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## Article on #usufruits

Subject : Recent decision of the Cour de Cassation confirming that a *usufruit* granted out of a *usufruit* possessed by an individual donor can only extinguish on the death of the donor ty on the death of the donee: implications for HMRC's invocation of s.43(2) ITA 1984 to attempt to treat a foreign legal right in rem as a form of interest in possession settlement without there being the trust necessary for the section to apply.

Date : 6th February, 2023.



In its decision reference *Cour de cassation, Chambre civile 1, 5 janvier 2023, 21-13.966*, published in its bulletin, the *Cour de cassation* held that the combination of articles 595 para 1 and 617 *Code civil* meant that where a *usufruit viager* was constituted by a gift of the *usufruit* out of a *usufruit viager* held by the donor, the second *usufruit* created out of the first was extinguished by the death of the donor and not by the death of the donee.

Effectively, the Cour de Cassation's ruling earlier this year confirms that HMRC's analysis of the *usufruit viager* as a form of settlement is a falsehood. As a right *in rem,* a *usufruit* a is a legal title constituted out of the legal title of the donor, not by way of trust or by way of settlement as would be required by s.43(2) ITA 1984 were it to be applicable.

The facts were that a mother who had inherited a *usufruit* from her deceased husband by way of succession gave that *usufruit* - which existed already - to her son. Her deceased husband had already left the *nue-propriété* in undivided shares to his three children, the son and the two daughters. The mother also gave the *usufruit* over two buildings which she owned outright to her son as well. The outcome is interesting as it clearly demonstrates the nature of the *usufruit* as a legal right *in rem*, and not as some form of fluid interest in possession or life interest.

The *Cour de cassation* upheld the two daughters' argument that the *usufruit* constituted out of the mother's *usufruit* could only terminate on the death of the mother and not by reference to the son's death. Article 617 simply states that a usufruit extinguishes on the death of the usufruitier (the son argued that the usufruit had been extended). In effect, the mother could not give her son a different, more extended interest to that which she possessed. However, the Cour de Cassation upheld the son's *usufruit* granted to him separately by his mother's will over the two buildings of which she owned the

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*pleine -propriété*. A modern illustration of *nemo dat quod non habet*. The mother did not have the right to extend the length of her *usufruit* by granting it to her son – who attempted to rely on the wording of article 617 *Code civil* to do so.

Let us place this in the context of HMRC's policy of deeming settlements where there are none.

In order for the first phrase of the last paragraph of s 43(2) ITA 1984, which can only apply to foreign trusts -governed by a foreign law whose regulation can be achieved under the law of any part of the United Kingdom, there would need to be a trust under foreign law, recognized as such under for the deeming provision to be applicable. There is no trust, and the second phrase giving HMRC the right to re-adjudicate the governing law of entities, cannot apply either.

It would be interesting to see how HMRC would attempt to assimilate the factual situation of the case into the second paragraph of s.43(2) ITA 1984 were, for example, the mother or he son to be domiciled in the UK at her death.

HMRC are consistently arguing the toss on the fatal assumption that the term settlement or trust in the first part of subsection (2) automatically includes foreign trusts. To do that they would need to jump through the blazing hoop of s. 1 Recognition of Trusts Act 1987 which incorporates the definition of a trust contained in article 2 of the Hague Convention of 1984 on the law applicable to trusts and on their recognition. As the French administration ably points out in the first paragraph of its initial *Instruction* on trusts, a *usufruit* is not a trust arrangement caught by article 720-0 *bis* I *Code general des impôts*. HMRC might not bear easily being brought to heel on the basis of such an affirmative statement of a European colleague, but the attempts at fiscalisation of foreign trusts and Liechtenstein foundations and anstalts on both sides of the Channel is based on the same fallacious reasoning: *nemo taxet quod non habet?*

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