

Reliance on HMRC manuals

It is difficult to see how the test for legitimate expectation set by the Court of Appeal could ever be met.

It is a matter of profound importance that taxpayers and professional advisers are able to rely on the published statements of HMRC in connection with their own tax affairs and the affairs of their clients.

The very idea that we might not be able to trust the public statements of one of the most important and prestigious organs of government must surely be unthinkable.

It is in this context that the recent decision of the Court of Appeal in *Aozora GMAC Investment Ltd v HMRC* [2019] EWCA Civ 1643 (reported in *Tax Journal*, 19 October 2019) assumes some importance.

The case was all about whether the company was entitled to double taxation relief which had been refused by HMRC on the authority of ICTA 1988 s 793A. The company said that HMRC's interpretation of s 793A was wrong – but crucially, even if HMRC was right, the relief should still be given because the HMRC manuals said that relief would be available in these circumstances. The company had a legitimate expectation that HMRC would apply the law in accordance with their published guidance on which taxpayers were entitled to rely. That is what judicial review is for.

Not so fast, Monsieur. You need a bit more than this. It is necessary to consider (and weigh) a number of issues; for example, whether the taxpayer or the persons advising them relied on the published statements for this purpose; whether the explanation provided publicly by HMRC was clear, unambiguous and devoid of any relevant qualification; whether the taxpayer had suffered a substantial detriment from relying on it; and whether it would be conspicuously unfair for the relief to be denied. Tough call.

I do not want to dwell on the particular facts of this case, which were inevitably complicated, but to highlight one of the conclusions of the Court of Appeal which reads as follows: 'it is necessary for [the taxpayer] to show a high degree of unfairness arising in its particular circumstances in order to override the public interest in HMRC collecting taxes in accordance with a correct interpretation of the law' (para 52).

In the current environment, it is difficult to see that such a test would ever be satisfied. It will always be possible to say that the public interest in collecting the right amount of tax according to the law must trump the interests of an individual taxpayer who has been disadvantaged.

However, I would respectfully suggest that this must be the wrong way round. Surely fairness should always prevail. Were we not taught that this is the whole foundation of equity, and that since 1615, in the event of such a conflict, equity should prevail?

A suggestion that taxpayers can be misled and disadvantaged ... by relying on official statements which the state can disown ... is not just the thin end of the wedge; it is the gates of the Kremlin

A suggestion that taxpayers can be misled and disadvantaged (and to bring us completely up to date, might commit suicide), by relying on official statements which the state can disown on the altar of the public interest, is not just the thin end of the wedge; it is the gates of the Kremlin. ■

Peter Vaines, Field Court Tax Chambers (pv@fieldtax.com)

The draft Withdrawal Agreement and the Irish backstop replacement

The key questions raised by the new Brexit deal's Irish backstop replacement.

The draft Withdrawal Agreement has finally been amended to replace the previous protocol on Ireland/Northern Ireland with a new protocol taking a rather different approach to securing the objective of avoiding a hard border between Northern Ireland and the Republic of Ireland.

A summary of the new approach: Under the new approach, Northern Ireland will remain subject to EU customs laws and most of its regulatory regime for goods, both agricultural and manufactured, will remain aligned with

EU internal market rules for goods.

The attempt to avoid creating a regulatory and customs border between Northern Ireland and the rest of the UK has largely been abandoned. While the original protocol required the UK to also apply a large amount of EU law, under the new protocol, Northern Ireland alone will have to apply EU customs laws, including the provisions of its free trade agreements and its trade defence measures and respect a raft of EU internal market legislation on goods.

To maintain the principle of Union with the rest of the UK, it is expressly provided in the new protocol that Northern Ireland shall be part of the UK customs territory, covered by the UK GATT schedule and benefit from UK trade agreements.

To reconcile these rather conflicting provisions, the new protocol provides that imports into Northern Ireland can be exempted from EU duties where there is no risk that the goods concerned will move across the uncontrolled border into the EU and will not be subject to processing. The joint committee is tasked with drawing up the detailed rules, requiring consensus between the parties. In addition, the UK is permitted to rebate any EU duties that have been paid and compensate for duties paid, provided that this does not constitute state aid to be policed by the European Commission.

This part of the new protocol may be terminated four years after its entry into force and periodically thereafter if so decided following a democratic process in Northern Ireland.

This complex balancing act, apparently drafted in 36 hours of intense negotiations on the fifth floor of the Commission headquarters in Brussels, leaves many questions open. The precise outcome of these arrangements will depend on how they are implemented and applied by both parties. This may of course be greatly facilitated by the terms of the future free trade agreement between the UK and the EU to be negotiated during the transition period and thus before the application of the new protocol.

We will not attempt to predict the outcome of this process but will endeavour to help achieve an understanding of the issues by listing some of the questions that will need to be resolved.

The open questions:

1. In view of the fact that there will be no controls on the border between Ireland and Northern Ireland, it could be argued that there will nearly always be a risk of a good imported into Northern Ireland moving into the EU. The joint committee is to establish