilty, but charged with the wrong offence".

The *ratio decidendi* of the case was that *Ramsay* applied so that the trustee was deemed to have received the dividend which was income for income tax purposes. That was considered enough to dispose of the matter. There was no analysis of why. Yet the precise analysis is very important in the current context. The offshore trustee might *for income tax purposes* have received income yet it had *for trust purposes* received capital. Hence, Mrs McGuckian was not entitled to that income so her husband could not be taxed on it in the normal way. However, as the payment swelled the value of the trust fund in which she had an interest in possession, she (and thus her husband) had power to enjoy what was "income" for income tax purposes. Hence, disregarding section 470, assessment under the Transfer of Assets Abroad Provisions was necessary as otherwise income tax would have been avoided.

And what of section 470? Again, once one had applied *Ramsay*, it had no scope of operation and was an irrelevance. In any case, it could operate only to make the receipt income of the offshore trust for income tax purposes, not for trust purposes. Thus, again, assessment under the Transfer of Assets Abroad Provisions was necessary.

No doubt largely because Mr Nugee Q.C. had been briefed only at a very late stage the analysis in the House of Lords was less than complete. Hence, some of their Lordships went on to express the view, strictly *obiter*, that the Transfer of Assets Abroad Provisions could apply even where the potential avoidance of income tax could be defeated by some other anti-avoidance provision (in this case, section 470). To reach that conclusion, they incidentally misconstrued parts of the legislation.

Now if these obiter dicta had indeed represented the law, then I can quite see how the FTT, faced with choice between two extreme propositions, would have felt obliged to reject that of the taxpayer.

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7 The more senior Q.C. for the taxpayer, who had been briefed at a very late stage in the proceedings and who did his very best in most difficult circumstances.

In my view, however, these dicta can also be disposed of first by reliance on the Finance Act 1997 amendments and secondly by adopting a less extreme variant of the taxpayer's proposition.

3. Which Individuals, If Any, Can Be Treated as a Transferor Where the Actual Transfer is Made by a Company?

3.1 Judicial History

3.1.1 *Congreve*

In *Congreve and Congreve v Commissioners of Inland Revenue* (1948) 30 TC 163, the House of Lords decided that it was not the case that, in order for the Transfer of Assets Abroad Provisions to apply, that the avoidance by the taxpayer of liability to tax must be achieved by means of a transfer of assets effected *by that individual*. (The transfer in *Congreve* had been effected by a company.) The House of Lords in *Vestey* held that to be wrong.

It has been said that it is part of the *ratio* of the Congreve, that a person who has procured a company to make a transfer is himself a transferor. In my view, it was not.

That the holding by the House of Lords that *Congreve* had been wrongly decided would involve a reopening of this issue was not lost on their Lordships in *Vestey*. As I stated in my Taxation of Trusts 2010 at 22B.4.6 Who is a Transferor?:

> "The term "Transferor" is not used at all in Income Tax Act 2007. It was used in the pre-Income Tax Act 2007 legislation, but only in the information provisions (e.g. Income and Corporation Tax Act 1988 section 745(3)(a)), where its meaning was obviously thought to be obvious!
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> The term has been in use for many years. It became particularly important after it was established by the House of Lords in *Vestey v Inland Revenue Commissioners* [1980] A.C. 1148 that the only person who could be made chargeable under Income Tax Act 1952 section 412 [Income Tax Act 1952] was an individual who had sought to avoid liability to income tax by means of such transfers of assets as are mentioned in the preamble, which read: "'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 …"

In order to be so taxable, must a person have actually effected the transfer in question? Or is it enough that he has sought to avoid liability to income tax by means of the transfer? In *Vestey v Inland Revenue Commissioners*, the House of Lords decided that beneficiaries of a discretionary settlement trusts who had not been in any way concerned in the making of the settlement were not caught.

It is highly arguable that

(a) Lords Wilberforce and Salmon would confine liability to actual transferors.

(b) Lord Edmund Davies would clearly extend it to persons who procured the transfer

(c) while the language of Viscount Dilhorne and Lord Keith is more ambiguous, it is wide enough to cover persons who procured the transfer (or their spouses), provided they had sought to avoid liability to income tax by means of a Relevant Transfer.

While in *Inland Revenue Commissioners v Pratt* [1982] STC 733, Walton J seems to have assumed that it had been decided in a person who procured a transfer could be a transferor, he upheld a finding of fact that the taxpayers were not such persons. I would question whether that assumption was correctly made."

3.1.2 *Inland Revenue Commissioners v Pratt*

The assessment in *Pratt* related to 1965/66 to 1968/69 and thus turned on Income Tax Act 1952 section 412 (before its amendment by Finance Act 1969). The taxpayers were three directors and shareholders of a United Kingdom incorporated and resident company which had sold land at market value to a Bahamian company. The land was eventually sold to Birmingham City Council for more than ten times the price the United Kingdom company had sold it. The proceeds eventually came into the hands of the foreign trustee of a discretionary settlement under which the taxpayers were, among others, beneficiaries.

There were eight directors of the United Kingdom company (so that the taxpayers were in a minority). The appellants at no time held sufficient shares to control the company, either separately or by virtue of their total holdings.

The Special Commissioners held that the taxpayers had not procured the transfer of assets abroad within the requirements of section 412 and Walton J upheld their decision.

While the decision was based on a version of the Transfer of Assets Abroad Provisions now forty-five years, *Pratt* remains the leading case on multiple transferors, especially on alleged multiple "quasi-transferors", i.e. persons who did not themselves effect the transfer but might be said to have "procured" it.

Walton J first noted the position after *Vestey* was that:

> "… strictly, of course, the question in relation to an individual sought to be taxed under s 412, is, is that person 'such an individual' as is mentioned in sub-ss (1) and (2) of s 412, that is to say, a person who has sought to avoid liability to income tax by means of a transfer of assets, which, being reduced to its simplest element, means that the individual in question must, as the first step, be a transferor of assets."

He then went on to consider some cases of multiple transferors:

> "There may also well be various transfers of assets which are made by two or more persons which give rise to no difficulties. Suppose, for example, A and B hold land as joint legal tenants on trust for themselves beneficially in equal shares, and they then make a transfer of that land abroad. I see no difficulty in regarding, for the purposes of s 412, A as the transferor of his beneficial half share therein, and B as the similar transferor of his beneficial half share."

That is clearly correct as there are two distinct transfers (of beneficial interests), each made by only one person, to there is no difficulty in applying the provisions.

> "The difficulties are increased, however, if in the example given A and B hold the land on trust for themselves as beneficial joint tenants. In substance, there is no difference between that and the example given, yet here we have two transferors of one subject matter."[8]

> "Another example given by counsel for the Crown is the case where (as, for example, in *Re Smith, Public Trustee v Aspinall* [1928] 1 Ch 915) there are a group of discretionary beneficiaries, no one of whom has title to any particular portion of income or capital, but who, between them, are entitled to direct the trustee how to apply the income or fund. It cannot be the case, submits counsel for the Crown, that if a single transferor is caught by s 412, multiple transferors, in the sense just noticed, are not also caught."[9]

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8 He referred to the position of joint tenants later in the judgment. See below.

9 Walton J did not comment on this further. One would imagine that much would in his view have depended on the extent to which one could attribute a percentage of the interest transferred to each beneficiary. In the circumstances of *Re Smith*, that would have been virtually impossible.

Walton J formed the view that

> "here we have it established [by *Congreve* and *Vestey*] that a person who is not a transferor may nevertheless be liable as if he were a transferor, if he 'procured' the transfer. It is convenient to … call such a person a 'quasi transferor'."[10]

So it was on that basis, right or wrong, he went on to consider whether the taxpayers could be assessed under the Transfer of Assets Abroad Provisions.

He noted that counsel for the Crown had submitted that in a company case there might well be more than one quasi-transferor. For example, there might be a two-man company, A and B being the directors and shareholders, or a three-man company, X, Y and Z being similarly situated. The submission was that it would be absurd to think that if all two or three procured the company to effect a transfer, that would not be within the provisions of the section.

The reply of Walton J was:

> "What the Special Commissioners had to decide on this topic was, quite simply, notwithstanding that the transfer was a transfer made by [the United Kingdom company] itself, *was the reality of the matter that somebody else was the real transferor*? To answer that question, nobody has so far produced a better suggestion than that of 'procurement'. It may not be completely apt, but it is far nearer an apt definition than anything else which has so far been suggested."[11]

Walton J in Pratt did not consider it necessary to distinguish between a transfer procured by directors as such and a transfer procured by shareholders as such. What he did make clear is that the test of "procurement" was the best which had been suggested so far. The term is not, of course, used in the Transfer of Assets Abroad Provisions, any more than is the term "quasi-transferor". I respectively suggest that the words of Walton J I have italicised in the above quotation are a much closer, and thus better, approximation to the meaning of the statute. (They also fit in very neatly with the modern approach to the construction of taxing statutes.) In my view, where the transfer is effected by the directors acting properly as such, they will not be quasi-transferors. Directors are simply fiduciaries with limited powers who must act bona fide in the best interests of the company. Provided that is all that they are in fact doing, e.g. when they agree that

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10 As mentioned above, in my view it was not at all "established" but was still up for argument. The House of Lords in *Vestey* had held the ratio in *Congreve* to be wrong had not even *obiter* approved the *obiter dicta* in *Congreve*.

11 Italics added.

the company shall sell at the best price reasonable obtainable an asset which it owns, I do not see how "the reality of the matter" can be that anyone other than the company, of which they the *alter ego*, is "the real transferor". While that is perhaps more obviously the case where the directors have no interest, or only an insignificant interest, in the share capital of the company, yet, in principle, it still holds good where they are also more substantial shareholders.

Where, however, the company's action is lawful only because shareholders agree to it, as where, for example, the company disposes of an asset at a deliberate undervalue, then I can well see that the shareholders whose consent was needed could in principle be said to be quasi-transferors. The position is strongest and clearest where the transfer by the company could not be approved even by a majority of the shareholders in general meeting e.g. because it would be a fraud on the minority, and thus needs to be approved by each and every one of them.

Counsel for the Crown had, on the facts, felt constrained to submit:

> "Each [taxpayer] was a shareholder and director of [the United Kingdom company] and J and each concurred in the proposal, and the decision, to sell the white land as mentioned above, trusting in their advisers to have arranged such sale for their benefit and knowing that a scheme for additional advantage for them was being arranged. Accordingly, each [taxpayer] had a "hand in" and was "associated with" the transfer … and "procured" the same within the principle stated by Cohen LJ [in the Court of Appeal *in Congreve*]..."

This submission was rejected by Walton J in particularly trenchant terms:

> "In my judgment the case fails on both points, as a matter of law, and as a matter of fact. As a matter of law, it appears to me that in the case of a plurality of transferors, if it is impossible to separate out their respective 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. I put my qualification in the manner I have done because I can see an argument open to the Crown, under many circumstances, that such a dissection is possible."

So the first requirement is, as a minimum, that one must be able to attributable distinct portions of the interest transferred to each of the alleged quasi-transferors and those portions must add up to 100%. It will be appreciated that even in the case of a company which has in issue shares of only one class, each of which carries identical rights, that may not always be possible. For the assets of a company do not belong to its shareholders. For example, the company's creditors, secured or unsecured, not least of which is likely to be HMRC, may have an even stronger indirect interest in those assets.

Walton J continued:

> "Without in any way deciding that this is indeed the position, I can well see that if A and B own an asset jointly, and transfer it abroad, then one might for this purpose be able to separate out their beneficial interests as being equal, or, if the transfer was in fact a sale, according to the division between them of the purchase money. Something of the sort might even be possible in the case of quasi transferors, where two or three of them own the company which makes the transfer, but where it is not possible to do just that, s 412 does not bite at all."[12]

Now what Walton J said about shareholders in a company is very guarded and very limited. In any case, it would apply only where their interests are "equal" or if they in fact divided between them the purchase money. It appears that beyond that Walton was not prepared to go. That is a significant limitation. In *Fisher,* for example, we are not told what SJA did with the proceeds of sale of the business to SJG. Perhaps Counsel for the Crown did not regard it as important, despite what Walton J had said.

Walton J then went on to develop a further strand in his argument:

> "Of course, counsel for the Crown recognised the difficulties in his way, and I shall note in a moment the way in which he attempted to deal with them. Those difficulties simply are that, in the circumstances put, the section provides no machinery whatsoever for attributing anything less than the whole of the income referred to any transferor. Where an identifiable portion of the asset transferred can be attributed to a particular transferor then, of course-at any rate in any normal case-that part actually transferred will produce a similar part of the income, and in no case is there any difficulty in applying the section, since one will apply it separately to each of the individual transfers, or each identifiable portion.
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> But, if there is no such identifiable portion, then what one is dealing with is, in the case of each individual, 'the transfer' and all the consequences which it produces, leading to the result that each individual transferor or quasi transferor is liable to tax on precisely the same income. 'Arbitrary,

12 The position regarding joint tenants is straightforward. First, each of them needs to consent to the transfer. Second, any of them could at any moment sever the joint tenancy and make himself a tenant in common. Thus, it is not at all difficult to treat them in the same way as if they were tenants in common in equal shares.

> unjust and unconstitutional' are some of the milder adjectives with which such a situation may be properly described."

As we shall see, in *Fisher*, the First Tier Tribunal considered the apportionment problem had been overcome by legislative changes.

Walton J continued:

> "Now, the manner in which counsel for the Crown seeks to escape from this position is as follows. He submits:
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> > 'The extent to which the income mentioned below is to be attributed directly or indirectly to the transfer of the white land is a question of fact, or mixed fact and law. The amount of the income so attributed is to be apportioned to each [taxpayer] as is just and reasonable in all the circumstances, and likewise is a question of fact, or mixed fact and law.'
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> *In limine*, I would myself regard this suggestion as completely unworkable, even if it were the law. It is very simple to say that something is a question of fact, or mixed fact and law, and leave it at that, but this does not solve anything at all. Moreover, how one could apportion the amount of the income between not only, of course, the taxpayers, but also all the other persons-all the directors and shareholders of M and J-who 'concurred' in the transfer, is a mind-boggling exercise of the first water."

Walton J then developed another strand of his reasoning. It is important to note that it is another strand. For while it has been held (in my own view wrongly) by the First Tier Tribunal in *Fisher* that the first strand has been overtaken by legislative changes, the second strand has not.

> "Fortunately, all this is, in my view, completely bogus. It was really dealt with by Lord Wilberforce in the 1980 *Vestey* case, because precisely the same problem arose as to apportionment-or suggested apportionment-in relation to discretionary beneficiaries, but what was going to be apportioned, if apportionment was going to take place, was the very same income with which I am now dealing.
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> I turn to the speech of Lord Wilberforce ([1980] AC 1148 at 1173-1174, [1980] STC 10 at 19-20, [1979] 3 All ER 976 at 985-986.
>
> > 'My Lords, I must reject this proposition. When Parliament imposes a tax, it is the duty of the commissioners to assess and levy it upon and from those who are liable by law. Of course they may, indeed should, act with administrative common sense. To

expend a large amount of taxpayer's money in collecting, or attempting to collect, small sums would be an exercise in futility: and no one is going to complain if they bring humanity to bear in hard cases. I accept also that they cannot, in the absence of clear power, tax any given income more than once. But all of this falls far short of saying that so long as they do not exceed a maximum they can decide that beneficiary A is to bear so much tax and no more, or that beneficiary B is to bear no tax. This would be taxation by self-asserted administrative discretion and not by law. As the judge well said: "One should be taxed by law and not be untaxed by concession." (See [1977] STC 414 at 439, [1977] 3 All ER 1073 at 1098, [1979] Ch 177 at 197.) The fact in the present case is that Parliament has laid down *no basis on which tax can be apportioned*[13] where there are numerous discretionary beneficiaries. This was clearly seen by the special commissioners. They say in the supplemental case stated on January 27 1978: "Apportionment of the 'deemed' income according to the quantum of the respective beneficial interests has much to commend it, but (as we noticed in paragraph 12 of our original decision) section 412 does not so provide. We recognise that apportionment may be impossible in the case of some of the discretionary beneficiaries whose expectancy may be insignificant. Various methods of apportionment were canvassed before us, the merits of each differing according to the circumstances. In our view, in default of a method prescribed by the section, and we can find none, it is for the board in exercise of their powers in the execution of the Acts to decide on the appropriate apportionment." It is interesting to compare this passage, and what Parliament has not done in the present context, with what it has done in another. There is power, as is well known, to apportion for purposes of surtax (or higher rates of income tax) income of "close companies" to shareholders, or "participators", including in some cases persons entitled to secure that income or assets will be applied for their benefit. But, here, Parliament has expressly conferred the power to apportion, has laid down principles according to which the apportionment is to be made, has defined the period for which assessments are to be made, and has allowed for appeals-all this in a detailed and precise manner (see Act of 1970, sections 296 ff.-derived from the Finance Act 1965-and Finance Act 1972, Schedule 16). The contrast between this legislation and the present is striking. The commissioners have, I gladly accept, done their best to devise a

13 Italics added.

> system which is workable and reasonably fair. But whatever system they might devise lacks any legal basis. I must regard this case therefore as one in which Parliament has attempted to impose a tax, but in which it has failed, in the case of discretionary beneficiaries, to lay down any basis on which it can be assessed or levied. In the absence of any such basis the tax must fail. That this must be the result was correctly perceived by Macnaghten J. in *Lord Herbert v. Inland Revenue Commissioners* ([1943] KB 288 at 291, [1943] 1 All ER 336 at 338, 25 TC 93 at 99)-a decision based upon the Act of 1938, section 38. The learned judge there used these words: "It seems to me fantastic to suppose that Parliament has conferred upon inspectors of taxes, or even on the special commissioners, the power to choose whether A, or B, or C should be liable to income tax or surtax, as the case might be."'

For the words 'discretionary beneficiaries' substitute 'multiple transferors' and the case is completely made. Moreover, Lord Wilberforce having just spelled all this out in relation to a plurality of beneficiaries, I cannot think that he had so put it out of his mind that he had forgotten all about it one page later in the judgment. Therefore, I am of the opinion that when he said, as he did ([1980] AC 1148 at 1175, [1980] STC 10 at 20, [1979] 3 All ER 976 at 986) 'No difficulty arises from cases of multiple transferors', after saying that the section is to be regarded as having a limiting effect to be directed against persons who transfer assets abroad, he must have been meaning that that was not a live issue."

The second strand is in effect that there is no basis on which tax (or, rather, income) can be apportioned. I shall return to that in the context of the Decision.

Walton J added, for good measure:

"In my judgment also, sub-s (3) [of section 412, which had become Income and Corporation Taxes Act 1988 section 741 and which incorporated the motive defence] throws another spanner into the works, so far as the Crown's contention is concerned, when dealing with a case of a single transfer with multiple transferors. There is a single transfer. That transfer was either made with the purpose or not with the purpose of avoiding liability to taxation. How could one apply that to, say, a two-transferor situation where A had the purpose of avoiding tax and B had only a simple commercial purpose? The answer of counsel for the Crown was to say that, in such a case, B should show that so far as he was concerned the purpose was a simple commercial purpose, and that will enable him to claim the benefit of that subsection. But this is not what the subsection says. It is not 'the transferor's purpose in effecting the transfer' but 'the purpose for which the transfer was effected'.

Of course, if, as is in my judgment the case, there can only be a single transferor to consider at a time, this subsection presents no problems whatsoever. ..."

Walton J then returned to the lack of any provisions for apportionment of income.

"Granted, then, that in general no joint assessments are possible, the only possible results of joint transferors are either (i) that each transferor is liable to be assessed in respect of the whole of the income in question, or (ii) some form of apportionment must take place.

The first possible suggestion-and indeed, the second-was soundly scotched in the 1980 Vestey case, but that case does not, as a matter of general principle, stand alone. ..."

Walton J then considered that in any case the Crown must fail on the facts. It is important that this was not the *ratio decidendi* of the case but *obiter dicta.*

"Even if the foregoing were wholly incorrect as a matter of law, and it is possible to have a multiple quasi transferor situation, it appears to me inevitable that the Crown must here fail on the facts. The only authority dealing with quasi transferors so far as a company is concerned-or indeed, at all-is Congreve's case, and what that case does is, whilst recognising that a transfer by an individual, even one holding 99A9% of the shares of the company, is not the same as a transfer by the company, to hold that a transfer by the company 'procured' by a quasi transferor holding the vast majority of the shares in the company is to be regarded as having been made by the quasi transferor himself.

The word used by Cohen LJ was 'procured'. This clearly indicates that the quasi-transferor in question had the ability to 'procure'. ... 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.

How different-how very, very different-are the facts in the present case. The sale here was obviously a board matter, about which the board was duly consulted and approved. There was no question of any one of the three taxpayers in this particular case, either alone or in concert, assuming that that could be material, being able, either at board or at shareholder level, to 'procure' M and J to do anything. And, indeed, this is precisely why the submission from counsel for the Crown which I read out earlier adopts the words 'have a hand in' and 'associated with', which undoubtedly were used by Lord Wilberforce. But, as I have already

> observed, those words are not to be treated as if they were in a statute: they plainly are not.
>
> Nor, however widely one construes any wording to be found in s 412, is the substance of a person being ‘associated with’ or ‘having a hand in’ a transfer necessarily equivalent in any way to that person himself making the transfer. It may be stretching the words of the section-indeed, I think it is-to say ‘la société anonyme, c’est moi’, but the elastic will have snapped long before one can say, ‘I had a hand in the transfer, therefore I made it’, or, ‘I am associated with the transfer, therefore I made it.’”

Walton J then went on to consider the Special Commissioners findings of fact:

> “On the facts, there is no evidence in the present case that the taxpayers, or any of them, acted together, or in concert with others, to procure M and J to make the relevant transfer to assets of Islands, whether as shareholders or as directors. The aggregate shareholdings of three taxpayers totalled 12,268 out of a total of 42,400 issued shares. The taxpayers were three out of a total of eight directors. But, in any event, a company can only act through its directors. To point to a majority means that others must be brought in. There is no guidance as to how these others should be selected, nor who has the right to make such a selection. A disposal of a very few shares might move a shareholder across the line between inclusion and exclusion, or vice versa, without his knowledge and without his being a party to the disposal. As to directors, the selection would be wholly arbitrary. *Although these appeals are being heard together, we have to regard the case of each taxpayer as if he alone were concerned* … Alone, whether as shareholder or as director, none could procure anything to be done by M and J. The evidence of Mr Morris points rather to a bona fide commercial decision by its directors on behalf of M and J than to the possibility of their (or some of them) obtaining a personal benefit; this notwithstanding the fact that s 412(3) was not prayed in aid. …”

I have italicised certain words in the above quotation. In my view, endorsed as they were by Walton J, they are very important and should have been at the forefront of the minds of the First Tier Tribunal members. As will be seen, they appear to have overlooked them. It is not enough that HMRC has assessed under the Transfer of Assets Abroad Provisions various persons who between them have a controlling shareholding in a company which was the actual transferor, where none of those shareholders by himself had such a holding.

3.2 *Fisher*

The issue as set out in the Decision was:

> "The quasi transferor issue
>
> 158. The transfer in question in this case is by a UK company (SJA) in which the three appellants are each shareholders. The legislation does not refer to either transferors or quasi transferors so it is necessary to set out some background in order to understand what is meant by those terms and in order deal with the appellants' next argument which is that the legislation simply cannot be applied to situations such as this case where there are multiple quasi-transferors."

I very much suspect that the argument for the Appellants has not been correctly recorded here and it must have been much more sophisticated and, indeed, involved alternative and/ or variant submissions. First, Stephen Brandon Q.C. is far too astute to have made such a bald submission in isolation. Second, it is clear that *Pratt* was cited at some length and one has only to read that decision to appreciate that there are various different reasons why Walton J decided against the Revenue. Third, later parts of the Decision itself make it clear that the argument was rather more sophisticated.

The First Tier Tribunal set out the dispute:

> "Multiple Quasi transferors possible under the law?
>
> 162. The parties dispute the significance of Pratt. The judgment of Walton J mentions two issues in relation to the difficulties with multiple quasi transferors. First, difficulties of apportionment, and second difficulties in applying the motive defence (in the situation where you have two transferors what do you do if one had the purpose of avoiding tax and the other had only a simple commercial purpose?). The appellants argue both reasons form part of the ratio, whereas HMRC say it is the former, and that the decision does not stand in the way of application to the appellants because any problems with apportionment have been cured by the subsequent introduction of s744(1)(a) ICTA 1988."

I pause there to note that the first issue dealt with two difficulties of apportionment. One of them concerned the lack of any statutory basis for apportionment. The other was based on the lack of any rational basis on which any apportionment could be made. In my view, even if what had become Income and Corporation Taxes Act 1988 section 744(1)(a) had solved the first problem (which, in my view, it had not), it had done nothing to solve the second.[14] I return to this below.

The First Tier Tribunal added:

> "163. If the appellants are correct on the twin ratio point then HMRC's case goes no further because of difficulties with the application of the motive defence. But, even if the appellants' view that there is a twin ratio is incorrect, they disagree that s744(1)(a) removes concerns about apportionment. *The provision cannot in any case tell you who the transferor is or solve the problem of whether apportioned income in fact resulted from the transfer.*"

I would respectfully agree with the words which I have italicised in the above quotation. I have searched in vain for anywhere in the Decision where they are answered by the First Tier Tribunal.
The First Tier Tribunal continued:

> "HMRC say difficulties with ascertaining multiple motives do not arise because there is one transfer and one motive here. The appellants are liable for the apportioned part of income deriving from SJG's business. It is not unfair or unreasonable to take this approach because by definition taxpayers are in this situation because they have acted jointly."

Thus, HMRC's case depended on several findings of fact being made. By "one motive" they must have meant "several motives which were identical".

The First Tier Tribunal went on to consider *Pratt*. They correctly stated:

> "172. There were then essentially two points before the court: 1) whether multiple transferors were possible under the legislation 2) whether on the facts the transfer by the company had been "procured" by the three taxpayers who had a minority interest. Walton J's view (at 51G) was the case failed on both points."

The First Tier Tribunal set out with reasonable accuracy what Walton J had said on the first point. It was when they came to the second point, concerning the motive defence, that they went badly astray:

> "179. There is disagreement between the parties as to the status of Walton J's concerns about applying the motive test. HMRC say this was a subsidiary argument.

14 Which is an additional reason why I do not consider it was trying to solve the first.

180. On balance we prefer HMRC's view. It is clear from what Walton J says that if it was not possible to identify the interests transferred then the section could not apply. The implication was that the section could apply when the interests could be identified. The concerns expressed about the motive defence are in our view relevant to tackling those situations where the interest transferred could be identified as there would have been no need to deal with situations where percentage interests totalling 100% could not apply as those situations would be knocked out by Walton J's first point. There was no suggestion that the taxpayers in the case had transferred an identifiable interest in the way envisaged by Walton J. In that sense we think his views on the difficulties with applying the motive defence situation were in relation to a hypothetical situation and are not binding. If the motive defence effectively dealt the knock out argument to multiple transferors in the way the appellants' argument would suggest, then there would seem to be little point in the decision exploring what situations of multiple transfer the legislation could bite upon."

This is a plain misreading of the judgment. Walton had correctly distinguished two types of multiple transfer

(a) where the apparent multiple transfer could be properly analysed as several separate transfers, each made by a different transferor.

(b) where there is only one transfer which cannot be properly analysed as several separate transfers (as was the case in *Pratt* and in *Fisher*).

Clearly, in the first type of case there could be a different motive for each transfer, which would be the motive of the transferor in question. Hence, he could hardly have been stating the opposite.

To my mind, it is very clear indeed that he was dealing with the second type of case: He prefaces the crucial paragraph with the words:

> "In my judgment also, sub-s (3) [of section 412 Income Tax Act 1952, which contained the motive defence] throws another spanner into the works, so far as the Crown's contention is concerned, when dealing with a case of a *single transfer with multiple transferors*."

It is difficult to see how the words at the end, which I have italicised, could be clearer.

The rest of the paragraph was:

> "There is a single transfer. That transfer was either made with the purpose or not with the purpose of avoiding liability to taxation. How could one apply that to, say, a two-transferor situation where A had the purpose of avoiding tax and B had only a simple commercial purpose? The answer of counsel for the Crown was to say that, in such a case, B should show that so far as he was concerned the purpose was a simple commercial purpose, and that will enable him to claim the benefit of that subsection. But this is not what the subsection says. It is not 'the transferor's purpose in effecting the transfer' but 'the purpose for which the transfer was effected'."

That seems to me to be compelling and obviously right.

Thus, having, in my view, wrongly rejected the comments of Walton J on the motive defence as inapplicable, the First Tier Tribunal then went on to consider whether Income and Corporation Taxes Act 1988 section 744(1) (which was introduced after *Pratt*) means multiple quasi transferors are now possible

They set out of the contention of the Crown:

> "182. The next question is whether it is correct, as HMRC say, that the introduction of certain statutory provisions in ICTA 1988, namely s744(1) (brought in by s46 of Finance Act 1981) deal with Walton J's concerns on apportionment with the effect that Pratt can be put to one side and that it presents no legal bar to there being multiple transferors or even multiple quasi transferors.
>
> 183. This provision …, say HMRC, recognises that more than one individual might be charged as a transferor in relation to a particular transfer, and provides a mechanism for apportioning income between those individuals. By providing such a mechanism, HMRC say it is clear Parliament intended there could be multiple "quasi transferors" in relation to any one transfer of assets."

The subsection provided:

> "(1) 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; and

(b) the jurisdiction of the Special Commissioners on any appeal against an assessment charging tax under those provisions shall include jurisdiction to review any relevant decision taken by the Board under this subsection."

The First Tier Tribunal set out the contention of the Appellants:

> "184. The appellants disagree. The provision they say deals with situations where the whole of income could be charged on two or more transferors or beneficiaries. The appellants give the example of settlements and resettlements as situations where the apportionment provision could be applied (and refers to the estate duty case of *Hatton v IRC* [1992] STC 140 and to *Congreve*). For the apportionment to work more than one transferor or beneficiary is taxable on the income. But, crucially, the appellants say, the provision does not help with establishing the prior question of what is the transfer and income payable in respect of each appellant. There is no discretion under the provision to attribute an actual transfer amongst quasi transferors."

I find the second part of the argument very compelling. The first part of the argument I find less than compelling. *Hatton* is a very difficult case on capital transfer tax (not estate duty) the reasoning of which is plumb wrong and which is, wisely, ignored by both HMRC and taxpayers' advisers. It is not surprising that HMRC countered:

> "185. … once it is conceded the apportionment works for sequential transfers of the same subject matter to stop it being taxed twice it surely ought to work for joint simultaneous transfers."

As will be seen, my approach to this issue would have been rather different.

In expressing its own view, the FTT appreciated that it was central to the appeals:

> "186. The introduction of s744(1) ICTA 1988 does in our view put an entirely different complexion on the significance of *Pratt* and opens the door that would otherwise be shut on the possibility of the TOAA code applying to situations where there are multiple quasi transferors. The necessity in Walton J's judgment to separate out interests in such a way that the sum is a 100% is in our view predicated on a fear that otherwise there would be double charging with no legal basis for reduction and that is something

> which cannot have been intended. Where there was no identifiable portion the result which gives rise to the feared outcome is (see 52C) that:
>
> > "one is dealing with...in the case of each individual "the transfer" and all the consequences it produces leading to the result that each individual transferor or quasi-transferor is liable to tax on precisely the same income.""

Yet, as mentioned, that was only one of the concerns of Walton J. His principal concern was that subjecting multiple transferors to tax on the same income was 'arbitrary, unjust and unconstitutional'. He has been offered an escape from this by Counsel for the Crown who had contended:

> "The extent to which the income mentioned below is to be attributed directly or indirectly to the transfer of the white land is a question of fact, or mixed fact and law. The amount of the income so attributed is to be apportioned to each [taxpayer] as is *just and reasonable* in all the circumstances, and likewise is a question of fact, or mixed fact and law.'

Walton J made it quite clear that this was a non-starter, even if it was the law:

> "In limine, I would myself regard this suggestion as completely unworkable, *even if it were the law*. It is very simple to say that something is a question of fact, or mixed fact and law, and leave it at that, but this does not solve anything at all. Moreover, how one could apportion the amount of the income between not only, of course, the taxpayers, but also all the other persons-all the directors and shareholders of M and J-who 'concurred' in the transfer, is a mind-boggling exercise of the first water.
>
> Fortunately, all this is, in my view, completely bogus. It was really dealt with by Lord Wilberforce in the 1980 Vestey case, because precisely the same problem arose as to apportionment-or suggested apportionment-in relation to discretionary beneficiaries, but what was going to be apportioned, if apportionment was going to take place, was the very same income with which I am now dealing."

The FTT continued:

> "187. It is implicit in any concern about double-charging that some conclusion must have been reached on what was charged in the first place."

At this point, one begins to think that they must have got the point. Unfortunately, one would be wrong, for they go on to state:

> "188. In our view s744(1) provides precisely such a mechanism for dealing with concerns of apportionment. There is nothing on its face which would limit its application to only sequential transfers or which suggests it could not be used to address joint simultaneous transfers.
>
> 189. It is true that s744(1) does not identify who the transferors, or indeed the quasi –transferors are but that will depend on the facts. In relation to the amount transferred the passage quoted above would tend to endorse a view that in the absence of an identified portion, the quasi transferor is held to account for all of the transfer as a first step (that sum then being reduced in accordance with the apportionment.) The assumption the appellants' case makes that each appellant cannot be a quasi transferor in respect of (and taxable on) all of the income of SJG is unfounded. In any case in order for someone to be found to be a quasi transferor (someone in Walton J's words at 51C/D who answers the description of "the real transferor"), it is not necessary to quantify what their interest is. The question is whether they have procured the transfer such that the transfer is to be imputed to them. It is not necessary to quantify a percentage share to them which when put together adds up to 100 to say someone is such a transferor."

The conclusion, of course, involves a complete misreading of *Pratt*. Walton J did not deny that there might be circumstances where it could be said that two or more persons might have indirectly procured what was truly only one transfer. His point was indeed that you could not charge the several transferors to tax under what was to become section 739 on any percentage share of the income which became payable to the person abroad - precisely the opposite of what the FTT are stating!

So what should, in my view, the FTT have decided? First, that the views on Walton J on the motive defence preventing the liability of multiple quasi-transferors were very much in point. They should have allowed the appeals unless HMRC had adduced some compelling argument as to why his views did not cover the present situation.

Secondly, they should have understood that the effect of Income and Corporation Taxes Act 1988 section 744(1) was not to allow HMRC a discretion as to whom to charge to tax under section 739 and in what proportions. One has only to read the sub-section to see that its whole purpose is to avoid a double charge to taxation in respect of the same income (of the person abroad). That is the effect of the opening words up to the semi-colon. What follows (from after the semi-colon) is intended to provide the machinery as to how precisely what would otherwise be a double charge to taxation can be avoided if such a situation has potentially arisen and been prohibited by the opening words. On my reading of the subsection, unless one has first identified a double charge to taxation on which the opening words can operate, the following words are simply not engaged at all.

Walton J, in *Pratt*, applying the same reasoning of the House of Lords in *Vestey*, had decided that there could be no charge where there were multiple transferors in relation to one and the same transfer (which could not be re-analysed as constituting in fact multiple transfers). He had done so for a number of reasons, one of which involved a potential multiple charge to tax. That was the law when Finance Act 1981 was enacted. Had Parliament intended to alter that position, it would in my view have used very different language. It would have first said positively that a person could be charged to tax under Taxes Act 1970 section 478 (which was to become Income and Corporation Taxes Act 1988 section 739) notwithstanding that one or more others could also be charged under the section in respect of the same income which had become payable to a person abroad. Only then would it have gone on to enact Finance Act 1981 section 46(1) (which was to become Income and Corporation Taxes Act 1988 section 744(1)).

If one considers section 46(1) in its original context, its meaning and intended scope make perfect sense. The House of Lords had decided in *Vestey* that non-transferors could not be caught by the Transfer of Assets Abroad Provisions. The response of Parliament was to enact, in Finance Act 1981 section 45, a new section which could catch non-transferors, but only as regards benefits actually received by them. While section 45 itself contained provisions for, in effect, attributing "relevant income" as between such non-transferors, so that a double charge to tax could not arise under that section in respect of the same "relevant income", it did nothing to prevent a double charge under section 478 on the one hand and section 45 on the other hand. It is in my view clear that section 46(1) was intended to prevent a double charge to tax being (a) a charge under section 478 on the one hand and (b) a charge under section 45 on the other hand. It was no more intended to deal with double charges under section 478 than it was with double charges under section 45. Just as no double charges could both arise under section 45 so no double charges could arise under section 478. If it had been Parliament's intention to impose such a double charge, much clearer and more apposite words would have been required.

Further, Walton J had made it clear in *Pratt* (which he decided after section 46 had been enacted) that applying a "just and reasonable" test as between different transferors would be unworkable.[15]

Thirdly, even if I am wrong on the scope and effect of section 744(1), the Appellants were right to contend that it does not tell one what income can be attributed to each quasi-transferor before the sub-section is applied.

I note, without commenting, that on the application of the law to the facts, the FTT found that the transfer was jointly procured by all three appellants, the husband and son acting with the authority of the wife. The lack of comment does not mean that I would agree with the FTT were their view of the law sound.

4. What is the scope of the motive defence?

4.1 The Relevant Statutory Provision

The Appellants relied on the "old" motive defence contained Income and Corporation Taxes Act 1988 section 741 (which corresponds to Income Tax Act 2007 section 739). The current position is much more complicated, even before one takes into account the effect of EU law. It provided:

> "741 Exemption from sections 739 and 740
>
> Sections 739 and 740 shall not apply if the individual shows in writing or otherwise to the satisfaction of the Board 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."

4.2 The Background

"Taxation" was never defined. We know it does not cover foreign taxation. Given the purpose of the Transfer of Assets Abroad Provisions, the obvious and

15 It is not that easy as between a transferor and a non-transferor. The situation will arise only where the transferor has not already been assessed, i.e. usually where the potential double charges arise in the same year of assessment. In that case, there needs to be a policy decision as to which charge should take precedence. For what my view is worth, it would be just and reasonable that the charge be on the non-transferor because (a) he would have received the benefited and (b) to that extent the transferor would not be able to benefit.

natural meaning to give would be "income taxation". Otherwise, why impose an income tax charge on someone who has simply tried to avoid e.g. betting duty?
The difficulty lies in the decision of the Court of Appeal in *Sassoon v Commissioners of Inland Revenue* (1943) 25 TC 124, decided by two judges only in the darkest days of World War II. It was held that an intention to "avoid"[16] estate duty was enough to deprive the taxpayer of the benefit of the defence. Ironically, the transfer (to a Foundation in Switzerland) had also had the effect of reducing the charge to income tax.

It is to my mind clear from the decision that the judges did not at all have direct taxes, such as value added tax, excise duty, customs duty or betting duty in mind! The FTT appear to have ignored the words of the judgment!

4.3 The Issue

The appellants' case as represented by the FTT was:

> "251. The move to Gibraltar was to save the business. The rest of the telebetting industry moved offshore to Gibraltar. Rather than allowing their business to go bust the appellants moved their business as well. … In any case there was no avoidance as SJG is a real operation in Gibraltar with premises and employees. Referring to Willoughby and dicta in IRC v Brebner (1966) 43 TC 705, the real economic consequences of not being subject to betting duty on UK bets placed there have been borne by SJG.[17] Further the reference to avoidance cannot apply to betting duty (because its economic incidence falls on the punter)."

The FTT found that the motive was to avoid only betting duty and not income tax or corporation tax yet that was a sufficient motive to prevent the motive defence being satisfied.

The Decision is highly defective in not always considering what is meant by "avoidance" in the section. They had no excuse as that was made abundantly clear by the House of Lords in *Inland Revenue v Willoughby* 70 TC 57. They utterly failed to refer to that test (per Lord Nolan in giving the lead speech):

> "Tax avoidance within the meaning of s 741 is a course of action designed to conflict with or defeat the evident intention of Parliament."

16 In my view, there was no purpose of estate duty "avoidance", as is now clear from *Willoughby*. However, even if the case was wrongly decided, that does not mean that it might not be authoritative on another point.

17 This sentence does not make sense and was, I assume, a corruption of the Appellants' argument.

It is clear that they instead fastened on a narrower aspect of Lord Nolan's speech in the preceding sentence " But it would be absurd in the context of s 741 to describe as tax avoidance the acceptance of an offer of freedom from tax which Parliament has deliberately made" and forgot about the sentence cited above:

> "278. However, in none of these cases above was it necessary to consider whether, if there had been a tax related motive, whether the motive was specifically to avoid tax or whether it was to mitigate tax by taking advantage of a regime that had been intended by Parliament to allow for that result."

They should have held that Parliament had decided

(a) that betting duty would be exigible only if the bet was placed with a United Kingdom based bookmaker and

(b) non-UK based bookmakers should not be able to advertise in the United Kingdom.

Provided, therefore, the bookmaker ensured he was not resident, operating or advertising in the United Kingdom, he would have complied with the conditions for freedom from taxation laid down by Parliament and would at the most have been engaging in tax mitigation, not tax avoidance, so the benefit of the defence should have been available.

The FTT found that as the bookmaker was accountable for the duty, so the incidence of the duty fell on the bookmaker and not on the punter. That not only defies reality but is quite inconsistent with judgments of the European Court of Justice in the context of value added tax. They are constantly reminding us that value added tax is a tax on consumption intended to be borne by the ultimate consumer. It is but rarely that the ultimate consumer is the person who is legally obliged to account for it, yet that does not alter the position one iota. The same is true of other direct taxes. An importer may be liable for duties of customs and a brewer for duties of excise yet the tax is in effect borne by the consumer.

The FTT clearly did not understand the enormous importance of the decision of the House of Lords in *IRC v Brebner* (1966) 43 TC 705 which concerned the transaction in securities legislation. The defence in that case was even narrower than in the Transfer of Assets Abroad Provisions. The question was

> "whether s. 28 did not apply to the transactions in question because they were carried out for bona fide commercial reasons and none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained."

Even a tax mitigation motive would have negatived the defence.

The House of Lords held that although the transaction was carried out in a way which achieved a tax advantage - allowing profits of a company to be distributed to its shareholders in a non-taxable form - the overall objective was a commercial one.

In *Fisher*, the FTT did not distinguish between an ancillary purpose, in the sense of a means to an end, and a final purpose, the end actually pursued. The non-liability to betting duty was not an end in itself but simply a means to an end, staying in business. The motive defence should in my view have succeeded.

5. Income from a New Trade

The FTT set out this issue:

> "Whether possible to work out income arising as a result of transfer in context of trading company whose business evolves?
>
> 201. The next issue is whether, as the appellants argue, the TOAA code is incapable of applying to facts such as those at issue here, which involve a trading company whose business has evolved into new areas (internet, casino and poker). HMRC point out that these new business ventures were financed from SJG's profit which were generated by the telebetting business [the transfer of which by SJA to SJG was the transfer relied on]."

The FTT found in effect that as the new business were financed by the profits of the business transferred so the profits of those businesses were caught by the Transfer of Assets Abroad Provisions. The FTT found that the income arose not from the original transfer but did hold that it arose from associated operations in relation to the original transfer.

I shall not comment on how the FTT dealt with the very intricate arguments, involving a consideration in particular of the somewhat abstruse decisions in *Fynn v IRC* 37 TC 629, *Carvill v IRC* [2000] STC (SCD) 143 and *Herdman v CIR* 45 TC 394.

My approach would be rather different. I would go back to the words of the statute. To my mind, the relevant question was:

> "To what extent had income become payable to a person abroad [SJG] "by virtue or in consequence of [the original transfer of assets], either alone or in conjunction with associated operations?"

The words "by virtue or in consequence of which" involves questions of causation. Such questions can sometimes be very difficult. They are best answered by persons such of those of us who have studied causation as part of an Oxford philosophy degree, or at least as part of an Oxford Jurisprudence degree, in those happy days when the Jurisprudence paper was rather more relevant to the law in practice than it is now. Failing such an education, those involved ought at least to look at decided cases on causation in various fields of general law. This is an area when one who knows only about tax is most likely to fall into error.

In this case, the FTT fell into the elementary error of treating a *causa sine qua non* as a *causa causans*. Let me give a homely example. I ask my Clerk, who would otherwise have stayed in the Clerk's room, to cross Chancery Lane to buy me a law book from a law bookshop. While crossing the street, he is run down by a maniac on a Boris bike who is cycling the wrong way down the street. My request is a causa sine qua non - if I had not asked the clerk to buy the book, the accident would never have happened. Yet it is not the efficient cause of the accident - any more than is Boris having provided the bikes. It is the negligence of the cyclist.

Where a fund is settled on an offshore trust, while the amount of income of the trust fund will to some extent depend on other factors, such as the efficiency of the trustees in managing the fund, few would doubt that the income arising from reinvested income is attributable to either the original transfer or at least to the reinvestment.

Yet where a new business is started which is financed by the income from another business, the position is far less clear-cut. One would need to ask to what extent the profits of the new business were generated by the financing and to what extent by other factors, such as the ingenuity and hard work of its mangers.

Ironically, if, in this case, the new businesses had been financed by borrowings from a bank or a non-UK resident member of the Fisher family, it is very difficult, if not impossible, to see how HMRC could have maintained that any of the profits derived from them had "become payable to a person abroad [SJG] "by virtue or in consequence of [the original transfer of assets], either alone or in conjunction with associated operations"