

Transfer of Assets Abroad

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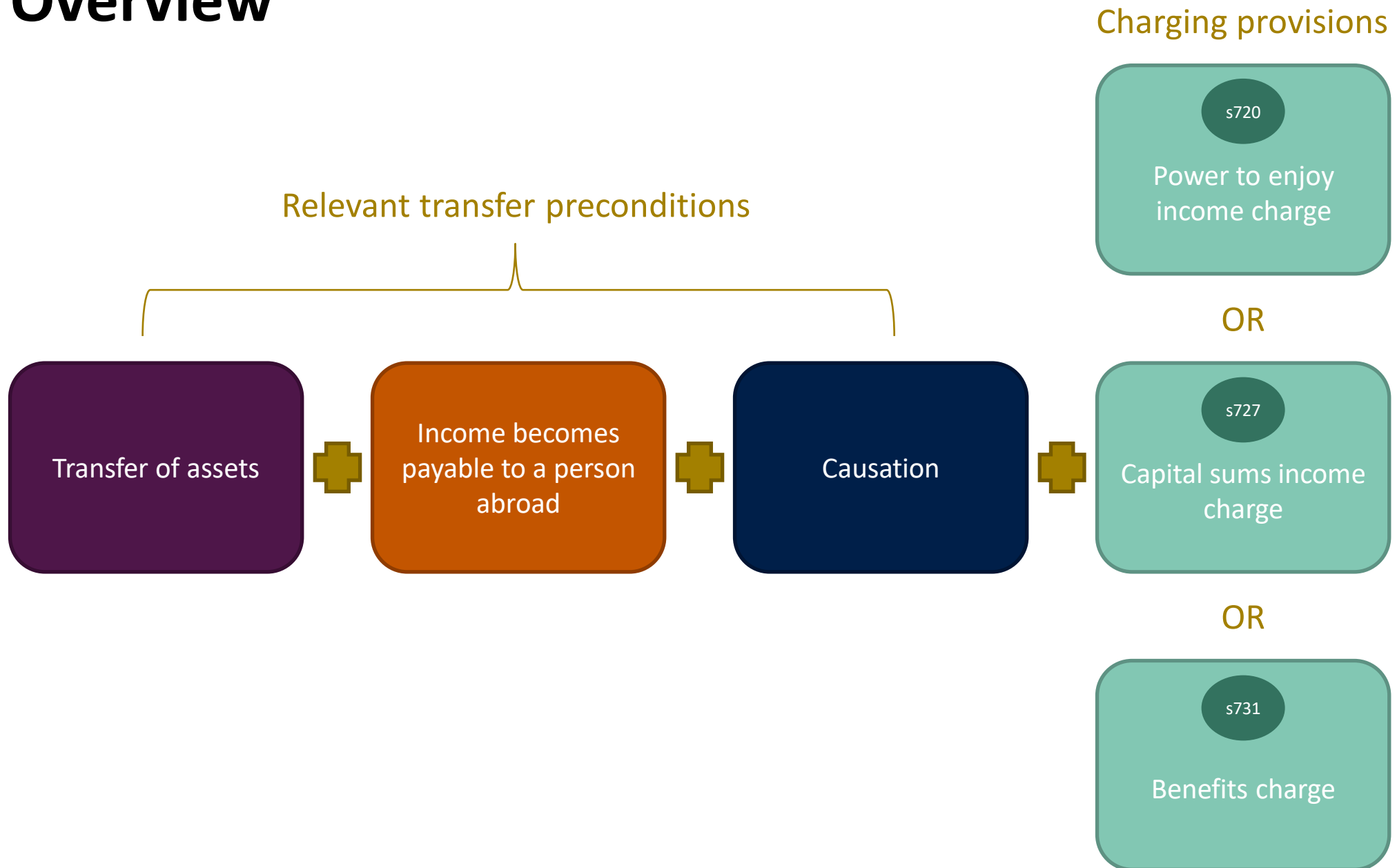
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- What are the Transfer of Asset Abroad rules?
 - Pre-conditions for TOAA charges to apply
 - Power to enjoy income charge
 - Capital sums income charge
 - Benefits charge
 - Defences
 - Practical examples
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What are the Transfer of Asset Abroad Rules?

- Transfer of Asset Abroad rules ("**TOAA Rules**") are found in ss714-751 ITA 2007.
- Broadly, they are an anti-avoidance measure designed to prevent individuals from avoiding UK tax by transferring assets abroad, but still hoping to benefit from that asset.



Overview



Pre-conditions: transfer of assets

- **Transfer**
 - Includes creation of rights
 - Interpreted broadly in case-law:
 - Disposal of assets
 - Settling money into settlement
 - Gift
 - Making / receiving loan
 - Subscribing for shares
- **Assets**
 - Very broad. Tangible / intangible, includes property and rights of any kind.
 - Assets do not have to be located outside UK / move from the UK.



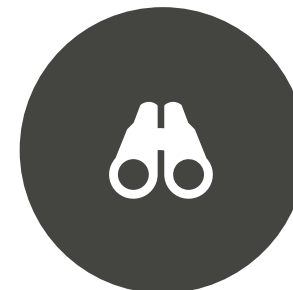
Pre-conditions: associated operations

Section 719

- Operation of any kind relating to
 - Transferred assets
 - Assets representing transferred assets
 - Income arising from assets
 - Assets representing accumulations of income

Relationship with transfer of assets

- Can be before / after / same time
- Something more than mere historical association?



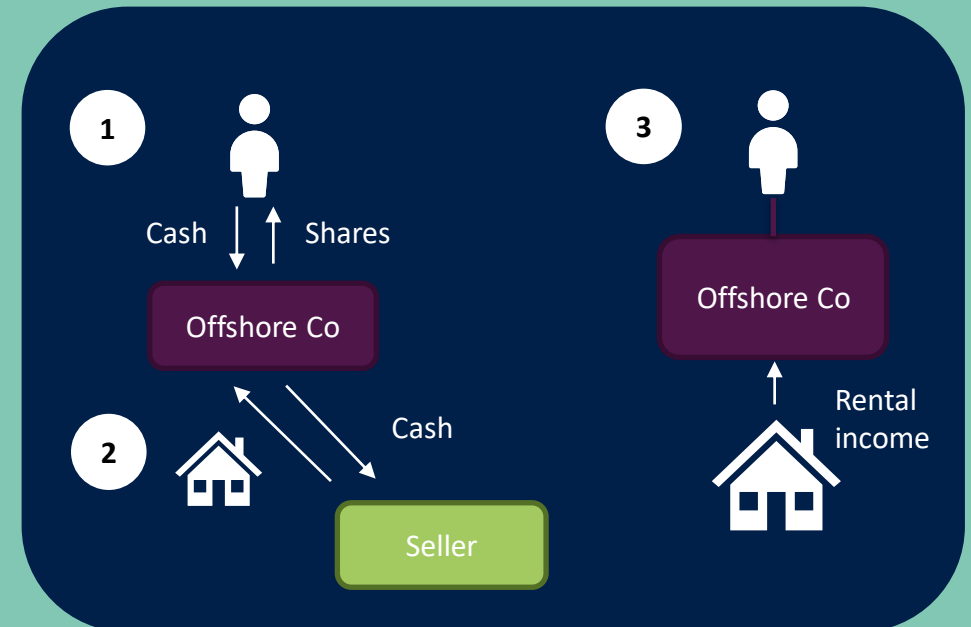
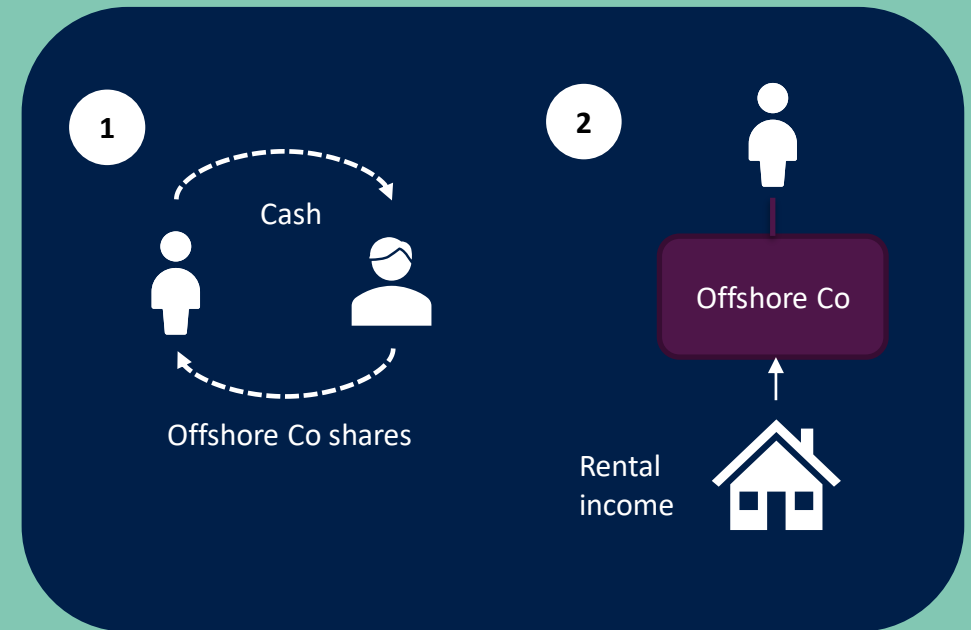
Pre-conditions: income becomes payable to a person abroad

- As a result of the transfer, or one or more associated operation, or the transfer and one or more associated operations, income becomes payable to a person abroad (s716(1), ITA 2007).
- "Payable" meant that "*process by which income finds its way into the pocket of the individual*" (*Latilla v CIR*).
- Income must **actually have been paid** or a person must be **entitled** to receive the income in order for a charge to arise.



Pre-conditions: causation

- Income must become payable to person abroad **as a result** of transfer of assets
- See UT discussion in Rialas



Pre-conditions – Individuals

The TOAA Rules apply
only to individuals

Individuals means
natural persons

Clear distinction between the
use of the terms "individual"
and "person" in legislation

Charges

The TOA Regime imposes three charges to income tax:

- A charge on individuals with power to enjoy income as a result of relevant transactions (s720, ITA 2007);
- A charge on individuals receiving capital sums as a result of relevant transactions (s727, ITA 2007); and
- A charge on non-transferors receiving a benefit as a result of relevant transactions (s731, ITA 2007).



Income charge – power to enjoy

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Power to enjoy income charge - introduction



“such an individual”

- Wide: any UK resident individual
- Narrow: a UK resident individual who does something to avoid IT by relevant transfers



Transferors

- Direct transferors
- Quasi transferors / indirect transferors / procurers



Avoidance of income tax

- Not required

Power to Enjoy Income Charge - Conditions

- **CONDITION A:** individual has **power to enjoy income of person abroad as a result of** relevant transfer and / or more associated operations - s721(2)(a)-(c)
- **CONDITION B:** the **income** of the person abroad **would be chargeable to income tax** if it were received by the individual in the UK - s721(3)
- **CONDITION C:** the individual must be **UK tax resident** for the tax year - s721(3A)



Condition
A



Condition
B



Condition
C

Enjoyment Conditions:

Condition A – s723(1), ITA 2007

Condition A is that:



the income is so dealt with by any person as to be calculated at some time to ensure for the benefit of the individual whether in the form of income or not.

Individual must have the power to enjoy any income of a person abroad either **at that time or in the future.**

"Benefit" includes a payment of any kind, so provided some benefit enures to the individual, it need not be a money payment.

Enjoyment Conditions:

Condition B – s723(2), ITA 2007

Condition B is that:



the receipt or accrual of the income operates to increase the value to the individual of any assets the individual holds, or of any assets held for the individual's benefit.

Examples include:

- Where an individual holds shares in a foreign company and the accrued income or profits of the company increase the value of its shares;
- Where the consideration for the transferred assets is left as a debt owing to the individual by the company.

Enjoyment Conditions:

Condition C – s723(3), ITA 2007

Condition C is that:



the individual receives or is entitled to receive at any time any benefit provided or to be provided out of the income or related money.

This condition is designed to capture situations where:

- An individual who holds redeemable debentures;
- A chain of companies is involved;
- A shareholder is entitled to receive dividend.

This condition also applies to capital sums e.g. *Earl Beatty's Executors v CIR*.

See s724 – taxed on value of benefit (not income arising)

Enjoyment Conditions:

Condition D – s723(5), ITA 2007

Condition D is that:



the individual may become entitled to the beneficial enjoyment of the income if one or more powers are exercised or successively exercised.

This condition largely arises in relation to settlements (trusts). For example, a company underlying a settlement whose shares are acquired by the settlement trustees and the company declares a dividend. The trustees then exercise their discretion as to the application of the dividend.

Interaction with Settlements Legislation (Chapter 5, Part 5 ITTOIA 2005): HMRC will charge under Settlements Legislation in the first instance (TOAA Rules only used as backstop).

Enjoyment Conditions:

Condition E – s723(7), ITA 2007

Condition E is that:



the individual is able in any manner to control directly or indirectly the application of the income.

This condition covers the situation where the individual has a controlling interest in a foreign company, either by controlling the voting rights or other rights under the company's Articles of Association.

Distinction between "control" (*Lee v CIR*) and "influence" (*CIR v Schroder*).

Income charge – power to enjoy: what is charged?

- Income which has become income of person abroad is deemed to be income of transferor
- Person liable: individual to whom income is treated as arising
- Amount of income: income of person abroad
- Same reliefs and deductions available as if has received income directly – s746
- Special rules for non-doms / 15/20 deemed doms

Income charge - capital sums

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Income charge – capital sums: conditions

1

Transfer of assets

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Income has become income of person abroad

- As a result of relevant transfer / associated operations

2

UK resident individual transferor

- “Such an individual”
- Transferor / quasi transferor

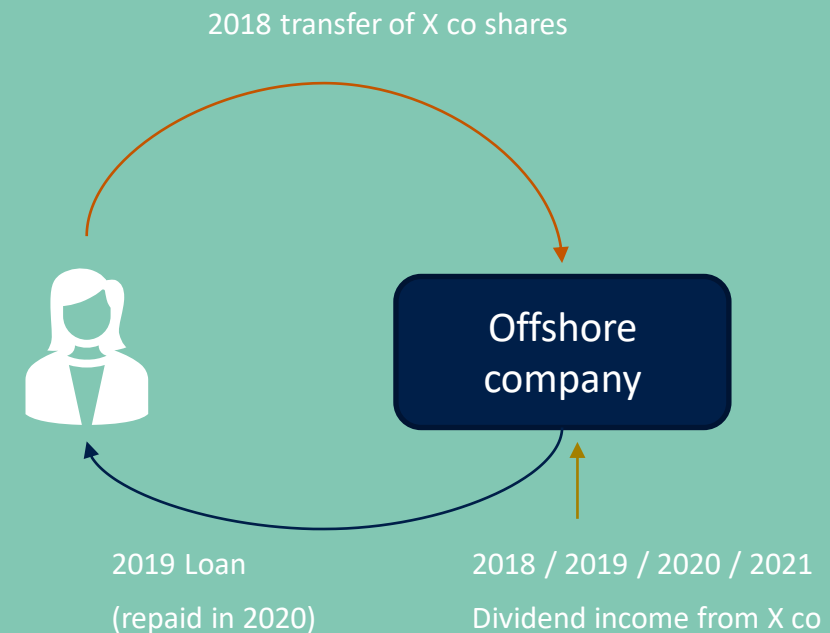
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Capital receipt conditions are met

- Section 729

Income charge – capital receipt conditions

- **S729(1)(a)**
 - In the tax year, individual receives / entitled to receive a capital sum; OR
 - Individual received a capital sum in an earlier tax year
- **S729(1)(b)**
 - Payment of sum connected with relevant transaction
- **Capital sums**
 - Loans to / from individual
 - Repayment of loan
 - Non-income payments not for full consideration
 - Includes receipt by 3rd party



Income charge – capital receipt: what is charged?

- Income which has become income of person abroad is deemed to be income of transferor
- Person liable: individual to whom income is treated as arising
- Amount of income: income of person abroad
- Same reliefs and deductions available as if has received income directly – s746
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Double tax relief



- See Kessler for how to claim foreign tax credit relief for foreign taxes on income of person abroad
- Person abroad cannot claim treaty relief from TOAA charge

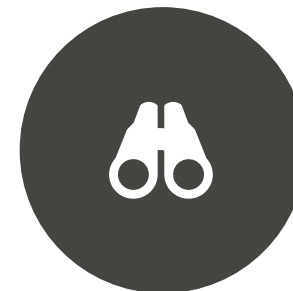
Benefits charge

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Benefits charge

Conditions

- Relevant transfer occurs
- Individual receives a benefit in tax year
- Benefit provided out of assets made available as a result of transfer / associated operations
- If individual is “relevantly domiciled”, not liable to tax under s720 / s727
- Individual not liable to income tax on benefit (other than under s731 / settlements provisions)



Benefits charge – amount charged

Identify value / amount of benefit



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graph TD; A[Identify value / amount of benefit] --> B[Deduct anything already taxed under benefits charge / CGT = total untaxed benefits]; B --> C[Calculate income arising to person abroad which can be used to provide benefit]; C --> D[Deduct anything already taxed under TOAA = available relevant income]; D --> E[Income treated as arising = lower of total untaxed benefits and available relevant income];
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Deduct anything already taxed under benefits charge / CGT
= total untaxed benefits

Calculate income arising to person abroad which can be
used to provide benefit

Deduct anything already taxed under TOAA = available
relevant income

Income treated as arising = lower of total untaxed benefits
and available relevant income

Interaction between non-dom rules and TOAA



- S726 / s730 / s735 apply where individual is non-dom and remittance basis applies
- Redesignate foreign deemed income as “relevant foreign income”
- Income charged to tax (if remitted) under Part 8 ITTOIA, not TOAA

Defences

- Motive defence – Condition A – s737(3)
- Motive defence – Condition B – s737(4)
- EU law defence – s742A

Purpose Test Defence

S737(3), ITA 2007: An individual will not be liable for income tax in the tax year of the charge if it would not be reasonable to draw the conclusion, from all the circumstances of the case, that the purpose of avoiding liability to taxation was the purpose, or one of the purposes, for which the relevant transactions or any of them were effected.

All the Circumstances of the Case

"All the circumstances of the case" includes the intentions and purposes of any person who designs, effects or provides advice.

Associated operations: now taken into account by HMRC.



Purpose Test Defence – The Reasonableness Test

The following factors are taken into account in considering "*all the circumstances of the case*":

- the individual's stated intentions;
- any other evidence of the individual's purposes and intentions;
- the intentions of any other parties carrying out relevant transactions;
- the actual or expected outcome of the transactions;
- a comparison of the UK tax payable by the individual or any other person with what the situation may otherwise have been if the transactions had not taken place or the income had arisen directly to the individual.



The Purpose Test (1)

- The second part of the motive defence is one of purpose i.e. that the purpose of the relevant transactions *cannot be* for "*avoiding liability to taxation*".
- No reference in legislation to purpose of any particular individual, but HMRC guidance refers to the individual who would otherwise be liable for income tax.
- Questions HMRC may ask include:
 - what was done;
 - why the transaction took place;
 - what was the expected outcome;
 - what was the actual outcome.

The Purpose Test (2)

- Objective or subjective?
- In reality, a combination of the two: intention is subjective, but HMRC will look objectively at *all the circumstances of the case*.
- *Fisher v HMRC* [2014] UKFTT 804 (TC) summarised the key concepts, including:
 - The test is subjective.
 - Knowledge that less tax is paid does not equate to a tax avoidance purpose (but knowledge is a pre-requisite to having a purpose).
 - Awareness of tax aspects does not equate to having a tax avoidance motive.
 - The mere fact of taking tax advice does not mean there is a tax avoidance motive.
 - (7) Picking a lower tax route over a higher tax route does not equate to tax avoidance (but equally does not preclude tax avoidance).

Purpose Test Defence – Avoiding Liability to Taxation

- The individual must prove that it would not be reasonable to draw the conclusion that avoiding liability to taxation was a purpose of the transactions.
- "Avoiding liability" is not limited to formal schemes or arrangements.
- *Willoughby v CIR* (70 TC 57): distinction made between tax avoidance and tax mitigation.
- Tax mitigation which correctly uses tax legislation e.g. a straightforward personal investment in an offshore fund, is unlikely to be regarded as avoidance.
- Exemption covers a much wider concept that the charging provisions - purpose must be to avoid "taxation" as opposed to "avoiding liability to income tax".



Genuine Commercial Transaction Defence - Overview

S737(2)(b), ITA 2007 provides that where Condition A is not met, Condition B must be met in order to qualify for an exemption.

S737(4), ITA 2007:

- all the relevant transactions were genuine commercial transactions; and
- it would not be reasonable to draw the conclusion, from all the circumstances of the case, that any one or more of those transactions was more than incidentally designed for the purpose of avoiding liability to taxation.



"Genuine Commercial Transaction"

Transaction must be on:

- a) arm's length terms; and
- b) is effected in the course of a trade or business or with a view to setting up and commencing a trade or business and for its purposes i.e. it is commercial.

Arm's Length Terms

- The transaction must take place on terms that would have been agreed by those **unconnected** to one another.

Investment Management

- Not commercial unless done for unconnected persons – s738(4)



Genuine Commercial Transaction Defence

More than Incidentally Designed

The second part of this defence is that:

- it would not be reasonable to draw the conclusion, from all the circumstances of the case, that any one or more of those transactions was more than incidentally designed for the purpose of avoiding liability to taxation.
- "Designed" → only "*some element*" of a purpose to avoid needed.
- "Incidental" → only a minor element of tax avoidance needed to satisfy this test.

Partial Exemption

- s742

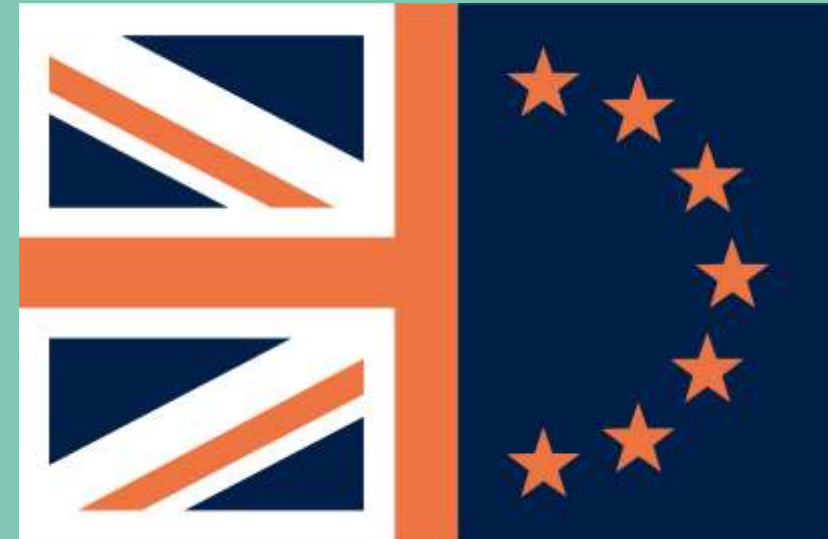
EU Law Defence

Statutory defence: s742A

- **Imposition of TOAA charge would breach EU law**
 - Contrary to freedom of establishment / free movement of capital
 - Not a proportionate restriction
- **Transaction is a genuine transaction**
 - Must be on arm's length terms unless satisfy personal reasons exclusion at s742A(11)
 - Any non-UK business establishment must have sufficient substance

Case law defence?

- Fisher v HMRC – FTT and UT decisions – but not CAA
- Conforming interpretation of motive test defence



Double tax relief

- Income cannot be taken into account more than once under TOAA - s743(1)
- If more than one person is taxed under TOAA, income must be apportioned – s743(2)
- Income cannot be taxed under a different provision of tax code if already taxed under TOAA – s743(2A)

