Press Summary

21 November 2023

Commissioners for His Majesty's Revenue and Customs (Respondent) v Fisher and another (Appellants) Commissioners for His Majesty's Revenue and Customs (Appellant) v Fisher (Respondent) No 2

[2023] UKSC 44

On appeal from [2021] EWCA Civ 1438

Justices: Lord Reed (President), Lord Hodge (Deputy President), Lord Sales, Lord Stephens, Lady Rose

Background to the Appeal

This appeal concerns the transfer of assets abroad ("**TOAA**") code set out in the Income and Corporation Taxes Act 1988 ("**ICTA 1988**"). Specifically, it concerns the application of section 739 of ICTA 1988, which specifies the circumstances in which an individual who transfers assets to a person overseas may be liable to pay tax on income arising from those assets after the date of transfer.

Anne and Stephen Fisher are the parents of Peter and Dianne Fisher (together, the "**Fishers**"). The Fishers established a betting business which, from 1988, was run through a UK company, Stan James (Abingdon) Limited ("**SJA**"). The Fishers held the shares in SJA and acted as directors of the company. SJA specialised in "telebetting", which involves the placing of bets by telephone. The Fishers decided to transfer their betting operations to Gibraltar, which at the time charged a significantly lower rate of betting duty. They initially set up a branch of SJA in Gibraltar and later incorporated a new company in Gibraltar, Stan James Gibraltar Limited ("**SJG**").

In 2000 SJA and SJG entered into an agreement transferring the whole of SJA's business (other than its betting shops in the UK) to SJG. The agreement was signed by Stephen Fisher as director on behalf of SJA and Peter Fisher as director on behalf of SJG. At the time of the transfer, the shareholdings in each of SJA and SJG were held entirely by the Fishers in varying proportions.

HMRC issued assessments to tax to each of Stephen, Anne and Peter in respect of a number of years of assessment falling between 2000/2001 and 2007/2008. Pursuant to section 739 of ICTA 1988, HMRC treated the profits of SJG as the deemed income of the Fishers in proportion to their respective shareholdings in the company. HMRC did not seek to tax Dianne as she was not a UK resident. The Fishers (excluding Dianne) appealed to the First-tier Tribunal Tax Chamber ("the **FTT**").

The FTT agreed with HMRC that for the purposes of section 739 the Fishers should be treated as the transferors of the business sold by SJA to SJG. The FTT allowed Anne's appeal on other grounds and allowed the appeals of Peter and Stephen in respect of some of the years of assessment on other grounds not relevant to the present appeal. The Upper Tribunal (Tax Chamber) allowed the Fishers' appeal on the ground that the transfer of assets had been made by SJA and not the Fishers. The Court of Appeal by a majority allowed HMRC's appeal as regards Stephen and Peter but dismissed it as regards Anne.

The Fishers and HMRC now appeal to the Supreme Court.

Judgment

The Supreme Court unanimously allows the Fishers' appeal and dismisses HMRC's appeal. It holds that the Fishers were not either singly or collectively the transferors of the business that was sold by SJA to SJG. Lady Rose gives the judgment, with which all the other Justices agree.

Reasons for the Judgment

The statutory provisions

It was common ground that the appeal should be determined on the basis of the legislation as it stood between March 1997 and April 2007 **[7]**. In broad terms, section 739 is an anti-tax avoidance provision that applies where an individual resident in the UK transfers assets abroad with the result that income arising from those assets becomes payable to a person abroad **[2], [8]-[19]**. Where the individual resident in the UK retains the "power to enjoy" the income (for example, the individual is able to control how the income is spent), as defined in the Act, the provision operates so that the income received by the overseas person is treated as income of the individual resident in the UK. That UK resident individual is then taxed on the income. It is not a requirement of the provision that the individual resident in the UK actually receives any of the income within the jurisdiction.

Section 740 of ICTA 1988 imposes liability on an individual resident in the UK who has received a benefit because of the transfer of assets outside of the UK but who did not themselves carry out the transfer **[14]**.

Does the individual charged to tax under section 739 have to be the transferor of the assets?

The Fishers argue that in order to fall within section 739(2), the taxpayer has to be the individual who transferred the assets **[29]**. They rely on the House of Lords decision in *Vestey*

v Inland Revenue Commissioners (Nos 1 and 2) [1980] AC 1148 ("***Vestey***"), which concerned an earlier version of the provision. HMRC argue that the interpretation upheld in *Vestey* should not be followed in the present case as ICTA 1988 differs in important respects from the predecessor legislation.

The Supreme Court holds that section 739 is limited to charging individuals who transfer assets abroad **[55]**. That is the most natural interpretation of the legislation **[56]**. The changes made to the legislation since *Vestey* do not undermine the reasoning in that case. The severe effect of section 739 for a taxpayer means that it is inappropriate to apply it to someone who was not the transferor **[57]**. The presence of the section 742(9), which extends the reference to "an individual" in section 739 to include the spouse of the individual, is inconsistent with HMRC's proposed interpretation **[60]**. There would be no need for the spousal extension if everyone who has the power to enjoy the income could be charged regardless of whether they are a transferor or not. Similarly, the inclusion of section 740, which deals with the liability of non-transferors, weighs against a wider interpretation of section 739 **[59]**.

Did the Fishers transfer the assets?

HMRC argue that, notwithstanding that the legal transferor of the assets was SJA and not the Fishers, the Fishers should be treated as the transferors of the assets because together they owned the controlling interest in SJA **[63]**.

The Supreme Court holds that section 739 does not apply to an individual in relation to a transfer made by a company in which they are a shareholder, regardless of the size of their shareholding **[73]**, **[76]**. There are no principled criteria set out in the statute which can be used to determine the circumstances in which a shareholder should be treated as responsible for a transfer made by a company **[74]-[76]**. In contrast with other statutory regimes, the TOAA code does not provide any framework for determining when an individual should be treated as controlling a company for this purpose **[77]-[79]**. The existence of multiple transferors for the purposes of section 739 would cause numerous difficulties in the provision's application **[79]-[85]**.

References in square brackets are to paragraphs in the judgment.