

Case Note: C&E Commissioners v Laura Ashley Ltd [2003] EWHC 2832 (Ch)

By Mario Angiolini

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Time limits for assessments under VATA 1994 s 73(2)—Where repayment traders submit voluntary disclosures and, as a result of that voluntary disclosure, the Commissioners make a payment to the trader, the time limit for any subsequent assessment for repayment of that amount runs from the accounting period to which the credit originally relates, not from the accounting period in which the voluntary disclosure was submitted

On 20 October 1999, in reliance on the Court of Appeal decision in *Primback Ltd v C & E Comrs* [1996] STC 757 relating to the taxable amount in sales by retailers involving “interest-free credit terms”, Laura Ashley submitted a voluntary disclosure seeking repayment of tax for each of the prescribed accounting periods from October 1996 to July 1999 inclusive.

The “interest-free” arrangements considered by the Court of Appeal involved the customer paying the normal retail price of the goods to a finance house and, by a separate agreement to which the customer was not a party, the finance house paying Laura Ashley a lump sum which was lower than the retail price of the goods. The difference between the retail price and the amount paid by the finance house represented the latter’s charge for providing the credit to the customer. The Court of Appeal decided that, in such a situation, the trader was only liable to account for VAT on the amount it received from the finance house and not on the higher retail price paid by the customer. As Laura Ashley had previously accounted for tax on the total retail price, thereby overdeclaring output tax, its voluntary disclosure sought repayment of that tax, on the basis that the taxable amount should have been the lower sum received from the finance house.

By the time Laura Ashley submitted its voluntary disclosure, the Court of Appeal decision was already subject to an appeal to the House of Lords, who decided to refer the matter to the ECJ for a preliminary ruling. The ECJ, accepting the Commissioners’ submissions, ruled that traders making use of this kind of arrangements were bound to account for output tax on the full selling price. This ruling, given in 2001, had the effect of reversing the Court of Appeal decision, some five years after that decision was first given.

Despite the appeal to the House of Lords and reference to the ECJ being pending, the Commissioners admitted Laura Ashley’s claims and the sums claimed were paid to Laura Ashley in March 2000. Of the prescribed accounting periods covered by the voluntary

Monckton Chambers
4 Raymond Buildings
Gray’s Inn
London WC1R 5BP

Tel 020 7405 7211
Fax 020 7405 2084
DX LDE 257

chambers@monckton.com
www.monckton.com

disclosure, those ended in October 1996 (10/96) and October 1997 (10/97) were different in that, during those two periods, Laura Ashley was a repayment trader (ie its input tax exceeded its output tax) while in all other periods it was a payment trader.

In October 2000, before the hearing of the *Primback* case in the ECJ, the Commissioners issued an assessment to Laura Ashley for the sums which had been repaid in March of the same year. The assessments for periods in which Laura Ashley was a payment trader were made under VATA 1994 section 80(4A) and no issue arose in relation to them. The assessments for the 10/96 and 10/97 periods, amounting to £35,853, on the other hand, were made under VATA 1994 section 73(2), as section 80(4A) was not applicable to the payments made in relation to those periods. The assessment letter stated that this latter assessment under section 73(2) related to the tax period ending 31 October 1999 "being the tax period in which [the] voluntary disclosure was received".

Laura Ashley appealed contending that the assessment was not made for the correct period in accordance with section 73(2) and was therefore invalid. The appellant contended that any assessment should have been made for the periods to which the relevant VAT credits related, ie the 10/96 and 10/97 periods. By the time the appeal was heard in the VAT Tribunal, such assessments would have been time-barred as made outside the relevant three-year time limit found in section 77(1). In the alternative, the appellants contended that the assessment should have been made for the period ended in April 2000 (04/00), during which the relevant credits had been given.

The Tribunal found in favour of Laura Ashley, holding that the "prescribed accounting period" for the purpose of section 73(2) was the period to which the relevant credit related, ie the 10/96 and 10/97 periods, and not the period in which the voluntary disclosure was submitted.

The Commissioners, relying on the decision of the Court of Appeal in *C & E Comrs v Croydon Hotel and Leisure Co Ltd* [1996] STC 1105, contended that the relevant period for the purpose of that section was that in which the credit was given, though, at the same time, accepting that the decision in *Croydon* was not necessarily binding and that material distinctions existed between that case and the present dispute. The Commissioners further argued that any contrary interpretation of section 73(2) would lead to "serious practical consequences", whereby the time limit for an assessment for the 10/96 period would expire at the latest on 26 October 1999 (ie three years after the end of the 10/96 period, which was a non-standard period ending on 26 October 1996) This was only a few days after submission of the relevant voluntary disclosure on 20 October 1999, which would leave little if any time for the Commissioners to raise an assessment under section 73(2). This would lead to a "positive incentive" on traders to delay making claims in order to prevent such an assessment being raised.

The learned judge, in dismissing the Commissioners' appeal, had no difficulty in finding, at paragraph 15 of his decision, that the natural reading of section 73(2) in its general statutory context would lead to the conclusion that the relevant prescribed accounting periods were the 10/96 and 10/97 periods to which the relevant VAT credit related. These were the periods in which the original over-declaration of output tax had been made and to which the VAT credits were attributable.

The learned judge further relied on Notice 700/45/93 – *How to correct VAT errors and make adjustments or claims* which makes a clear distinction between errors with a net value of less than £2,000, which could be corrected as part of the return in a subsequent tax period and therefore become part of the tax paid during the period in which the correction is made, and errors involving larger amounts, which have to be submitted by way of voluntary disclosure, whereby any amendments would be referred back to the prescribed accounting period in which the error first occurred. The judge also referred to Notice 700/12/02 – *Filling in your VAT return* which clearly states that, in relation to disclosure of errors with a net value of more than £2,000, a "Notice of Voluntary Disclosure will be issued showing only corrections to the period in which the error occurred". When applied to the fact of the present case, the two Notices indicate that the repayments in March 2000 had to be referred back to the 10/96 and 10/97 periods, as contended by Laura Ashley.

The judge's conclusions were also reinforced by the approach adopted by the Commissioners in the Notice of Voluntary Disclosure issued to the appellant on 1 March 2000, following Laura Ashley's voluntary disclosure in October 1999. That Notice clearly related each payment due from the Commissioners to Laura Ashley to the period in which the error was made, and not to the period in which the voluntary disclosure was submitted. Accordingly, the Commissioners' own approach, when allowing the claims in March 2000, was "entirely consistent with the submissions of Laura Ashley" and ran counter to the Commissioners' case on appeal.

The judge, having regard to the relevant time limits, also rejected the "serious practical consequences" on which the Commissioners sought to rely in support of their contention as "largely illusory".

Finally, the judge distinguished the decision in *Croydon Hotel* as, in that case, the credit claimed by the taxpayer, although relating to a chargeable event which took place in the period 03/91, could not have been claimed before the 09/91 period as the taxpayer did not hold the necessary documentary evidence before that period. The Court of Appeal in *Croydon Hotel* had held that, as the input tax was claimed in the 09/91 return, which was the first return in which it could have been claimed, the credit was given in that period and not for the period in which the chargeable event had occurred. Unlike the present case, *Croydon Hotel* was not a case in which any correction had been made or could be made to the return for an earlier period by way of voluntary disclosure. Accordingly, *Croydon Hotel* did not lead to the conclusion that where, as was the case here, a claim is properly made by way of correction or adjustment for an earlier period, the ensuing repayment is paid not for that period but for the period in which the claim is eventually made.

The net result of this decision is that the assessments were invalid because they were made for the wrong period. As time for any further assessments for the correct accounting period has now expired due to the Commissioners' error, Laura Ashley is left with what could perhaps be described as a "windfall gain" of some £35,000, which would otherwise have been repayable by them. What is perhaps puzzling about this case is that, as late as March 2000, in full knowledge of the fact that the decision of the Court of Appeal in *Primback* had already been referred to the ECJ by the House of Lords and, presumably, knowing that the hearing before the ECJ was due to take place in November of that same year, the Commissioners decided nevertheless to allow Laura Ashley's claims and issue payments, only to seek to reverse those payments some six months later. Perhaps a more sensible course of action for the Commissioners to take would have been to reject the payments while the reference before the ECJ was pending, while at the same time indicating that, should the ECJ eventually find against the Commissioners, the claims would be allowed and the appropriate payments would be made. Such an approach would have ensured that the Commissioners' position was protected in case of success before the ECJ and at the same time reassured Laura Ashley in case the ECJ endorsed the Court of Appeal's approach.

The author understands that the Commissioners have not appealed this decision, time having now expired.

For more information on Mario Angiolini, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section on www.monckton.com.

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