CHANCERY BAR

Tax Update – Transfer of Assets Abroad and the Impact of EC Law

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Fisher v HMRC – the facts

- Stan James betting business – owned by Fisher family
- Incorporated as Stan James (Abingdon) 1986 – SJA
- By 1988 shares held by Stephen, Anne, their son Peter and their daughter Diane.
- Business originally betting shops, and supplying odds to independent bookmakers
- By 1990's advent sky sports etc telebetting included
- 1992 SJA centralized telebetting business – increasingly important
- By 1999 telebetting accounted for major part business – teletext was very important

Fisher v HMRC – the facts

- Betting duty on each bet charged was 9% (UK duty 6.75%, horse race levy 1%, grossed up and to a whole number)
- Legally possible for a bet to be placed overseas (e.g. in Gibraltar) – no UK duty
- Betting regime prohibited advertising UK or if resources were shared with an entity in the UK in order to take the bet – criminal matter
- 1997 SJA set up a branch in Gibraltar take overseas bets
- March 1999 Victor Chandler (a main competitor) moved entire betting business to Gibraltar + in July 1999 they obtained High Court decision that advertising Gibraltar business in UK by teletext was legal

Fisher v HMRC – the facts

- By August 1999 Ladbrokes, William Hill and Corals announced intention to move telebetting overseas
- Stephen told HMRC summer 1999 that branch begin taking UK bets
- 1999 SJG was incorporated Gibraltar – shares held by Stephen, Anne, Peter and Dianne
- Early 2000 Advice taken QC on betting law and from QC and KPMG tax consequences moving betting business to Gibraltar
- Advice was that the company SJG should carry on the telebetting business
- Share capital SJG increased: Peter and Dianne held 24% each and Stephen and Anne 26% each – separate classes of shares but with equal rights

Fisher v HMRC – the facts

- Telebetting business was valued at £500,000
- February 2000 CA overturned Chandler: use of teletext to promote betting overseas prohibited
- 29 February 2000 telebetting and other business (not shops) transferred (TAA); Substantial business set up in Gibraltar
- From 2003 internet betting and gambling platforms set up
- December 2008 Anne and Stephen sold shares in SJG to Peter and Dianne
- February 2009 SJG became Plc
- Anne and Stephen all relevant times UK resident but Anne Irish national
- Dianne ceased be UK resident in February 2000 and Peter in July 2004

Fisher v HMRC – the issues

3 broad strands to the issues before FtT

- Interpretation of TAA code
- Whether treaty rights of freedom of establishment and free movement of capital were engaged, how TAA legislation read in the light of such engagement, the effect on Gibraltar
- Validity of assessments certain years

Fisher v HMRC – TAA questions

- Whether section 739 (now 720 ITA) requires there to have been actual avoidance of income tax before it is engaged
- Is it possible for TAA to apply to situations where there are multiple shareholders of the transferor company
- Whether it is possible to apply the provision to the context of a trading company whose business evolves into distinct areas from the business transferred
- Whether the motive defence applies because no tax avoidance purpose as purpose was to save the business

Fisher v HMRC – the Ft-T answers

- No requirement of income tax avoidance for application TAA provisions (note contrary to their own guidance)
- Can apply to multiple transferors – section 744 which allows apportionment overruled Pratt (motive defence problem?)
- Can apply where business evolves to distinct area: "*by virtue or in consequence*" narrow; AO limited to new income/power to enjoy, but on facts income fruit of the telesales tree
- Motive defence subjective; distinguished *Brebner*: narrow test: purpose to specifically avoid tax; betting duty avoidance

Fisher v HMRC – EC issues

- Compatibility of TOAA provisions: Anne's Irish nationality gave European law rights of establishment/capital in Gibraltar
- UK AA legislation applied to restrict those rights, without justification, and was not proportionate
- Applying conforming interpretation to UK legislation: scope of the motive defence widened, lower BD not avoidance
- Gibraltar issue: EU freedoms do not apply between UK and Gibraltar – situation wholly internal to the member state.
- Declined reference to EU. Defective assessment issues

Commission v UK C-112/14 ECJ

- Case on compatibility of section 13 TCGA 1992 (imputes gains to participators) with free movement of capital
- Note ECJ thought freedom of movement of establishment also relevant but: *since the Commission seeks primarily a declaration that the United Kingdom has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the EEA Agreement, the Court should confine itself to examining the present case from the point of view of the provisions of the Treaty and the EEA Agreement on the free movement of capital, an examination from the point of view of freedom of establishment being necessary only if the failure to fulfil obligations alleged primarily is not established.*

Commission v UK C-112/14 ECJ

In the present case, it is common ground that the effect of section 13 of the TCGA is that taxable gains made by non-resident close companies, including those resident in another Member State of the European Union, are immediately attributed for tax purposes to participators in those companies who are United Kingdom residents, if they hold rights over more than 10% of the gains.

Commission v UK C-112/14 ECJ

Those participators are then liable to tax on the amount of those gains, whether or not they have actually received them, the tax being calculated according to the gain made by the company itself. By contrast, for close companies resident in the United Kingdom, tax is charged only in the event of a distribution of the gains to the participators, or if the participators dispose of their interests in the company in question, the tax then being calculated, moreover, according to the amount actually received by the participator.

Commission v UK C-112/14 ECJ

Consequently, in so far as that legislation is such as, first, to discourage residents of the United Kingdom, whether natural or legal persons, from contributing their capital to non-resident close companies and, secondly, to impede the possibility of such a company attracting capital from the United Kingdom, it constitutes a restriction of the free movement of capital, which is prohibited in principle by Article 63 TFEU.

Finally…

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