Michaelmas Term
[2023] UKSC 44
On appeal from: [2021] EWCA Civ 1438

JUDGMENT

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

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Sales
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
21 November 2023

Heard on 19 and 20 July 2023

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LADY ROSE (with whom Lord Reed, Lord Hodge, Lord Sales and Lord Stephens agree):

(1) INTRODUCTION

1. The taxing provisions which are at the centre of this appeal have been the subject of litigation in the senior courts almost from the moment they were first introduced into the tax code by the Finance Act 1936. They have been amended over the decades and re-enacted in consolidating legislation. But they have continued to perplex and concern generations of judges faced with the task of construing them.

2. The basic idea behind the provisions is expressed in the tag given to them – the transfer of assets abroad code or TOAA. The paradigm case in which they impose a tax charge is where an individual resident in the United Kingdom transfers assets, for example, shares in a company or partnership, to a person overseas so that instead of that individual receiving and paying tax on income arising from the assets, such as dividends from those shares, the overseas company either retains the income or transfers it to the individual in the form of capital. The effect, broadly, of the provisions is that the income received by the overseas person is deemed to be the income of the individual who is then charged tax on it, whether or not he has actually received any of that income within the jurisdiction. An early case in which the provisions came before the House of Lords involved just such a paradigm sets of facts: *Latilla v Inland Revenue Comrs* [1943] AC 377, (1943) 25 TC 107. Their Lordships in that case were scathing in their dismissal of the arguments put forward by the taxpayers seeking to construe the provisions in a way which left their ingenious methods of avoiding tax intact. Viscount Simon LC in the first paragraph of his speech in *Latilla* said that:

> "… one result of such methods, if they succeed, is, of course, to increase pro tanto the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres."

3. Lord Greene MR made similar comments in *Lord Howard de Walden v Inland Revenue Comrs* [1942] 1 KB 389 ("*Lord Howard de Walden*"). In that case, the issue was whether the amount brought into tax for the UK resident individual was (a) limited to the income that he was in fact entitled to, or able to, enjoy or (b) comprised all the income of the overseas company to which the assets had been transferred or (c) comprised only the income of that overseas company which was traceable to the assets transferred. In concluding that it was the second, largest amount, Lord Greene MR said that section 18 of the Finance Act 1936 was a penal provision. He referred to the "battle of manoeuvre" waged between the legislature and tax avoiders whose skill, determination and resourcefulness had often worsted the legislature. He regarded the

provisions as an attempt to put an end to the struggle by imposing the severest penalties: p 397.

4. The problems have arisen, however, when the circumstances of the taxpayer do not fall squarely within that paradigm case. It has not been clear who, apart from the Lord de Waldens of this world, is caught. A taxpayer who falls within the provisions can be charged to tax on a substantial amount of income that they have not actually received and which bears no relation to the value of the assets initially transferred. In the later cases, the judicial criticism has focused not on the taxpayers but on the legislation itself or on the Commissioners' expansive interpretation of that legislation. Not every judge has endorsed Walton J's description of the Solicitor-General's role as like that of Count Dracula when putting forward a construction of the legislation which, the judge thought, contradicted the most rudimentary notions of justice and fair play (*Vestey v Inland Revenue Comrs (No 2)* [1979] Ch 198, 215). But many judges have used strong words to deprecate different elements of the taxing provisions and how the Commissioners have sought to enforce them.

5. The appeals of the members of the Fisher family with which the court is now concerned have highlighted again the potential breadth of the TOAA code's application and the difficulty of working out how it is intended to apply. The appeal at every stage of the proceedings has raised many difficult issues about the meaning of the code which was set out in sections 739 to 746 of the Income and Corporation Taxes Act 1988 ("ICTA 1988"). The key question, however, arises from the fact that the transaction which HMRC identify as being the transfer of assets triggering the application of the code was the sale of a business operated by a UK incorporated company, the shares of which were owned by the Fishers, to a company incorporated in Gibraltar which the Fishers also owned. The provisions only apply to impose a tax charge on individuals and it has been common ground throughout that "individuals" means natural persons and not bodies corporate. None of the Fishers held a majority interest in either the transferor or the transferee company. Does that mean that the Fishers cannot be caught by the code at all?

6. I have concluded that the Fishers are not caught by the taxing charge on which HMRC have relied in issuing their assessments to tax. In light of that, this judgment focuses on that issue and does not need to explore the many other issues on which we received helpful submissions and with which the tribunals and court below grappled.

(2) THE LEGISLATION

7. The provision under which the Fishers have been charged to tax is section 739 ICTA 1988 (as amended). The tax years to which the assessments under appeal relate are 2000/2001 to 2007/2008. The rewritten version of the code set out in the Income

Tax Act 2007 applies to the final year of assessment at issue. It is agreed, however, that any differences do not affect the issues in this case and the parties have addressed the case on the basis of the version of the provisions as they stood between March 1997 and April 2007.

8. First, there is section 739 which is the primary charging section with which we are concerned. The relevant provisions are:

> "**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 transfers 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—
>
> (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 a 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."

9. Some commentary on that provision is helpful at this point. Subsection (1) broadly reproduces what started out as a preamble to section 18 of the Finance Act 1936, setting out the purpose of the provision before subsections (1) to (7) of section 18. It was re-enacted as a preamble rather than as a subsection in later versions of the code until it was made the first subsection of section 739 ICTA 1988. It sets out the tax avoidance purpose of the charging provision.

10. An important issue in this appeal and in previous cases is:

(i) what does subsection (1) mean by specifying that the tax avoidance by individuals is "by means of transfers of assets"; and

(ii) how does that affect the requirement in the charging provision in subsection (2) that "such an individual" has power to enjoy the income of the overseas person. How much of the description of the individual in subsection (1) is imported into subsection (2) by the word "such" – is it just that the individual is ordinarily resident in the UK or is it also that he or she transferred the assets overseas?

11. Subsection (2) deals with the charge to income tax where the individual has power to enjoy the income of the non-resident person. That is the charging provision which is said to apply to the Fishers. Subsection (3) covers the situation where the individual receives a capital sum connected with the transfer rather than having a power to enjoy the income of the overseas person. In both circumstances the effect of the provision is that the income of the non-resident person "shall be deemed to be the income of the individual" for income tax purposes.

12. What is meant by the "power to enjoy" is set out in section 742. This provision is both broad and complex and includes where:

(i) "the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit": (section 742(2)(b)); or

(ii) "the individual is able in any manner whatsoever, and whether directly or indirectly, to control the application of the income": (section 742(2)(e)).

13. Section 740 deals with the liability of non-transferors:

"**740.— Liability of non-transferors**

(1) This section has effect where—

(a) by virtue or in consequence of a transfer of assets, either alone or in conjunction with associated operations, income becomes payable to a person resident or domiciled outside the United Kingdom; and

(b) an individual ordinarily resident in the United Kingdom who is not liable to tax under section 739 by reference to the transfer receives a benefit provided out of assets which are available for the purpose by virtue or in consequence of the transfer or of any associated operations.

(2) Subject to the provisions of this section, the amount or value of any such benefit as is mentioned in subsection (1) above, if not otherwise chargeable to income tax in the hands of the recipient, shall

(a) to the extent to which it falls within the amount of relevant income of years of assessment up to and including the year of assessment in which the benefit is received, be treated for all the purposes of the Income Tax Acts as the income of the individual for that year;

(b) to the extent to which it is not by virtue of this subsection treated as his income for that year and falls within the amount of relevant income of the next following year of assessment, be treated for those purposes as his income for the next following year,

> and so on for subsequent years, taking the reference in paragraph (b) to the year mentioned in paragraph (a) as a reference to that and any other year before the subsequent year in question."

14. One can immediately see that section 740 has some important features. The first is that it only applies if the individual is not liable to tax under section 739. Another key difference between the liability of the individual who falls within section 739(2) and the individual who falls within section 740(1)(b) is that the latter must receive a benefit provided out of assets by virtue or in consequence of the transfer. Where such a benefit is received by the individual falling within section 740(1)(b), then, according to section 740(2), it is that benefit which is treated as the income of the individual for the relevant tax year. This contrasts with the position under section 739(2) where the individual need only have a "power to enjoy" the income of the overseas person and can be subject to the tax charge even if they do not actually receive any money from the overseas person during the course of the tax year. Section 740 is not the charging provision relied on in these appeals but its presence in the TOAA code is relied on by the Fishers as indicating that section 739 is only intended to apply to transferors of assets.

15. Section 742 contains some definitional provisions common to both sections 739 and 740. Subsection (9) provides:

> "(9) For the purposes of sections 739 to 741—
>
> (a) a reference to an individual shall be deemed to include the wife or husband of the individual;
>
> (b) 'assets' includes property or rights of any kind and 'transfer', in relation to rights, includes the creation of those rights;
>
> (c) 'benefit' includes a payment of any kind."

16. The deeming provision in section 742(9)(a) was included in the earlier versions of the code and has been referred to in the cases as "the spousal extension". Although it is not directly relied on by HMRC in the case of the Fishers, it has been regarded as indicating that the charging provisions have a more limited scope than that for which HMRC contend.

17. Then comes section 741 which provides an exemption from the charge in sections 739 and 740 where tax avoidance was not a purpose behind the transfer of assets or where the transfer was a bona fide commercial transaction and not designed for the purpose of tax avoidance. I shall refer to this exemption as the "motive defence". Section 741, in the version which applies to transactions taking place before 5 December 2005 and hence which is relevant for this appeal, provides:

> "**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.
>
> The jurisdiction of the Special Commissioners on any appeal shall include jurisdiction to review any relevant decision taken by the Board in exercise of their functions under this section."

18. This version of section 741 has been superseded by section 741A which was inserted by the Finance Act 2006 and which applies to transfers and associated operations occurring on or after 5 December 2005. Section 741A could still be described as a motive defence but is rather more elaborate than section 741. Since the transfer of the SJA business occurred before 5 December 2005, it is the older section 741 which applies even in relation to tax assessment years after that date.

19. Finally for our purposes, section 744 provides for what is to happen if more than one individual is liable to be taxed on the same income of the overseas person:

> "**744.— No duplication of charge**
>
> (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."

20. Again, although there is no issue about the application of section 744 in this appeal, its presence in the TOAA code is relied on, this time by HMRC, as relevant to the proper construction of the scope of section 739.

(3) THE FACTS, THE PROCEEDINGS BELOW AND THE ISSUES FOR THIS COURT

21. Anne and Stephen Fisher are the parents of Peter and Dianne Fisher. The betting business at the centre of this dispute was consolidated in 1988 in a company, Stan James (Abingdon) Limited ("SJA"). That company was resident in the United Kingdom and, as from 1988, the shares were held by the four Fishers. They were the only directors of the company. As the FTT found, the betting business operated by the Fishers was one of the first to recognise and exploit the possibilities of the fast developing market for "telebetting", that is the placing of bets by telephone. Before that, the bets were all placed by customers in the betting shops in the UK.

22. Once the bet can be placed by someone who is not present in the shop, the possibility that the customer can place a bet by telephone from another jurisdiction arises. The differences between betting duties in this jurisdiction and in the jurisdiction where the bet is taken then become an important consideration. Under the Betting and Gaming Duties Act 1981, bookmakers have to account for betting duty on bets placed by customers. In 1999, UK betting duty was charged at a rate of 6.75% on the amount staked. In Gibraltar betting duty was only 1%. It was legally possible under the regime for a bet to be placed overseas, so for a bookmaker in Gibraltar to take a bet from a customer in the UK and for the bet to be placed in Gibraltar. In such a case, there would be no liability for UK betting duty on that bet. But the statutory regime prohibited overseas bookmakers from advertising in the UK and prohibited also the sharing of resources between an overseas bookmaker and an entity in the UK in order to take the

bet: see the discussion of this provision in *Victor Chandler International Ltd v Customs and Excise Comrs* [2000] 1 WLR 1296, para 7.

23. Initially the Fishers set up a branch of SJA in Gibraltar. SJA's Gibraltarian betting licence became operational from 1 April 1998. The branch had computers, software and telephone systems and took bets from non-UK customers over the telephone. Once the branch started taking UK bets by telephone, there was a significant change in the scale of its business. The branch went from having six members of staff to having over 20. More telephone lines and computers had to be installed. On 22 July 1999, a new company, incorporated in Gibraltar, was set up called Stan James Gibraltar Limited ("SJG"). Between August 1999 and February 2000, arrangements were put in place to transfer the whole of SJA's telebetting operation and its other activities (apart from shops) to SJG. The agreement giving effect to this transfer from SJA to SJG, at an independently assessed valuation, took effect as from 29 February 2000. It was signed by Stephen Fisher as duly authorised director on behalf of SJA and by Peter Fisher as duly authorised director of SJG. The business sold included the telebetting operation located in the UK at SJA's Abingdon premises and at the Gibraltarian branch. At the time of the transfer, the shareholdings in SJG were 24% each held by Peter and Dianne and 26% each by Stephen and Anne. Their shares all carried equal rights. The shareholdings in SJA at the time of the transfer were 12% to Dianne and Peter Fisher and 38% each to Anne and Stephen Fisher.

24. The Gibraltar business continued to prosper and expand. About 25 to 30 staff and their families were relocated from SJA's operations in the UK to work for SJG. As from September 2003, SJG developed internet betting and gaming platforms. Assessments to tax were issued by HMRC to each of Stephen and Anne in respect of the years of assessment 2000/2001 to 2007/2008 and Peter in respect of the years 2000/2001, 2001/2002, 2003/2004 and 2004/2005. Figures for the amounts now claimed in tax by HMRC were provided at the court's request following the hearing. These show that HMRC treated the income of SJG as the deemed income of Stephen, Anne and Peter in proportion to their shareholdings in that company as at the date of the transfer. The actual amount of tax to be charged was slightly different for Stephen and Anne because of the effect of income from other sources. The remaining 24% of SJG was held by Dianne who was not resident in the UK and so not caught by section 739. The Fishers point out that at the time of the transfer of its assets by SJA, their shareholdings in SJA were different: Stephen and Anne both owned 38% of the transferor SJA and Peter owned 12%. So although the basis for the imposition of the tax charge is the Fishers' shareholdings in SJA at the time of the transfer of the business, the tax charge has been calculated on a different basis. They also point out that the amounts claimed by HMRC are said to be due regardless of whether the Fishers actually received any money from SJG. The figures show the following:

Tax year	SJG profits (£)	Stephen (26%)		Anne (26%)		Peter (24%)	
		Income subject to tax (£)	Tax charged (£)	Income subject to tax (£)	Tax charged (£)	Income subject to tax (£)	Tax charged (£)
2000/2001	4,113,925	1,069,621	427,848	1,069,621	427,848	987,342	394,138
2001/2002	2,297,518	597,355	239,409	597,355	239,749	551,404	214,636
2002/2003	930,819	242,013	97,370	242,013	97,602	223,397	[0][1]
2003/2004	2,860,286	743,674	297,469	743,674	297,469	686,469	274,587
2004/2005	2,816,767	732,359	293,251	732,359	293,321	182,841	65,344
2005/2006	3,443,652	895,350	358,461	895,350	358,252	[2]	
2006/2007	3,970,564	1,032,347	413,281	1,032,347	413,336	[2]	
2007/2008	466,670	121,334	48,533	121,334	48,533	[2]	
	TOTAL		**2,175,624**		**2,176,113**		**948,706**

[1] The FTT held that HMRC's assessment on Peter Fisher for tax year 2002/3 was out of time and that decision was not appealed by HMRC. The amount of Peter Fisher's income tax, which would have been due for 2002/03 if the assessment had been valid, was £81,900.40.

[2] Peter Fisher ceased to be resident in the UK on or around 16 July 2004, so income chargeable apportioned to 24% of 102/366 days from SJG's profits in accounting period ended 31 December 2004 only.

25. The Fishers appealed to the First-tier Tribunal Tax Chamber ("FTT"). The FTT released its decision on 14 August 2014 ([2014] UKFTT 804 (TC), [2014] SFTD 1341). On the issue of whether the Fishers were transferors of the business sold by SJA to SJG, the FTT held that they were to be so treated and that the whole of the transfer was to be attributed to each of them. If this potentially led to the same income being taxed multiple times, then the apportionment mechanism in section 744 could address that. The FTT allowed Anne Fisher's appeal on other grounds and allowed the appeals of Peter and Stephen Fisher in respect of some but not other years of assessment on grounds not relevant to the appeals before us.

26. The Upper Tribunal (Tax and Chancery Chamber) decided to refer a question to the Court of Justice of the European Union concerning the exercise of the freedom of establishment or free movement of capital between the United Kingdom and Gibraltar. The Court in Luxembourg, by reasoned order released on 12 October 2017 (in Case C-192/16), held that as a matter of EU law, the UK and Gibraltar comprise a single Member State for the purposes of those freedoms. The Upper Tribunal then heard the appeals and released its decision on 4 March 2020 ([2020] UKUT 62 (TCC), [2020] STC 1218). They addressed the question whether it was possible to impute the transfer by SJA to any of the Fishers at paras 57 onwards of their decision. They disagreed with the reasoning of the FTT and held that the transfer 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 assets": para 95. They therefore allowed the Fishers' appeal on the grounds that the TOAA code was not engaged at all.

27. The Court of Appeal heard the Fishers' appeals and the HMRC's cross-appeal and handed down judgment on 6 October 2021 ([2021] EWCA Civ 1438, [2022] 1 WLR 651). Newey LJ (with whom Arnold LJ agreed) held that Stephen and Peter Fisher were properly subject to the charge under section 739 and therefore allowed HMRC's appeal from the decision of the Upper Tribunal. But they held that Anne escaped the charge because although she was a shareholder and director, the FTT had found as a fact that she had not been involved in running the business and had played no active part in the decision making. They therefore dismissed HMRC's appeal against the Upper Tribunal's decision in relation to Anne. Phillips LJ dissented and would have dismissed HMRC's appeal in respect of all three taxpayers. He concluded that none of the Fishers had procured the transfer of assets by SJA simply by voting in favour of the transfer. Peter and Stephen Fisher were granted permission to appeal to this court against the Court of Appeal's order in respect of their assessments and HMRC were granted permission to appeal against the Court of Appeal's decision in relation to Anne.

28. The issues which need to be resolved in order to dispose of these appeals can be summarised as follows:

(i) Does the transfer of assets referred to in subsections (1) and (2) of section 739 have to be a transfer by the individual who has the power to enjoy the income that becomes payable to the overseas person or can the transfer be by any person, provided that the individual assessed to tax has a power to enjoy that income by virtue or in consequence of the transfer?

(ii) If the individual has to be the transferor of the assets in order for section 739 to apply, in what circumstances (if any) can an individual be treated as a transferor of the assets where the transfer is in fact made by a company in which the individual is a shareholder?

(4) ISSUE 1: DOES THE INDIVIDUAL CHARGED TO TAX UNDER SECTION 739 HAVE TO BE THE TRANSFEROR OF THE ASSETS?

29. Submissions on this issue were made on behalf of the Fishers by Imran Afzal. He submitted that in order to fall within section 739(2), the taxpayer has to be the individual who transferred the assets which give rise to the income which that individual is then deemed to receive within the UK. The Fishers rely principally on the decision of the House of Lords in *Vestey v Inland Revenue Comrs (Nos 1 and 2)* [1980] AC 1148 ("*Vestey*"). In that case, they say, the House of Lords construed identical wording in section 412 of the Income Tax Act 1952 as limiting that charging provision to individuals who transfer the assets in question. In so deciding, the House of Lords in *Vestey* departed from an earlier decision of the House in *Congreve v Inland Revenue Comrs* (1946-1948) 30 TC 163 ("*Congreve*") which had decided that the individual

charged to tax did not have to be the transferor of the assets generating the income. Mr Ewart KC made submissions on behalf of HMRC on this issue. HMRC contend that *Vestey* does not decide the issue one way or the other as regards section 739 of ICTA 1988. The Commissioners do not ask this court to overrule *Vestey* but they argue that the reasons why the House of Lords construed section 412(1) in its then statutory context as limited to transferors no longer pertain to section 739 in the current TOAA code. Mr Ewart invites this court to conclude that section 739 is not limited to individuals who transfer the assets to the overseas person.

30. On this preliminary point about how far the court should pay regard to the decision in *Vestey*, Mr Ewart referred us to the authorities which have stressed that when construing legislation that has been consolidated, it is wrong automatically to look back at the earlier versions of the provisions and the cases decided upon them. Such an exercise risks undermining the purpose of consolidating the law into a single, easily accessible enactment: see for example per Lord Wilberforce in *Farrell v Alexander* [1977] AC 59, 72-73. Mr Ewart also drew our attention to passages in *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020) ("*Bennion*") referring to *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402. The *Barras* principle derived from that case suggests that where an Act uses a word or phrase that has been the subject of previous judicial interpretation in the same or a similar context, it may be possible to infer that the legislature intended the word or phrase to bear the same meaning as it had in that context: see *Bennion* section 24.6. *Bennion* makes clear, however, that the principle does not apply to consolidation or tax rewrite Acts. Acts of that kind are not intended to change the law and so merely reproduce whatever ambiguity was present in the previous provision. Mr Ewart accepted he could not push this point too far. There are over a hundred years of case law, for example, on what is meant by the distinction between capital and income and one does not jettison all that each time the relevant provisions are brought forward into a new consolidating taxes Act. I note also that *Vestey* itself was construing a later version of the code than had been before the House in *Congreve* and yet their Lordships still considered in detail whether the discretion conferred on the House by the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 should be exercised.

31. I am prepared to assume for present purposes that *Vestey* would not need to be overruled in order for this court to decide the first issue in HMRC's favour and that the *Barras* principle may not resolve the point. But it is the case that, since *Vestey*, the courts have regarded the requirement that the taxpayer be the transferor of the assets as having been settled. The question is what did *Vestey* decide and then how does that apply where the transfer was made by a company? In answering that question, I must first consider the House's decision in *Congreve*.

32. The facts in *Congreve* were labyrinthine and appear to have involved a number of transfers of shares in companies and of the assets of companies. Mrs Congreve and her husband were assessed to tax on income arising overseas although the Special

Commissioners accepted her evidence that she knew nothing about the complex series of transactions: "everything was done by her father, she merely signed documents when asked to do so": p 177. At first instance, Wrottesley J described how the preamble in section 18 of the Finance Act 1936 (now section 739(1)) set out the purpose of the section as that of preventing tax avoidance by individuals "by means of transfers of assets". He had to read that preamble together with the reference in the opening words of the charging provision in section 18(1) (now section 739(2)) to the situation in which "such an individual had by means of any such transfer" acquired the right to enjoy income.

33. He identified the first point he had to decide as whether the target of section 18 included a person who makes no transfer at all whether personally or through an agent (p 184). He held that the ordinary and commonsense meaning of the words used was:

> "to deal with the plain and straightforward case of an individual bent on evading tax and doing so by means of a transfer. The Section does not deal with the case of an individual who escapes tax because of a transfer which some other person makes. The use of the words 'by means of' fits this interpretation."

34. He held further that the preamble was "drawn in to explain and so to limit or expand the kind of transaction" which was dealt with in the substantive provision. His conclusion was therefore that the individual did have to be the transferor.

35. In the Court of Appeal, Cohen LJ, giving the judgment of the court, disagreed with Wrottesley J as to the effect of the words "by means of" in the preamble to section 18. He held that Mrs Congreve could be caught by the charging provision even though she was not the transferor of the assets:

> "We do not think the words 'by means of' connote activity by the individual concerned. According to the Shorter Oxford Dictionary the primary meaning of the words is 'by the instrumentality of a person or thing', and they are fully satisfied if the avoidance of tax is effected through the instrumentality of the transfer by whosoever it is executed. *A fortiori* is this the case if we take the second meaning given in that dictionary, 'in consequence of, owing to'. Nor do we think that the use of the phrase in the preamble in conjunction with the word 'avoiding' compels us to interpolate something that is not there and read 'by means of transfers of assets' as if it were 'by means of transfers of assets made by them'."

36. The case went to the House of Lords. Lord Simonds, with whom the rest of the Appellate Committee agreed, formulated the question as being whether the transfer of assets must be "a transfer effected by Mrs Congreve or her agent or may be … effected by anyone, father, friend, or company in which she has an interest great or small so long as the result is reached that she has power to enjoy the relevant income.". He agreed with the judgment of the Court of Appeal that the words "by means of" in the preamble "do not connote any personal activity on the part of the person who is said to enjoy or suffer something by those means": (p 204). Although Mrs Congreve had not made the transfer personally, she did acquire the right to enjoy the income. The tax assessments were correctly made on her and on her husband.

37. This first issue decided in *Congreve*, namely whether the individual taxpayer had to be responsible for the transfer, arose tangentially again in *Bambridge v Inland Revenue Comrs* [1953] 1 WLR 1460 (Court of Appeal) and [1955] 1 WLR 1329 (House of Lords). That case concerned the settlement and wills of Rudyard Kipling and his wife and the assessment to tax of their daughter Mrs Bambridge. The taxpayer argued that her power to enjoy the income of the overseas company to which the Kiplings had transferred assets only arose on their deaths and the probate of their wills, sometime after the transfers. Those events were not "associated operations" so her power to enjoy the income was not the result of the transfer or any associated operations. In the Court of Appeal, Sir Raymond Evershed MR in his short concurring judgment commented that until the House of Lords in *Congreve* "had pointed out the true scope of the language used by Parliament in Section 18 of the Finance Act, 1936, it was not perhaps generally realised how far-reaching that Section might be": p 1467. Having regard to the decision in *Congreve*, the Court of Appeal held in *Bambridge* that it was not open to the taxpayer to argue that she fell outside section 18 of the 1936 Act because she was not herself a transferor or a party to the transactions. The House of Lords agreed and upheld the assessments, Lord Cohen also noting that the assessment to tax had been prompted by the decision in *Congreve* (p 1332).

38. The facts in *Vestey* were that the taxpayers' family had many years previously settled certain overseas properties on trustees resident overseas on discretionary trusts. The income was accumulated and invested so as to form a capital fund, the income from which fund was then accumulated and invested in turn. Between 1962 and 1966 the trustees, using powers contained in the settlement, made appointments to the taxpayers who were members of the class of discretionary beneficiaries. The Commissioners assessed the six appellant taxpayers to income tax relying on section 412 of the Income Tax Act 1952 (corresponding to section 739 ICTA 1988). The Commissioners imposed the charge only in respect of the capital payments actually received by them, but the Crown contended that it was strictly entitled to exact tax on the whole income of the trust from each of the six taxpayers. The Commissioners had voluntarily restricted the quantum of the assessments and hence had not sought to collect tax on a multiple of the total income of the trust. That income, the Commissioners said, should be apportioned between the taxpayers "at the discretion of the Crown": (p 180B).

39. The assessments came before Walton J on two occasions. The first, *Vestey v Inland Revenue Comrs* [1979] Ch 177, concerned the application of the capital provision in what was section 412(2) of the 1952 Act, now found in section 739(3) ICTA 1988. He said that whatever might be said of the true nature of the ratio decidendi in *Congreve*, he was bound to follow the Court of Appeal in *Bambridge* which had clearly decided that the words "such an individual" in the charging provision, referring back to the preamble, only meant an individual resident in the United Kingdom and were not restricted to the person originally transferring the assets.

40. The second appeal from the Special Commissioners concerned the application of the "power to enjoy" provision then in section 412(1) of the 1952 Act which corresponds to section 739(2) ICTA 1988: *Vestey v Inland Revenue Comrs (No 2)* [1979] Ch 198. Walton J declined the taxpayers' invitation to distinguish *Congreve* and *Bambridge* on the grounds that they had been concerned with the capital provision under section 412(2) and not the income provision in section 412(1). He held that the section could not pose different tests according to whether the payments made are income or capital.

41. The House of Lords dealt with both appeals. Lord Wilberforce expressed the consequences of the Commissioners' contention as to the scope of the taxing charge as that (p 1171D-E):

> "each and every one of such beneficiaries if resident in the United Kingdom is liable to income and surtax in respect of the whole of the income of the trustees."

42. He turned to considering *Congreve* at p 1174. He first made clear that he regarded the proposition that the taxpayer did not need to be a transferor as the ratio of *Congreve*, indeed he regarded it not only as a ratio but as the main ratio. It was followed in subsequent cases including *Bambridge* and he had to decide whether it was correct. He then set out two possible interpretations of section 412 (pp 1174-1175):

> "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 manage when resident in the United Kingdom to obtain or to be in a position to obtain benefits from those assets. For myself I regard this as being the natural meaning of the section. This avoids all the difficulties discussed above. No difficulty arises from cases of multiple transferors.

> The second is to give the whole section an extended meaning, so as to embrace all persons, born or unborn, who in any way may benefit from assets transferred abroad by others. This is or follows from the *Congreve* interpretation. This I regard as a possible but less natural meaning of the section."

43. He therefore concluded that the more natural meaning of the words used was that the individual with power to enjoy the income was the person who had transferred the assets abroad in order to avoid tax. He then mentioned two arguments in addition to those linguistic considerations. The first was the Commissioners' contention that section 412 was a penal section. That had been a good argument in favour of a wide construction of the provision in a case such as *Lord Howard de Walden* (p 1175):

> "But the argument turns the other way when so draconian a tax ('astonishingly severe' were Mr. Nolan's words [counsel for the Crown]) is sought to be imposed upon persons who had no hand in the transfer, who may never benefit from it, who cannot escape from it, who remain under liability so long as they live or the settlement lasts. In relation to such persons equity and principle suggest that Parliament intended no such thing —or at least cannot be assumed from the veiled language used to have intended any such thing. To penalise is one thing, to visit the sins of the transferor on future generations is quite another."

44. The second argument put forward for a broader interpretation of section 412 was that the stated objective of the provision was the avoidance of tax. But Lord Wilberforce noted 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. This, he said, "seems to show that the mischief at which the section was directed was a more limited one".

45. Those arguments together with the linguistic one persuaded Lord Wilberforce that the better interpretation of the section was not that accepted in *Congreve* but was one limiting its operation and charging effect to the transferor of assets. Turning then to the question whether the House should overrule *Congreve*, he said that it could now be seen that the consequences of the interpretation accepted in *Congreve* must lead in relation to a large class of settlements to "a situation involving results which are arbitrary, potentially unjust and fundamentally unconstitutional". If that had been appreciated by the House in *Congreve*, he could not believe that the eminent Lords who decided the case would have been willing to ascribe to Parliament an intention to produce such results. He addressed the argument that to limit the section so as to relate only to transferors of assets would emasculate it. He cited the comments of Lord Greene

MR in *Lord Howard de Walden* and the opening words of Viscount Simon LC's speech in *Latilla* which I have set out earlier. Those indicated the clear, identifiable and substantial mischief against which the section was certainly directed. That did not lead to the conclusion that it was also directed against cases where persons transferred assets abroad for the benefit of a child or grandchild. He concluded at p 1178 that *Congreve* should be overruled as to its principal ratio and:

> "the section interpreted as applying only where the person sought to be charged made, or, may be, was associated with the transfer."

46. Viscount Dilhorne in his speech in *Vestey* also noted at the outset that the amount of tax for which the taxpayers had been assessed was greatly in excess of the amounts they had received. One taxpayer had received a total of £365,000 from the trustees and was assessed for tax in the sum of £888,500 and one whose wife had received £100,000 in 1996 was assessed to tax in the sum of £274,121.95. He also faced head on the fact that the ratio of the decision in *Congreve* was a clear rejection of the contention that the section "only applied to the individual who had by himself or through an agent made such a transfer" (p 1182H). He also focused on the reference in section 412(1) and (2) to "such an individual" and considered what characteristics of the individual described in the preamble were thereby imported into the charging section. A possible meaning was that they referred to an individual ordinarily resident who has sought to avoid liability to income tax by means of a transfer of assets abroad. If that was their meaning then the scope of section 412 was limited. If on the other hand they just meant an individual ordinarily resident in the UK then the decision in *Congreve* was right.

47. Viscount Dilhorne attached significance to the spousal extension in subsection (8) of section 412 which expressly extended the reference to "an individual" to include the spouse of the individual. Those words would be important if otherwise the individual was limited to the person who transferred the assets but would have no apparent significance if the reference to an individual was not so limited.

48. Viscount Dilhorne also stated that the House in *Congreve* had not had to consider how the section would operate if there was more than one individual who had acquired rights to enjoy the income. He thought it was significant that the statute failed to provide for what happened if a number of individuals have to be deemed to have the income of the non-resident. He therefore held that the decision in *Congreve* was wrong and that the House should depart from its previous interpretation of the provision. He considered whether this led to "a yawning gap" because persons who transfer assets abroad may do so for the benefit of their families and not for their own benefit. He said that "Gaps when they are found in our tax laws are usually speedily filled". The wider application of the provision was productive of such manifest injustice that Parliament could not have intended it. He also concluded that it was right to overturn *Congreve* (p 1187).

49. Lord Edmund-Davies described the consequences of applying the ratio in *Congreve* to a multiplicity of beneficiaries as "astounding", "startling", "unattractive", "breathtaking", "extraordinary", "unacceptable" and "disturbing". He held that the words "such an individual" appearing in section 412(1) and (2) harked back to the opening words of the preamble, namely to individuals whose purpose is the avoidance of liability to tax and not simply to any individual ordinarily resident in the UK: p 1196. He agreed with Viscount Dilhorne that if the latter interpretation is adopted it was not easy to see the point of the spousal extension, deeming the reference to the individual to include the wife or husband. *Congreve*, he held, was erroneous and ought to be overruled. Finally, Lord Keith of Kinkel agreed with Lord Wilberforce's and Viscount Dilhorne's speeches. He summed up the decision of the House as follows:

> "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. Further, this meaning gives a sensible content, which would otherwise be lacking, to the provision in subsection (8) (a) that reference to an individual shall be deemed to include the husband or wife of the individual. Finally, the consequences which follow from attributing the wider meaning to the words, when that meaning is applied to a numerous class of beneficiaries under a discretionary trust, are so dramatically unjust, as the facts of the present case illustrate, that I cannot think it to have been intended by Parliament."

50. Mr Ewart made two main points as to why this court should not regard *Vestey* as settling that the reference in section 739(2) to "such an individual" means an individual who is not only ordinarily resident in the UK but has also sought to avoid tax by means of a transfer of assets. The first is his reliance on certain references in the speeches in *Vestey* which suggest some flexibility in extending the scope to someone other than the one who actually makes the transfer. I address these points in the discussion later as to who actually counts as a transferor. HMRC's second more fundamental point on *Vestey* is, broadly that: that was then, and this is now. The TOAA code set out in ICTA 1988 has a vital difference from the TOAA code set out in Income Tax Act 1952 (as amended) with which *Vestey* was concerned. This is the existence of section 744 which provides a statutory basis for preventing a situation where tax is levied on a multiple of the total income of the overseas transferee of the assets.

51. Mr Ewart rightly points out that the absence of such a mechanism in the code in the Income and Corporation Taxes Act 1952 was a powerful factor in favour of the narrower application of the tax charge which Walton J and the House of Lords in *Vestey*

favoured. The difficulty facing the Commissioners in *Vestey* was the logical consequence of their contention that the tax charge could be imposed on beneficiaries who had not transferred the assets, combined with the decision in *Lord Howard de Walden* that the amount subject to the charge was the whole of the income of the overseas person. That would mean that all six beneficiary taxpayers in that case could, as a matter of law, be taxed on the whole of that income. The Crown's answer to this was the exercise of an extra-statutory discretion not to tax to the full extent possible but to limit its assessments to a fraction of the income corresponding to the fraction of the aggregate of the amounts actually received. Lord Wilberforce described the discretion claimed by the Commissioners as a radical departure from constitutional principle: see pp 1172- 1173:

> "Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.
>
> A proposition that whether a subject is to be taxed or not, or, if he is, the amount of his liability, is to be decided (even though within a limit) by an administrative body represents a radical departure from constitutional principle. It may be that the revenue could persuade Parliament to enact such a proposition in such terms that the courts would have to give effect to it: but, unless it has done so, the courts, acting on constitutional principles, not only should not, but cannot, validate it.
>
> … The fact in the present case is that Parliament has laid down no basis on which tax can be apportioned where there are numerous discretionary beneficiaries."

52. Importantly, Lord Wilberforce contrasted the absence of any provision in the statute to apportion the tax liability amongst potential taxpayers with other places in the tax code where Parliament had expressly conferred the power to apportion and had laid down principles according to which the apportionment was to be made. If the result in *Congreve* produced results which were unconstitutional, that must cast doubt on the decision. He referred to the absence of "any prescribed mechanism to operate" the tax charge again at p 1176D and to the "administrative and constitutional difficulties of a high degree" caused by *Congreve* at p 1178.

53. Viscount Dilhorne also regarded Parliament's omission to make any provision in the section to deal with where a number of individuals are deemed to have the income

of the non-resident as "very significant" when construing the provision: p 1184G-H. He observed that the right to appeal against an assessment was worthless if the amount depends solely on the discretion of the revenue. He went further in holding that, given the mandatory terms of section 412, the revenue had no power to mitigate the gross injustice that arose by limiting the assessment to a fraction of the total income. Lord Edmund-Davies regarded the case as an opportunity to consider the basis for the revenue's asserted power to make extra-statutory concessions by assessing each taxpayer to tax only on a proportion of the whole income. He concluded that there was no statutory support for the revenue's practice in applying section 412: p 1194.

54. Mr Ewart argues that this factor, so clearly important in *Vestey*, does not affect the construction of section 739 now because section 744 ICTA 1988 supplies what was so egregiously missing from ICTA 1952. Section 744 was introduced into the TOAA code by section 46 of the Finance Act 1981 and modified the effect of what had by that time become section 478 ICTA 1970 (corresponding to the earlier section 412 of the Income Tax Act 1952 and the later section 739 ICTA 1988). Section 46 did not amend section 478 or insert additional provisions into ICTA 1970 but provided that no amount of income should be taken into account more than once in charging tax under section 478 ICTA 1970. The provision which is now section 744 achieves three important things. It prevents the sum to which the tax charge is applied under sections 739 and 740 adding up to more than the total of the income of the overseas person. In fact, as is shown by this case, HMRC do not have to apply the tax charge to all the income of the overseas person. In the Fishers' case, only 76% of the profits of SJG were subject to the charge because they disregard the shares held by the non-resident, Dianne Fisher. Secondly, it confers on HMRC a discretion to apportion the tax charge in such a manner as appears to HMRC to be just and reasonable. Thirdly, it provides for an appeal against that apportionment. Mr Ewart submitted that this court was not bound to construe section 739 in the same way as the House construed section 412 of the Income Tax Act 1952. Although he accepted that there would be a question mark over whether the enactment of section 46 Finance Act 1981 could affect the proper interpretation of the unamended section 478 ICTA 1970, he submitted that once the provisions all formed part of the same code in ICTA 1988 there was no difficulty. Section 744 was, from the time that ICTA 1988 was enacted, part of the context in which section 739 fell to be construed. The presence of a mechanism to apportion the income removed the main plank on which the House of Lords had based its decision in *Vestey* to limit section 412 Income Tax Act 1952 to transferors.

55. In my judgment, however, section 739 construed as part of the overall TOAA code is limited to charging individuals who are ordinarily resident in the United Kingdom and who transfer the assets which generate the income which is then deemed to be their income under section 739(2) or which generates the capital triggering the charge under section 739(3). It is true that their Lordships in *Vestey* regarded the absence of an apportionment mechanism as a strong pointer in favour of such an interpretation. But Lord Wilberforce's primary reason for deciding that *Congreve* was wrong was that he regarded the narrower interpretation as the natural meaning of the

words. That is how Lord Wilberforce's decision was interpreted by Lord Nolan in *Inland Revenue Comrs v Willoughby* [1997] 1 WLR 1071, 1074. Lord Nolan said that it has now been made clear by the decision in *Vestey* that the charging provision of what by then had become section 739 ICTA 1988 can be applied only to the individual (or the wife or husband of the individual) who has made the relevant transfer of assets. The case of *Willoughby* in fact addressed a different issue. The House held in that case that section 739 applied only to transfers of assets by individuals who were ordinarily resident at the time of the transfer. It was not enough that they became ordinarily resident here at the time the income accrued to the overseas person. That ruling was reversed by section 739(1A) which was introduced by the Finance Act 1997 before the House of Lords decision in *Willoughby* but after the decision of the Court of Appeal in that case which had arrived at the same conclusion.

56. I respectfully agree with Lord Wilberforce that the most natural meaning of the words is the meaning he gave to the earlier provision in *Vestey*. The reference in section 739(2) to "such an individual", being the individual who has power to enjoy the income of the overseas person, requires one to consider what characteristics of the individuals referred to in section 739(1) are thereby brought into subsection (2). There is no reason to pick out one of those characteristics (the fact that the individual is ordinarily resident in the UK) and ignore the others (that they are trying to avoid liability to income tax by means of transfers of assets).

57. The presence of section 744 does not mitigate the features of the charge that led to it being described as penal and harsh. It is still the case, following *Lord Howard de Walden*, that a single individual caught by section 739 can be charged tax on the whole of the income of the overseas transferee if they have power to enjoy that income, even if they have received little or no actual income from which to defray that tax. The Court of Appeal in *Lord Howard de Walden* posited a case where the assets were transferred to an existing overseas corporation with very large assets and income of its own. The income attributable to the assets transferred might be a very small proportion of the overseas company's total income. Lord Greene MR recognised that the effect of the provision was that it would be the total income that was deemed to be the income of the individual and subject to tax. This is why he described the provision as "the severest of penalties" imposed on those who were minded to throw the burden of taxation off their own shoulders on to those of their fellow citizens. That burden is certainly thrown by the transferor of the assets but that is not an apt description of someone who was not the transferor.

58. The Fishers made a similar point unsuccessfully in their appeal to the FTT, arguing that the income on which they should be taxed should be less than the total profits of SJG in each year. Peter put forward calculations which he said showed that by 2008, the profits of SJG were such that only 10% came from customers SJG had acquired in the transfer of the business from SJA: see para 206 of the FTT's decision. They argued that the income from the new trade was too remotely related to the

transferred assets to fall within the charge. The FTT rejected that argument referring to *Lord Howard de Walden*: see para 213. The FTT accepted that profits from SJG's internet, casino and poker business were the consequence of the intervening events of those new ventures being set up rather than arising "by virtue or in consequence of" the transfer of the telebetting assets (para 217). However, those ventures were all "associated operations" within the meaning of section 739 so that the income arising from them was to be treated as income arising from the transferred assets: paras 243-246. The Upper Tribunal dealt with this point at paras 97-103, upholding the FTT's conclusion. This penal aspect of the charge appears therefore to be as strongly asserted by HMRC under the current version of the TOAA code as it was under section 18 of the Finance Act 1936. This, as Lord Wilberforce said, is a strong pointer towards limiting the scope of the charge to the transferor.

59. Thirdly, Mr Ewart's reliance on the apportionment mechanism introduced by section 46 of the Finance Act 1981 as indicating that section 739 ICTA 1988 now catches everyone is fatally undermined by section 740. Section 740 re-enacts section 45 of the Finance Act 1981, the companion piece to the apportionment mechanism in section 46 (now section 744 ICTA 1988). Section 740 is specifically designed to deal with non-transferors who are not caught by section 739. As explained earlier, it provides a significantly less penal taxing charge for non-transferors who are taxed only on the benefits they receive, if they would not otherwise be charged income tax on those benefits. Section 740 and section 739 cannot be applied to the same individual. Yet if Mr Ewart is right, there is a substantial overlap now between the two sections and no indication in the code as to how to decide whether a particular individual should be taxed under one rather than the other. Section 744 does not help if there is only one person potentially liable to tax on the income. To say that it is in HMRC's discretion whether to tax a non-transferor on the total income or only on the benefit received is to fall into the trap that the courts have branded unconstitutional. Parliament did indeed fill the gap created by *Vestey* but did so by enacting section 740 rather than by amending section 739.

60. Fourthly, the spousal extension point which weighed heavily with their Lordships in *Vestey* still applies. What was section 412(8) now appears in section 742(9), expressly extending the reference to "an individual" in section 739 to include the spouse of the individual. Like Viscount Dilhorne, Lord Edmund-Davies and Lord Keith, I struggle to see the point of the spousal extension if everyone who has the power to enjoy the income can be charged regardless of whether they are a transferor or not. Mr Ewart put forward some alternative explanation for this as dealing with the case where one spouse who has the power to enjoy the income of the overseas person is not resident in the UK and the other spouse who does not have the power to enjoy is resident here. That must be a rare occurrence even today when would-be tax avoiding couples may lead more independent and jet-setting lives than wealthy spouses tended to do when the provision first appeared in 1936. I regard it as very unlikely that the spousal extension had that purpose in 1936 and there is no reason to suppose it was being re-purposed in the manner suggested by Mr Ewart when it was brought forward into ICTA 1988.

61. Section 744 still has an important role in the code if section 739 does not apply to non-transferors. There may well be situations where section 739 applies to the transferor of the assets and other non-transferors who receive income are caught by section 740. Because of section 744, HMRC could not rely on *Lord Howard de Walden* to tax the transferor on the totality of the income of the overseas person and in addition tax the non-transferors on the benefits they receive out of that income.

62. I would therefore decide this first issue in favour of the Fishers. They can only be subject to the charge under section 739 if they are properly to be regarded as the transferors of the assets which were sold by SJA to SJG in February 2000.

(5) ISSUE 2: DID THE FISHERS TRANSFER THE ASSETS?

63. There is no doubt that the legal transferor of the assets was SJA and not the Fishers. HMRC argue that because the Fishers together owned the controlling interest in SJA, they should be treated as transferors of the assets and therefore within the charge imposed by section 739. This raises two questions – is it ever possible for someone other than the owner and legal transferor of the assets to be treated as a transferor for the purposes of section 739? If so, in what circumstances (if any) do the shareholders of a company which transfers its assets count as transferors?

64. As to the first of these questions, HMRC rely on references in the case law to individuals who "procure" the transferor to transfer the assets, or who are "in reality" the transferor or who are "quasi-transferors". They also point to Lord Wilberforce's rather gnomic statement in *Vestey* that "No difficulty arises from cases of multiple transferors" (see para 42., above). This shows, they submit, that there is some flexibility as to who is caught by section 739 even if the answer to Issue 1 is that section 739 is limited to transferors. HMRC then submit that in certain circumstances, including the circumstances of the Fishers, the shareholders of a company are the quasi-transferors of assets in fact transferred by that company for the purposes of section 739.

65. The starting point for this discussion requires me to go back to the *Congreve* case and to consider the alternative basis on which the Court of Appeal and the House of Lords dismissed Mr and Mrs Congreve's appeal. As I explained earlier, Wrottesley J at first instance held that the individual did have to be the transferor of the assets in order to be caught. That was not, however, the end of the matter as he went on to explain:

> "It is conceded by Mr Tucker [*sc* Counsel] for the Appellants that a person who by an agent transfers his assets would not on that account escape the operation of the Section. I think that a person who, by owning all or practically all of the capital of an investment company, is able to bring about such

> a transfer as is referred to in the Section, is, for the purposes of such a Section, a person who has avoided tax by means of a transfer."

66. Cohen LJ held, disagreeing with Wrottesley J on the first point, that section 18 of the Finance Act 1936 applied to a taxpayer who was not the transferor of the assets because the words "by means of" in the preamble did not require any activity on the part of the taxpayer. Cohen LJ then went on to deal with Wrottesley J's further point (p 197):

> "But even if we were prepared to accede to the argument that the preamble 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. Mr Tucker, in commenting on the judgment of the learned Judge in the Court below, said, and Mr Jenkins [*counsel for the Commissioners*] agreed, that execution by a company could not be said to be execution by the individual, even though the individual owned all or practically all the shares in the company. We think, however, that the decision of the learned Judge can be upheld on the ground we have stated, since it is, we think in the present case, a reasonable inference from the facts found that the execution and performance of the transfers and associated operations in question by all the companies concerned were procured by Mrs Congreve acting through her agent Mr Glasgow. We should have been prepared, if it had been necessary, on this alternative ground to uphold the decision of the Commissioners."

67. In the House of Lords in *Congreve*, Lord Simonds posed the question whether the transfer of assets must be "a transfer effected by Mrs Congreve or her agent" or whether it could be effected by anyone. He did not address the point other than in that comment.

68. When the House returned to the point in *Vestey* and overruled the decision in *Congreve*, their Lordships referred to this alternative basis on which *Congreve* had been decided in the context of identifying the ratio of *Congreve* and so addressing whether the 1966 Practice Statement test needed to be satisfied. Lord Wilberforce said that the House in *Congreve* "accepted an alternative argument to the effect that in any case Mrs Congreve had organised or engineered transfers by her father": p 1174F. He concluded that *Congreve*:

> "should be departed from or overruled and the section interpreted as applying only where the person sought to be charged made, or, may be, was associated with, the transfer."

69. Viscount Dilhorne in *Vestey* described the facts of *Congreve* as very complicated but said that it sufficed to say that Mr Glasgow, Mrs Congreve's father, had transferred assets to a foreign company and that Mrs Congreve "had done so too": p 1182C-D. He held that the decision in *Congreve* was wrong in extending liability to persons other than the transferors involved in the tax avoidance: "though the actual decision of the case can be upheld on the alternative ground stated by Cohen LJ in his judgment" (p 1185C).

70. Lord Edmund-Davies in *Vestey* described the primary holding in *Congreve* as being that section 18 applied "if the transfer was procured by the taxpayer, even though not actually executed by him", adding "So far, so good.": p 1192. He also regarded that as the true ratio of the case. Finally, Lord Keith referred to the subsidiary argument accepted by the House in *Congreve* as being that "in any event certain transfers had been organised or brought about by the taxpayer herself": p 1197F.

71. Newey LJ in the Court of Appeal in the Fishers' appeal, said at para 41 that Mrs Congreve had been taxed on the assets of a company called Humglas even though the only transfer of assets to Humglas had been by a company, Humphreys & Glasgow (England), in which Mrs Congreve held 65% of the shares. He said: "It follows that the Court of Appeal did not think that the fact that Mrs Congreve had only a 65% interest in Humphreys & Glasgow (England) prevented that company's transfer of assets to Humglas as being one of 'the transfers … procured by Mrs Congreve acting through her agent Mr Glasgow'." Later in his judgment, Newey LJ quoted the words of Lord Wilberforce in *Vestey* about someone being "associated with" the transfer and those of Lord Edmund-Davies and Lord Keith I have set out above. He concluded that Stephen, Peter and Anne had "procured" the transfer for this purpose.

72. I respectfully disagree with that analysis of *Congreve* and *Vestey*. In *Congreve* the Court of Appeal, though accepting that a transfer could be procured by the taxpayer, expressly eschewed the view that a shareholder procured transfers made by the company, even if that shareholder owned all or practically all the shares: see Cohen LJ at p 197 (quoted at para 66., above). Further, if that had been the alternative basis of the decision, the person whom Mrs Congreve would have been treated as "procuring" to transfer the assets would have been the company in which she owned the 65% shareholding, whereas it is clear that the person who was regarded as her "agent" or whom she had procured to make the transfer was not the company but her father Mr Glasgow. The impenetrable facts of *Congreve* make it difficult to understand what exactly it was that Mrs Congreve did to procure her father to make the transfers. But those two points from Cohen LJ's judgment – namely that a shareholder does not

"procure" the transfer of assets by the company simply by owning all or most of the shares and that the person regarded as Mrs Congreve's agent was her father not the company she controlled – are what emerges clearly. *Congreve* does not, in my judgment, provide any support for a construction of the TOAA code that treats the shareholders of a company as the transferors of assets which are transferred by that company.

73. Nonetheless, the speeches of their Lordships in *Vestey* left some flexibility as to who is a transferor. Is there any reason to construe section 739 as applying to the shareholders of a company on the basis that they are "associated with" or that they "procure" the transfer of assets by that company? In my judgment there are no reasons for construing the section in that way and plenty of reasons not to do so.

74. First, I agree with the criticisms made by Phillips LJ in his dissenting judgment in the Court of Appeal. He said at para 141 that he saw no difficulty with regarding an individual who exercises their controlling interest in a company so as to procure a transfer by that company as a quasi-transferor. The more problematic issue was whether and in what circumstances a party who holds only a minority interest in the transferor company could be so classified. He pointed out that it was not clear from Newey LJ's judgment exactly what it was that Stephen and Peter had done which amounted to "procuring" the transaction. It appeared to entail no more than that they each supported the making of the transfer qua minority shareholder, whether by formal vote or otherwise. He regarded this as wrong in principle and illogical: (para 145). Minority shareholders have no power themselves to procure any outcome, having to abide by the majority decision. Most (if not all) decisions of companies will, by definition, be taken by or with the underlying support of shareholders who, collectively, hold a controlling interest in the relevant company. If being part of a group of minority shareholders who vote in favour of a transaction is sufficient to render them all quasi-transferors, that must apply to thousands of shareholders in a PLC. It would even apply, potentially, to a shareholder who has given a proxy to the board of a PLC which was proposing to effect the transfer.

75. During the hearing before this court, Mr Ewart struggled to express what was needed in order for a shareholder to become a transferor. At some points he seemed to be suggesting that the fact that the shareholders at a general meeting usually have the power to remove the board of directors was enough for them all to be transferors, by reason of them not exercising that power when the directors cause the company to transfer an asset. At other times he seemed to be suggesting that it was necessary for the shareholders to have been seen to get together, or to act in concert (though it was not clear what he meant by that) before they could be regarded as quasi-transferors. A myriad of different scenarios were suggested. What happens to a holder of, say, 30% of the shares who, knowing that all the other shareholders intend to vote to transfer the company's assets overseas, cannily votes against the motion, or abstains, or cries off attending the meeting? Does he or she thereby avoid the charge to tax whilst still having

the power to enjoy the assets transferred pursuant to the motion passed by the other shareholders so that it is only the voting shareholders who are caught by the provision?

76. At some points Mr Ewart seemed to be suggesting that this degree of uncertainty about when and to whom the charge applied was a positive virtue of the drafting. The provision was, he said, designed to discourage people from moving assets abroad with a tax avoidance purpose. The problem with having a bright line is that people devise a way round it. The penal provision works better to achieve its aim if taxpayers are unable to know whether they would be caught or not. HMRC could then assess them to tax on the income of the overseas person, leaving the taxpayer to try to convince HMRC or the tribunal on appeal that they were not transferors. That is, in my judgment, an improper argument for HMRC to run. It has a flavour of the same unconstitutional approach to the enforcement of these provisions that was so strongly deprecated in *Vestey*. I agree with Mr Afzal's submission in response when he said that the law cannot be left in some unclear state "just to scare people".

77. The second reason is allied to the first and pushes me to go further than Phillips LJ was prepared to go and further than the Fishers needed to argue in this appeal. Like Cohen LJ in *Congreve*, I would reject the idea that even a "controlling" shareholder in the company is to be treated as procuring the transfer of assets by the company. The points that their Lordships made in *Vestey* about the absence of an apportionment mechanism apply here too. Lord Wilberforce (p 1173G) contrasted the absence of such a mechanism with other areas of the tax code where Parliament had expressly conferred the power to apportion and laid down the principles according to which apportionment is to be made. The contrast between that legislation and section 412 was "striking". Similarly, there are many places in the tax code where Parliament has carefully defined the circumstances where an individual is treated as controlling a company. See for example section 416 ICTA 1988 which is a great deal more complicated than simply saying that an individual with 51% of the shares in a company controls it. Other places incorporate by reference one of the definitions of when a person is treated as having control of a company in sections 450 or 707 or 1124 of the Corporation Tax Act 2010. Those sections also contain many subsections and draw in words and phrases which are in turn given complex definitions in other sections.

78. Section 739 is expressly limited to "individuals". The absence of any definition of what it means for an individual to control a company in order to be the transferor of assets transferred by that company suggests strongly to me that section 739 was not intended to apply to transfers by companies. Any attempt to draw a bright line by saying, for example, that someone who owns 100% of the shares, or 51% of the shares is caught does not avoid the problem. If the owner of 100% of the shares is itself a corporate body, is the owner of that parent, or of the parent of that parent caught? Whether any particular shareholder, even one with more than 50% of the shares, is actually consulted on and involved in the decision to transfer assets depends on the division of responsibilities in the articles of association between the board of directors

and the shareholders. A large company may transfer an income generating asset which, though substantial in absolute terms, is only a small fraction of its overall business. That decision may be delegated entirely to the directors, but HMRC accept that directors will rarely be caught by the charge because they do not have a "power to enjoy" the income of the overseas transferee. HMRC counter that the provision should apply at least where the shareholders and directors are the same people. Again, there are other places in the tax code where the concept of the "close company" is introduced and that concept was defined in sections 414 and 415 ICTA 1988. It is a sophisticated definition which defines a close company as one which is under the control of five or fewer participants but goes on to exclude certain companies, to bring in other defined terms such as when shares are or are not deemed to be held by the public as well as what is meant by "control".

79. HMRC's contention therefore bristles with difficulties. These were discussed by Walton J when he returned to the fray after *Vestey* in *Inland Revenue Comrs v Pratt* [1982] STC 756 ("*Pratt*"). The taxpayers were three of the eight directors of a UK company and together owned just under 30% of the shares. The company sold land in Birmingham to a Bahamian company. The sale was made outright but there was an understanding that there would be an additional benefit to the shareholders if the land was granted planning permission. Part of the land was sold and was granted planning permission. The taxpayers entered into a tax avoidance scheme aimed at ensuring that any increase in the land value would be a capital and not an income receipt. As a result of *Vestey*, the question for the court was whether the directors were transferors of the assets. Walton J accepted that there may be various transfers of assets which are made by two or more persons but which give rise to no difficulties. He gave the example of A and B holding land as joint legal tenants upon trust for themselves beneficially in equal shares then making a transfer abroad of their interests in that land. He saw no problem in regarding them both as the transferors of their respective beneficial half shares: p 791f. It was more difficult if they held the land as beneficial joint tenants because then there would be two transferors of one subject matter. He referred to Cohen LJ's description of the alternative ground of liability in *Congreve*, the ground that was accepted as justified by the House of Lords in *Vestey*. Walton J accepted as established that a person who is not a transferor may nevertheless be liable as if he were a transferor if he "procured" the transfer. He dubbed such a person a "quasi transferor" (p 796g). Turning to whether the taxpayers there could be quasi-transferors, he noted that the Revenue's submission covered directors or shareholders who formally or informally, expressly or tacitly brought about or joined in bringing about the transfer. That test, he said, (p 792j):

> "is such that it would embrace any shareholder in the company who refrained from commencing an action to prevent the sale upon some ground or other. It might even be argued that a shareholder who refrained from such action because, the price being a perfectly proper one, and the company being in considerable need of money, he was

> advised (perfectly correctly) that he had no conceivable change of success in any such action, was caught, for such a person nevertheless tacitly concurs in the action taken."

80. In answer to the question whether "the reality of the matter" was that somebody other than the company was the transferor, Walton J held that the Crown's case failed both as a matter of law and as a matter of fact. He held as a matter of law that in the case of a plurality of transferors, if it is impossible to separate out their respective interests so as to say which percentage of the asset each transferred, then section 412 did not bite at all. The difficulty with holding otherwise was that the section provides no machinery for attributing anything less than the whole of the income to any transferor (the applicable law did not include section 46 of the Finance Act 1981). Turning to the facts, he pointed out that in *Congreve* the House recognised that a transfer by an individual, even one holding 99.9% of the shares of the company was not the same as a transfer by the company. But the House held that Mrs Congreve did procure the transfer and thereby was a quasi-transferor. The facts of the case before him in *Pratt* were, Walton J said, "very, very different" (p 796). The sale of the land was a matter for the board of the company and the board was duly consulted and approved the sale. There was no question of any one of the three taxpayer shareholders either alone or in concert being able to procure the board to do anything.

81. HMRC say again that the existence now of section 744 ICTA 1988 allowing apportionment can overcome the problem of multiple transferors and hence in large part overcomes the problem of each shareholder of the company being treated as a quasi-transferor. This was the argument that found favour with the FTT in the Fishers' appeals. The FTT accepted that the introduction of section 744(1) put an entirely different complexion on the problems of multiple transferors identified in *Pratt* and opened the door that would otherwise be shut on the possibility of the TOAA code applying to situations where there are multiple quasi-transferors: see para 186 of their decision.

82. Respectfully I do not agree that section 744 is the answer for the same reasons as I do not regard it as undermining the construction of these provisions supported by *Vestey*.

83. One might have thought that the existence of the motive defence in section 741 ICTA 1988 would serve to distinguish between active, knowledgeable shareholders who should be treated as quasi-transferors procuring the company to transfer its assets and passive shareholders who do not know anything about the transfer or do not agree with it. The latter would not have a tax avoidance purpose. That is not the case since it was accepted by both parties that the motive defence in section 741 focuses on the purpose for which the *transfer* was effected not the purpose of each individual whom HMRC seek to charge to tax. If a minority shareholder is treated as a quasi-transferor then he or

she can be taxed even if they did not have any tax avoidance purpose, provided that the transfer was carried out with a tax avoidance purpose by the other transferors. The Fishers point out that in *Pratt*, Walton J regarded this point as throwing "another spanner into the works" of the operation of the provisions if there were multiple transferors (p 795). They argue that this spanner is demonstrated in the present case in which the FTT found as a fact that Anne had no tax-avoidance motive as regards the transfer (para 515) but held that she could not rely on the motive defence. The avoidance of betting duty was the main purpose of the transfer of the business from SJA to SJG because that had been Stephen's and Peter's subjective purpose: para 533.

84. Mr Ewart argued that Walton J recognised that there could be multiple transferors of an asset in other contexts. Further, Mr Ewart said that there are other places in the tax code where the purpose of a transaction agreed upon by a number of people must be identified: see for example *Inland Revenue Comrs v Brebner* [1967] 2 AC 18. Although I see the force in Mr Ewart's argument, it does not wholly meet the point. On HMRC's case, the motive defence is the sole escape route for a minority shareholder from a potential substantial tax charge but that escape route is not available for such a person even if they did not themselves have a tax avoidance purpose at all and regarded the transfer as an entirely bona fide commercial transaction.

85. As to what Lord Wilberforce meant when he referred to an individual being "associated with" the transfer as contrasted with someone "who had no hand in" the transfer (p 1175D), that must, in my judgment, be left to be explored in another case. A set of facts may arise in future where HMRC can properly argue that someone who is not the owner or the legal transferor of the assets has nonetheless procured the transfer or used an agent to transfer the assets. I agree with Walton J's approach in *Pratt* to the wiggle room apparently left by their Lordships in the speeches in *Vestey*. Those words, Walton J said, are not to be treated as if they were in a statute (p 796). The issue of quasi-transferors did not arise in *Vestey* because the beneficiaries whom HMRC sought to tax had not been involved in any way with the transfers.

86. What is, however, clear is that the shareholders of a company, even if they are also the directors, are not quasi-transferors and do not procure the transfers made by the company. As Walton J said in *Pratt*: (p 796)

> "It may be stretching the words of the section – indeed, I think it is – to say 'La Societe 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'."

87. HMRC may protest that this leaves a lacuna in the legislation since all an individual needs to do is put the asset into a company and then get the company to transfer that asset abroad. The answer to that is three-fold. First, as Mr Afzal pointed out, the introduction of section 740 applying to non-transferors means that that individual will not escape the tax charge if he or she actually receives a benefit in this jurisdiction in the form of income or capital. The second answer may lie in the point that the Upper Tribunal made at para 63 of their decision. They said a taxpayer could not avoid the operation of section 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 would still be a transfer of those assets by the individual to the foreign entity. 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 recognised exceptions to the distinct legal personality of the company. No such argument could be relied on by HMRC here because SJA was a bona fide company which had been trading for many years. Thirdly, if there is indeed a gap created by this ruling, then as Viscount Dilhorne said in *Vestey*, gaps in our tax law can be and usually are speedily filled. If the Government does not regard section 740 as adequately filling the gap, then it will need to think carefully about how to fill that gap in a fair, appropriate and workable manner.

88. I would therefore conclude that the Fishers' appeals must be allowed and HMRC's appeal must be dismissed. The Fishers were not either singly or collectively the transferors of the business that was sold by SJA to SJG and they are not therefore within the charging provision in section 739 ICTA 1988.