VAT update

March 2020

In this month's update we report on (1) HMRC's recently published policy paper in relation to the VAT liability of digital publications; (2) EU Council Regulation (EU) 2020/283 and Council Directive (EU) 2020/284 in relation to combatting VAT fraud; and (3) EU Council Directive (EU) 2020/285 in relation to the special scheme for small enterprises. We also comment on three recent cases which consider (1) whether a specific form is required for the notification of an assessment of VAT; (2) when VAT is collectable as a debt due; and (3) what constitutes a reasonable excuse for incorrectly issuing a zero-rating VAT certificate.

News items

HMRC publishes policy paper in relation to the VAT liability of digital publications

On 19 February 2020, HMRC published a policy paper confirming that HMRC's VAT treatment of supplies of digital newspapers and other digital publications has not changed following the Upper Tribunal's decision in *News Corp UK and Ireland Ltd (UT/2018/0065) (News Corp)*. more›

Publication of EU legislation to combat VAT fraud

On 2 March 2020, the following two acts, relating to measures designed to assist with the detection of VAT fraud, were published in the Official Journal of the European Union more›

Publication of EU legislation reforming the special scheme for small enterprises

On 2 March 2020, Council Directive (EU) 2020/285, amending Directive 2006/112/EC on the common system of VAT as regards the special scheme for small enterprises, and Regulation (EU) No 904/2010, regarding the administrative cooperation and exchange of information for the purpose of monitoring the correct application of the special scheme for small enterprises, were published in the Official Journal of the European Union. more›

Cases

Aria Technology – No specific form required for notification of assessment of VAT

In *Aria Technology Ltd v HMRC* [2020] EWCA Civ 182, the Court of Appeal confirmed that there is no particular form or formality required for an assessment under section 73(1), Value Added Tax Act 1994 (VATA) and an assessment can be contained in more than one document as long as the minimum requirements are set out in a clear and unambiguous way. more›

Any comments or queries?

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About this update

Our VAT update is published on the final Thursday of every month, and is written by members of RPC's Tax team.

We also publish a Tax update on the first Thursday of every month, and a weekly blog, RPC's Tax Take.

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Rhino Television & Media – VAT collectable as a debt due as soon as assessment is notified to the taxpayer

In *HMRC v Rhino Television & Media Ltd* [2020] EWHC 364 (Ch), the High Court confirmed that the deeming due provision, contained in section 73(9), VATA, following the issue of a VAT assessment, does not require the expiry of any review or appeal period and that cross-undertakings in damages on freezing order applications are not required from a public authority when it is performing its public function. more›

Marlow Rowing Club – Charity had a reasonable excuse for incorrectly issuing a zero-rating certificate

In *Marlow Rowing Club v HMRC* [2020] UKUT 0020 (TCC), the Upper Tribunal (UT) held that a charity which relied on advice received from accountants and counsel had a reasonable excuse for incorrectly issuing a zero-rating certificate to the supplier of construction services. more›

News items

HMRC publishes policy paper in relation to the VAT liability of digital publications

On 19 February 2020, HMRC published a policy paper confirming that HMRC's VAT treatment of supplies of digital newspapers and other digital publications has not changed following the Upper Tribunal's decision in *News Corp UK and Ireland Ltd (UT/2018/0065) (News Corp)*. HMRC stated that its policy is to continue to treat supplies of digital publications as standard rated.

However, it has since been announced in the 11 March 2020 Budget, that the government will introduce legislation to zero rate e-publications, such as e-books, e-newspapers, e-magazines and academic e-journals, from 1 December 2020.

The policy paper can be viewed here.

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Publication of EU legislation to combat VAT fraud

On 2 March 2020, the following two acts, relating to measures designed to assist with the detection of VAT fraud, were published in the Official Journal of the European Union:

- Council Regulation (EU) 2020/283, amending Regulation (EU) No 904/2010, introduces certain measures designed to strengthen administrative cooperation in the fight against VAT fraud, and
- Council Directive (EU) 2020/284, amending Directive 2006/112/EC, introduces certain requirements for payment service providers.

Both of the above will enter into force on 1 April 2020 and will apply from 1 January 2024. In the case of the Directive, Member States are required to adopt and publish the laws, regulations and administrative provisions necessary to comply with the Directive, by 31 December 2023 and apply those provisions from 1 January 2024.

The Regulation can be viewed here and the Directive can be viewed here.

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Publication of EU legislation reforming the special scheme for small enterprises

On 2 March 2020, Council Directive (EU) 2020/285, amending Directive 2006/112/EC on the common system of VAT as regards the special scheme for small enterprises, and Regulation (EU) No 904/2010 regarding the administrative cooperation and exchange of information for the purpose of monitoring the correct application of the special scheme for small enterprises, were published in the Official Journal of the European Union.

The Directive will enter into force on 1 April 2020. Member States are required to adopt and publish the laws, regulations and administrative provisions necessary to comply with Article 1 of the Directive by 31 December 2024, and to apply those provisions from 1 January 2025. Article 2 of the Directive will apply from 1 January 2025.

The Directive can be viewed here.

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Cases

Aria Technology – No specific form required for notification of assessment of VAT

In *Aria Technology Ltd v HMRC* [2020] EWCA Civ 182, the Court of Appeal confirmed that there is no particular form or formality required for an assessment under section 73(1), Value Added Tax Act 1994 (VATA) and an assessment can be contained in more than one document as long as the minimum requirements are set out in a clear and unambiguous way.

Background

Aria Technology Ltd (the appellant) is a computer components retailer and wholesaler.

In its VAT return for the VAT accounting period 07/06, the appellant claimed input tax for purchases which, after setting off output tax, left a repayment due to the appellant of £445,156.98.

By letter dated 6 October 2008, HMRC informed the appellant of its decision to deny input tax of £758,770.69, on the grounds of missing trader fraud which the appellant knew of, or ought to have known of, and informed the appellant of its right to appeal against HMRC's decision within 30 days. The letter also stated that: "A further letter showing the corrected amount of VAT now due in respect of 07/06 is enclosed". This second letter, dated 7 October 2008, amended the appellant's return for the VAT period 07/06 to show input tax in the sum of £754,545.66 and net tax due to HMRC of £313,613.71. The letter also notified the appellant of its right to appeal against HMRC's decision within 30 days.

The appellant appealed.

At both the First-tier Tribunal and the Upper Tribunal, among other challenges, the appellant unsuccessfully argued that this 'correction' did not have the force of an assessment under section 73(1), VATA.

The Court of Appeal granted the appellant permission to appeal on this issue only.

Court of Appeal judgment

The appeal was dismissed.

The Court accepted, as a general proposition, the appellant's argument that there are three stages to a VAT assessment:

1. a decision to assess;
2. the assessment itself; and
3. notification of that assessment.

The Court noted, however, that there is normally no distinction in substance between these three stages.

In finding against, the appellant, the Court confirmed that:

- there is no statutory definition of 'assessment' in VATA; it is the legal act of the Commissioners determining the amount of VAT due;
- there is no particular formality required by statue, or regulation;
- the use of any particular form makes no difference; a notification of assessment can be contained in one or more letters; and
- whether an assessment has been made is determined by objective analysis; how would the document be understood by the reasonable reader?

The Court commented that an assessment would be made if the relevant document(s) contained, in unambiguous and reasonably clear terms, the 'minimum requirements, being the name of the taxpayer, the amount of tax due, the reason for the assessment and the period of time to which it relates.

The Court held, on an objective analysis, that the two letters HMRC sent to the appellant constituted an assessment of the VAT due for the purposes of section 73(1), VATA, and were not simply a correction of the appellant's VAT return. The Court noted that it would have been preferable if the letters had been headed "Notice of Assessment", but nothing turned on that because it was the substance, not the form, which mattered.

Comment
This decision confirms that in deciding whether an assessment has been made, an objective test must be applied and there is no particular form, or formality, required in order for there to be a valid assessment for the purposes of section 73(1), VATA.

Whilst the outcome, on the facts, is perhaps not surprising, that an assessment can be contained in more than one document (as long as the minimum requirements are set out in a clear and unambiguous way), and it will be left to the courts to determine how the document(s) would be understood by the reasonable reader, is likely to generate considerable uncertainty and lead to future disputes with HMRC. It would be preferable if, rather than relying on a "substance" argument, HMRC heeded the advice of the Court of Appeal and simply headed all assessments: "Notice of Assessment".

The judgment can be viewed here.

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Rhino Television & Media – VAT collectable as a debt due as soon as assessment is notified to the taxpayer

In *HMRC v Rhino Television & Media Ltd* [2020] EWHC 364 (Ch), the High Court confirmed that the deeming due provision, contained in section 73(9), VATA, following the issue of a VAT assessment, does not require the expiry of any review or appeal period and that cross-undertakings in damages on freezing order applications are not required from a public authority when it is performing its public function.

Background

On 9 May 2019, HMRC made a without notice application to the Court for a freezing order against the bank account of Rhino Television & Media Ltd (Rhino) on the basis that funds paid into the account were VAT refunds which had been obtained dishonestly and there was a real risk that, if not restrained, the funds in the account would be dissipated. The application attached a demand letter, dated 8 May 2019, from HMRC to Rhino attaching details of a reassessment which had re-assessed Rhino's VAT resulting in VAT to pay in the sum of £1,434,576. This letter of demand had not been notified to Rhino at the time of the freezing order hearing, although there was evidence that the letter of demand had been delivered through the front door of Rhino's premises at 9.42am on 9 May 2019, before the hearing being held at 10.00am. The Court granted the freezing order sought.

Between 9 May 2019 and 29 January 2020, HMRC and Rhino were in correspondence and agreement was reached to vary the order and adjourn 'return to court' dates. Attempts to resolve the underlying dispute, were unsuccessful and on 29 January 2020, Rhino applied for a return to court date in relation to the freezing order.

Rhino argued that at the time that the freezing order was granted, there was no debt owed to HMRC because the reassessment had not been notified to it. If the Court considered it was appropriate to continue the freezing order, Rhino sought an undertaking in damages from HMRC.

High Court judgment

The Court found in favour of HMRC.

Rhino argued that there was no evidence that HMRC had in fact created the documents it had purported to deliver to Rhino's premises on the morning of the application for the freezing order and disclosure of the metadata relating to the assessment should be ordered. The Court dismissed this application, noting that the time of creation of the assessment had not been raised by Rhino at any time between 9 May 2019 and 29 January 2020 and, further, there was no evidence to support the suggestion that the document had been created after 9 May 2019.

Rhino also argued that, in order for the VAT reassessment to have created a collectable debt in favour of HMRC, both the assessment had to be notified to Rhino and the time period for review and appeal of the assessment had to have passed. At the time of the application for the freezing order, the notification had, on HMRC's case, been notified to Rhino, but its right to a review, or appeal, of the decision had not expired, therefore there was no debt due which could be protected by freezing Rhino's bank account.

The Court reviewed the wording of section 73, VATA, on which the argument rested, and which provides that the amount assessed may be recovered "subject to the provisions of this Act as to appeals". In the view of the Court, section 73(9) means that the quantum of VAT due will be amended on any successful appeal or review, not that the VAT assessment notified to the taxpayer becoming a due debt is conditional on the conclusion of any review and/or appeal. The Court considered that the enshrining in VATA of the right to a review of an assessment in section 83A added no additional requirement to delay before the ability to recover the debt arose.

Rhino also argued that, as the process of assessment included both the assessment and the notification of the assessment to the taxpayer, the Court should exercise its discretion and order HMRC to disclose the metadata of the letter of demand in order to dispel Rhino's concern that the letter of demand had in fact been created after the application for the freezing order. The Court declined to make such an order, noting that there was no reasonable basis for the allegation that HMRC had created the assessment documents after the application. The Court commented that HMRC had a good arguable case both that the assessment had been made, and that Rhino had been notified of it prior to the application for the freezing order.

Rhino also sought, in the event that the Court upheld the freezing order and pending resolution of the dispute, a cross-undertaking from HMRC to Rhino in damages. The Court noted the starting point that public authorities are not generally required to risk funds, given to them by the public to carry out their essential activities, by providing cross-undertakings in damages on the granting of an injunction, unless there are 'special circumstances'. The Court confirmed that where HMRC seek an injunction for the purpose of recovering tax, it is acting as a public authority and satisfies the requirements set out in *Financial Services Authority v Sinaloa Gold Plc* [2013] UKSC 11. In the view of the Court, there were no special circumstances in this case justifying a departure from the usual position and the Court therefore refused to require HMRC to provide a cross-undertaking in damages.

Comment

This case highlights the importance of registering all objections to the facts giving rise to injunctive relief at an early stage in the process, even if the parties are endeavouring to resolve the underlying dispute by agreement. The outcome in this case might have been different had Rhino immediately made its concerns and objections known to HMRC.

Confirmation from the Court that HMRC falls within the definition of a public authority for *Sinaloa* purposes, when it is engaged in the collection of tax, is not surprising. The Court did, however, leave open the possibility that there may be instances in which HMRC is acting in which it would not fall within *Sinaloa*, but it commented that there was 'considerable doubt' that damages would be the appropriate remedy in any event.

The judgment has not been published.

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Marlow Rowing Club – Charity had a reasonable excuse for incorrectly issuing a zero-rating certificate

In *Marlow Rowing Club v HMRC* [2020] UKUT 0020 (TCC), the Upper Tribunal (UT) held that a charity which relied on advice received from accountants and counsel had a reasonable excuse for incorrectly issuing a zero-rating certificate to the supplier of construction services.

Background

Marlow Rowing Club (Marlow) is a company limited by guarantee and also a registered charity. It was incorporated in order to take over the activities of the unincorporated association of the same name (which had been registered as a Community Amateur Sports Club), and as part of that process its constitution was altered to incorporate charitable objects.

Marlow issued a certificate to a supplier of construction services for a new clubhouse building that incorrectly specified that the supply fell within Group 5, Schedule 8, VATA, and that the supply was therefore zero-rated (the certificate).

The particular element of Group 5 which was in issue was the condition relating to whether the relevant parts of the building were intended to be used "otherwise than in the course or furtherance of a business". That wording was considered by the Court of Appeal in *Longridge on Thames v HMRC* [2016] EWCA Civ 930 (*Longridge*). However, at the time the certificate was issued, that case had only reached the First-tier Tribunal (FTT) and the FTT had decided the issue in favour of the appellant charity.

HMRC decided that Marlow was liable to a penalty of £279,866, under section 62, VATA, because it did not have a reasonable excuse for issuing the certificate. Marlow appealed against this decision to the FTT.

FTT decision

The appeal was dismissed.

Before the FTT, the parties' arguments centred on the significance of various advice Marlow had received from its accountants and counsel in advance of the issue of the certificate.

The FTT applied the test considered in *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 (*Clean Car*), that whether a taxpayer has a reasonable excuse: "should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered".

When Marlow first sought advice from its accountants, *Longridge* had not been decided, and the advice provided indicated that the certificate could not be issued. Marlow then sought advice from counsel at the point when the FTT had issued its decision in *Longridge*, which appeared to support the view that Marlow could issue the certificate, although that decision was under appeal to the UT. Counsel's opinion, that the certificate could be issued was, accordingly, stated to be subject to HMRC not succeeding on appeal.

Marlow sought further advice from its accountants. The accountants' report clearly stated that its comments were made on the assumption that a certificate could be issued and did not consider whether the assumption was correct. The report concluded that there would be an advantage to undertaking a particular structure on the basis that it would highlight the issue to HMRC at a relatively early stage so that certainty could be obtained at the earliest opportunity. Marlow chose not to undertake that structure but, instead, followed an alternative suggestion.

In the view of the FTT, given the fundamental uncertainty in counsel's opinion (in relation to the need for HMRC not to succeed on appeal in *Longbridge*) and the accountants' clear recommendation that HMRC be advised of the position at the earliest opportunity, Marlow should have taken further steps to ascertain whether HMRC would agree with its actions. It should have ensured that HMRC was aware of the position rather than simply wait to see whether HMRC checked the position. If it disagreed with HMRC's position, Marlow could have appealed and requested that its appeal be stayed pending the conclusion of the *Longridge* litigation.

Accordingly, as Marlow did not take such further steps, the FTT considered that it did not have a reasonable excuse for issuing the certificate. Marlow appealed.

UT decision

The appeal was allowed.

The UT followed the approach suggested by the UT in *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) (which was expressed to be in accordance with the decision in *Clean Car*) and considered whether what Marlow did (or omitted to do) was objectively reasonable in the circumstances of the case.

The UT concluded that Marlow acted reasonably in seeking advice from its accountants and counsel, who had expertise in relation to VAT. It was also reasonable for it to rely on that advice in the way it did, omitting to seek advice from HMRC and issuing the certificate. The UT therefore found that Marlow had a reasonable excuse for issuing the incorrect certificate.

Comment

This decision provides useful guidance on the meaning of "reasonable excuse", which is likely to be relevant to tax disputes outside the specific context of section 62, VATA.

The UT also confirmed that, in the circumstances of this case, it was not necessary for Marlow to seek advice from HMRC in order to have a reasonable excuse, noting that "in these circumstances ... HMRC would be in no better position to advise on what the correct position was as to the interpretation of the law than a professional adviser". Although the UT pointed out that the relevance of whether a taxpayer has sought advice from HMRC will depend on the particular facts, the UT's comments may be applicable in other similar contexts.

The decision can be viewed here.

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