Transfer of assets abroad: mind your motives

International Tax | Personal tax



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A recent First-tier Tribunal decision highlights the challenges of demonstrating the motive defence for transfer of assets abroad purposes.

Key Points

What is the issue?

The transfer of assets abroad code aims to prevent tax avoidance by taxing income derived from assets transferred abroad. The code includes a motive defence that exempts taxpayers from charges if they prove that tax avoidance was not a purpose of the transactions, but recent cases highlight the difficulty of meeting this evidential burden.

What does it mean to me?

The First-tier Tribunal in *A Moran v HMRC* demonstrated the difficulty of establishing the motive defence, especially with decades-old transactions, limited evidence and the involvement of third parties, resulting in the defence being rejected due to indications of tax motivation.

What can I take away?

Taxpayers should holistically review their offshore structures, document evidence meticulously, prepare detailed disclosures and defence files and engage proactively with HMRC to manage enquiries effectively.

The transfer of assets abroad (ToAA) code is a cornerstone of the UK's anti-avoidance regime, designed to prevent individuals from avoiding UK income tax by transferring assets to persons abroad – such as non-resident companies and trusts – so that income falls outside the UK tax net. The code is set out in the Income Tax Act 2007 and operates through two principal limbs:

- **The transferor's charge:** This applies to individuals who have transferred assets abroad and either:

i) retain the power to enjoy the income arising from that transfer or any associated operation (Income Tax Act 2007 s 720); or

ii) have received, or are entitled to receive, a capital sum connected with the transfer or any associated operation (s 727).

- **The non-transferor's charge:** This applies to individuals who are not transferors but receive benefits as a result of a transfer of assets abroad or any associated operation (s 731).

While the ToAA code is intentionally broad, it is tempered by the so-called 'motive defence' exemptions. These exemptions are intended to ensure that only arrangements with a tax avoidance purpose, or those lacking genuine commercial substance, are caught by the rules. If the motive defence applies, it protects the taxpayer from income tax under both the transferor's and non-transferor's charges.

Call for evidence: offshore anti-avoidance rules

The ToAA rules are a component of the broader and complex offshore anti-avoidance legislation. Acknowledging the intricacy of the current regime and the need for simplification, the government has launched a call for evidence entitled ‘Personal tax: offshore anti-avoidance legislation’. This initiative encompasses the ToAA, as well as the settlements and capital gains tax anti-avoidance provisions.

On 21 July 2025, the UK government published its summary of responses to this call for evidence. It is encouraging to note the government’s commitment to improving the operation of the rules in this area, including the subjective nature of the motive defence test and the lack of clarity around what must be disclosed to HMRC to obtain certainty. The government has indicated that it will consider how best to engage with relevant experts as it develops further reforms in this area.

It has also been clarified that any changes to the legislation are not expected to take effect before the 2027/28 tax year at the earliest, which represents a delay from the original target date of 2026/27 announced previously.

The motive defence: statutory framework

For transactions effected after 4 December 2005, Income Tax Act 2007 s 737 provides an exemption from the ToAA code if the individual satisfies an HMRC officer that either Condition A or B is met:

- **‘Condition A** is that 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.
- **‘Condition B** is that:
  a) all the relevant transactions were genuine commercial transactions (see s 738); and
  b) 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.’

It is necessary to determine the purposes for which the relevant transactions were undertaken, taking into account not only the actions of the individual but also those of others who designed, advised on or otherwise effected the transaction. The

individual’s assertions, by themselves, are insufficient; instead, all the surrounding circumstances must be considered, requiring an objective assessment of the relevant evidence. Conditions relating to exemptions for transactions effected before 5 December 2005 can be found at s 739.

Evidential burden

The burden of proof lies squarely with the taxpayer, who must demonstrate that Condition A or Condition B of the motive defence are met. The motive defence exemption applies automatically if the relevant conditions are met. According to HMRC guidance (International Manual INTM602660), taxpayers who wish to rely on an exemption must provide a full explanation of all relevant transactions, including the applicable amounts, as well as specific reasons why they believe the exemption applies. This information should be included when completing their Self Assessment tax return to satisfy an HMRC officer.

While there is the normal right of appeal to the tribunal, in the first instance the taxpayer must be prepared to provide evidence that will satisfy an inspector. In effect, the taxpayer must prove a negative: that tax avoidance was not one of their purposes. HMRC guidance (International Manual INTM602600) notes that the evidence required will depend on the individual circumstances, and it is for taxpayers to determine what evidence is appropriate to support their case.

The Moran case: a practical illustration of the challenges

The recent First-tier Tribunal (FTT) judgment in *A Moran v HMRC* [2025] UKFTT 540 (TC) (see tinyurl.com/2uvz9htr) starkly illustrates the practical challenges that taxpayers face in discharging this burden for ToAA motive defence purposes.

The taxpayer (Mrs Moran) lived in a UK home held via an offshore structure set up by her husband many years ago without realising that the use of the property was taxable on her under the ToAA rules. Given that the structure was set up by her husband without her involvement, she could not proactively demonstrate that the conditions of the ToAA motive defence were met.

The facts of the case, though complex, can be summarised as:

- Mr Vincent Moran purchased a residential property, Highlands, in 1987 as the family home. He left the UK in 1994 and never returned to reside in the UK.
- Mr Moran incorporated two Jersey companies, Namib Limited ('Namib') in July 1994, and Watcher Limited ('Watcher') in February 1995. Beneficial ownership of the Namib shares was transferred to Watcher in March 1995.
- He established a Jersey discretionary trust, the Blest Trust, in February 1995, and settled shares in Watcher into said trust on the same date.
- The freehold of Highlands was transferred to Namib in December 1995.
- In October 2001, the Castletown Trust was established, and Watcher transferred its beneficial ownership in Namib to this trust.
- Namib had no income-producing assets and received loans from Watcher to finance property maintenance.
- Mr Moran died in August 2002 in a boating accident. Mrs Moran lived in the Highlands property rent-free during these years.

HMRC assessed Mrs Moran on the basis that her rent-free occupation constituted a benefit taxable under the non-transferor's charge of the ToAA regime. Mrs Moran appealed against HMRC's assessment, arguing:

1. The ToAA rules did not apply as the technical pre-conditions for an Income Tax Act 2007 s 731 charge were not met (i.e. the loans from Watcher were not associated operations).
2. Even if the pre-conditions were met, the motive defence (Condition A) under s 737 and/or s 739 applied.
3. The ToAA charge was contrary to EU law (the freedom of movement of capital).

All these arguments were ultimately dismissed by the FTT. Although the FTT provided useful commentary on each argument, this article focuses solely on the domestic motive defence exemptions. The following aspects of the FTT's approach are particularly noteworthy:

Burden of proof: The FTT confirmed that the burden of proof rests with the taxpayer. The judge acknowledged the difficulty of this task, given the passage of nearly 30 years since the relevant transactions, the deaths of key individuals, the retirement of participants and the scarcity of documentary evidence.

Evidence: Compelling evidence is required to discharge the burden. In the *Moran* case, the evidence was limited: the FTT considered both positive evidence (from

surviving documents and witnesses) and negative evidence (ruling out alternative theories). The judge placed significant weight on a 2002 attendance note from professional advisers, which referred to ‘asset protection from the UK Inland Revenue’, indicating a UK tax motivation for the offshore structure.

Witness statements and assertions: The argument that the transfers were motivated by asset protection from creditors was not supported by convincing evidence. Specifically, there was no indication from the documentary evidence that Mr Moran was in financial jeopardy or that creditors threatened his assets. The FTT also noted that witness statements were influenced by a desire to mitigate Mrs Moran’s UK tax liabilities and so gave such statements little weight.

Relevance of tax advice: The FTT judge enquired whether tax advice was taken by Mr Moran when setting up the structure to understand whether there was a tax motivation. However, it was not possible to locate any such advice despite extensive enquiries.

Decision-making approach: The FTT judge approached the matter from the perspective of a hypothetical HMRC officer. After considering all the evidence presented, the judge was not satisfied that the motive defence had been established. The judge concluded that the structuring was motivated by UK tax considerations, specifically a desire to reduce exposure to inheritance tax and to minimise the taxation of UK-resident beneficiaries in relation to accommodation benefits.

The FTT’s approach demonstrates that the intentions of the relevant parties, as well as the surrounding circumstances, will be carefully examined. Even limited references to tax protection can be fatal to the motive defence.

The challenges

Given the insufficient evidence available in this specific case, the FTT’s decision is not surprising. However, it highlights fundamental challenges with discharging the burden of proof in ToAA cases: the relevant transactions may have occurred decades earlier, the taxpayer may have had no involvement at all, and very limited information or documentation may be available to discharge the burden of proof.

In theory, the motive defence should be available if the taxpayer can show that it would not be reasonable to conclude that tax avoidance was a purpose (particularly

for post-4 December 2005 transactions, where the wording makes clear that there is an element of objective examination). In practice, however, HMRC rarely accepts such hypothetical arguments unless there is documentary evidence supporting the specific non-UK tax reasons for transactions.

Taxpayers often seek advice from a range of advisors, and some of this advice may be protected by legal privilege, which is a fundamental human right. HMRC's Litigation Strategy acknowledges that no adverse inference should be drawn from a taxpayer's decision to maintain privilege over legal advice received; however, in the context of the ToAA rules, this can present a dilemma. While no negative inference should be made, a taxpayer may find themselves unable to provide the positive evidence required to satisfy HMRC, as doing so could necessitate waiving privilege.

HMRC's guidance (International Manual INTM602680) states that if an individual chooses to withhold particulars that may contain material evidence about transactions (such as legally privileged advice), this may lead the HMRC officer to conclude that the conditions for exemption are not met. This will place taxpayers in a challenging position as they balance the protection of privileged communications with the need to provide sufficient evidence to support their case.

Even when some evidence is available and submitted to HMRC, questions often arise regarding its sufficiency. HMRC's requests for information are frequently very broad, and responding to such extensive requests can be an onerous exercise for taxpayers. The inherent scepticism in HMRC's approach, combined with the absence of clear guidance on what is strictly required to satisfy an inspector, means that ToAA enquiries are often prolonged and can be particularly frustrating for taxpayers as they attempt to substantiate their position.

Where does this leave taxpayers?

Pending the outcome of the government's announced consultation process, taxpayers will need to continue operating under the current rules for at least the next two tax years (2025-26 and 2026-27). With the abolition of the remittance basis of taxation, a significantly broader group of individuals will be brought within the scope of the existing ToAA regime. Individuals who currently qualify for the new Foreign Income and Gains regime (please refer to the January issue of *Tax Adviser*) should carefully consider how it interacts with the ToAA, particularly from a

disclosure perspective.

Taxpayers who wish to rely on the motive defence should examine their structures holistically and consider appropriate disclosure to HMRC, including the following steps.

1. Review of facts and evidence

Reviewing the purposes of relevant transactions: This involves assessing the underlying motivations for the establishment and ongoing operation of offshore structures.

Evaluating evidence: All available evidence should be critically examined, with particular emphasis placed on contemporaneous documents, including professional advice, meeting notes and emails. As previously noted, special consideration must be given to materials that may be subject to legal privilege.

Quantifying relevant income and considering anti-avoidance provisions: It is necessary to quantify the relevant income protected by the defence and to analyse the potential interaction with wider anti-avoidance provisions, including the settlements rules and the capital gains tax anti-avoidance provisions (Taxation of Chargeable Gains Act 1992 ss 3, 86 and 87).

2. Document results of review

Documenting the results of the review: The form of such documentation will depend on the circumstances of each particular case. It is important for such materials to document relevant facts holistically, set out technical ToAA preconditions and only then consider the availability of the ToAA defences in sufficient detail.

Drafting disclosure on the tax return: When drafting the disclosure, it is important to bear in mind that the quality of the disclosure is an important factor considered by HMRC when deciding whether to open an enquiry into the position (International Manual INTM602600).

Preparing a ‘defence file’: Given the complexity of the motive defence exemption, it is prudent to assume that HMRC will open an enquiry into the position following submission of the tax return claiming the motive defence. Preparation of

the defence file allows taxpayers to explain the position comprehensively at an early stage of an enquiry.

3. Engagement with HMRC

Dealing with an enquiry: Should HMRC open an enquiry, it is important to review HMRC's information requests and understand their specific areas of concern. This will help the enquiry process to be more focused and streamlined. Clear articulation of the factual position and all available defences are crucial to resolving enquiries on this matter in an effective manner.

Engaging with HMRC: In complex cases, it may be beneficial to engage proactively with HMRC to address any concerns and agree on a practical course of action.

Conclusion

The *Moran* case highlights the considerable evidential burden that taxpayers face when seeking to rely on the motive defence under the current ToAA rules. In light of this, taxpayers are strongly encouraged to review both their historical and planned transactions. Best practice continues to be meticulous record keeping, comprehensive evidence gathering and the maintenance of a robust defence file.

There is hope that the government's ongoing consultation will result in improvements to the operation of the ToAA rules and broader anti-avoidance measures, thereby simplifying compliance for taxpayers and administration for HMRC. However, given the complexity of the task, no changes are anticipated before 6 April 2027. In the meantime, taxpayers should continue to follow the best practices outlined above until any reforms are implemented.

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