Analysis

# Supreme Court upholds barring order against HMRC

## Speed read

**The Supreme Court has upheld the barring order on HMRC originally imposed by the First-tier Tribunal in *BPP University College of Professional Studies v HMRC*. The decision represents the first time that the Supreme Court has considered the approach to be taken by the tax tribunals to sanctions for non-compliance with procedural directions, and its observations as to the standards of behaviour to be expected of HMRC as a public law litigant are notable. In upholding the barring order imposed by the FTT, the Supreme Court has confirmed that appellant taxpayers are entitled to full particulars of the cases that they will have to meet in order to make good their appeals. In doing so, the court has also clarified that HMRC as a public body is expected to comply with at least the same standards of behaviour as private litigants.**

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A striking factor of the litigation between BPP and HMRC, which culminated in the Supreme Court judgment in *BPP Holdings v HMRC* [2017] UKSC 55 (reported in *Tax Journal*, 4 August 2017), was HMRC's argument, rejected at all stages of proceedings, that as a public body it should somehow be treated more leniently when it comes to procedural compliance. That HMRC maintained this argument before the Supreme Court, notwithstanding the observations made by the Senior President of Tribunals in the Court of Appeal, was particularly surprising. It is a central tenet of justice that parties to litigation should be aware of and understand their opponent's cases.

As a public authority, of course HMRC should be a bastion of good conduct and behaviour – as the Supreme Court has now confirmed in its judgment. The fact that this had to be set out by the Supreme Court suggests something more endemic in the mindset of HMRC. What is needed now is a cultural change in that mindset to filter down to the policy makers and officers, and for HMRC to be held to account more fully in its decision making processes. It should never be acceptable for HMRC to assert, for example, that a supply is taxable, without setting out any sort of factual or legal basis for that position until either directed to do so by the FTT or until the time comes to exchange skeleton arguments in appeal proceedings. It is hoped that earlier engagement with the relevant issues by HMRC will lead to the speedier and more efficient resolution of disputes, without having to burden taxpayers and the tribunal system with what may often be unnecessary appeal proceedings.

### Background

The case involved a long running dispute between BPP and HMRC concerning the VAT treatment of printed materials supplied by BPP in connection with professional courses. From 2006, BPP's service structure was such that printed materials were supplied by a separate group member, which was not registered as part of the same VAT group as the course provider. BPP claimed that the supplies of printed materials were not part of a single supply of education in these circumstances, but represented a separate supply that was zero-rated under VATA 1994 Sch 8 Group 3. HMRC disagreed and argued that the printed materials formed part of a single taxable supply, notwithstanding the general rule confirmed by the Court of Appeal in *Telewest Communications plc* [2005] EWCA Civ 102 that two supplies made by different suppliers cannot be treated as a single supply for VAT purposes.

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The dispute between BPP and HMRC encompassed periods both before and after mid-July 2011 when notes (2) and (3) were introduced to Sch 8 Group 3. The effect of these notes in essence was to override the *Telewest* position and to provide that where a supply of printed materials by one supplier is connected with a supply of taxable services by a different supplier, the supply of printed materials will not come within the zero-rating provisions. HMRC contended that the supplies of printed materials by BPP, both before and after July 2011, were chargeable to VAT at the standard rate.

HMRC levied assessments on BPP, and BPP appealed the assessments and accompanying decisions to the FTT. Directions were issued for HMRC's statement of case to be served on 2 October 2013. In the event, HMRC served its statement of case late on 21 October 2013 and then applied retrospectively for a short extension of time.

### Defects with HMRC's statement of case

BPP was dissatisfied with HMRC's statement of case. In particular, BPP felt that the statement of case failed to set out any facts that HMRC intended to rely on in support of its case that the supplies of printed materials were taxable at the standard rate. In November 2013, BPP applied to the FTT for directions that HMRC provide further and better particulars of its case.

At a hearing in January 2014, the FTT recorded that HMRC had agreed to further particularise its case, and directed HMRC to do so by 31 January 2014. The FTT issued its direction under rule 8(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules, SI 2009/283, ('the tribunal rules') and made the order in such terms that 'unless' HMRC provided the required further and better particulars within the specified timeframe, HMRC *might* be barred from taking further part in the proceedings. This is an important distinction, because the order barring HMRC from further participation in the proceedings did not follow automatically from HMRC's failure to comply with the January 2014 direction. Instead, the decision to bar HMRC involved a careful exercise of judicial discretion.

When HMRC served its further and better particulars on 31 January 2014, it again failed to particularise its case adequately. In particular, HMRC set out no facts or arguments at all in support of its position in respect of the period post July 2011, which was the subject of the third of the three decisions under appeal. BPP therefore asked the FTT to exercise its discretion under rule 8(3)(a) and issue a direction barring HMRC from further participation in the proceedings ('the barring application'). In the meantime, HMRC conceded its case in relation to the period prior to July 2011 (which covered the first two decisions under appeal), leaving it with essentially no pleaded case in relation to the remaining open issue, i.e. the zero-rating of the supplies from July 2011 onwards.

It was not until shortly before the hearing of the barring application in June 2014 that BPP was given any indication of the facts that HMRC intended to rely on in support of its case on this issue. In the event, HMRC made a last ditch attempt to correct the defects in its statement of case and further and better particulars by setting out the basis of its substantive case in its skeleton argument opposing the barring application.

### The FTT's decision to grant the barring order

On 1 July 2014, following a careful and lengthy review of all the circumstances of the case and, in particular, the then recent guidance given by the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, the FTT (Judge Mosedale) granted BPP's application and issued a direction barring HMRC from further participation in the appeal ('the barring order').

In its decision (at [2014] UKFTT 644), the FTT observed that both HMRC's statement of case and further and better particulars had failed, despite repeated requests, to set out any facts on which HMRC intended to rely in support of its argument that the supplies of printed materials did not qualify for zero-rating. No explanation was offered as to why HMRC had not complied with the original 'unless' order. Further, it was clear that HMRC could have provided the necessary facts (as it did in the skeleton argument), but had chosen not to do so.

HMRC argued that BPP could have discovered the factual basis of its case from the existing correspondence between the parties. However, the FTT noted (and HMRC agreed) that an appellant is entitled to have these facts set out in one place in the pleadings and should not be required to sift through correspondence to deduce the facts to be relied on. It was clear, therefore, that HMRC was in breach of the 'unless' order.

The FTT then went on to consider what the appropriate sanction was. BPP argued that the FTT should consider the guidance given by the Court of Appeal in *Mitchell* and apply this to FTT procedure. *Mitchell* involved an application for relief from a sanction imposed by the civil procedure rules (CPR) for failing to meet a deadline. In considering an appeal against the original High Court decision, the Master of the Rolls stated that a court must take into account all the circumstances of the case, but that the paramount considerations were for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with rules, practice directions and orders.

The FTT accepted that the *Mitchell* guidance was not directly applicable to BPP's application, both on the basis that:

- the CPR does not apply directly to FTT proceedings; and
- BPP's application did not seek relief from an automatic sanction but rather the imposition of a discretionary sanction.

Nevertheless, the FTT considered that the *Mitchell* guidance was relevant in this context and should be heeded.

## Lord Neuberger considered that HMRC's argument, if accepted, could set a 'dangerous precedent'

HMRC also argued that a measure as radical as barring should only be used where the breach was incapable of remedy. The FTT rejected this argument. Very few breaches are irremediable and the fact that the breach had been remedied (albeit extremely late) by HMRC's skeleton argument opposing the barring application did not preclude the FTT from barring HMRC. HMRC's continued failure to set out the factual basis for its case had undoubtedly prejudiced BPP and had caused BPP unnecessary delays and expense. HMRC had been subject to an 'unless' order and had failed to meet the requirements of that order. Taken together with the fact that HMRC had served its statement of case late and had also been late in producing a related list of documents, barring was the appropriate remedy in this case.

### HMRC's challenges to the barring order

Where HMRC is barred from further participation in proceedings before the FTT, and the reason for barring is procedural non-compliance, the tribunal rules give HMRC the right to apply for the barring order to be set aside. HMRC made such an application in July 2014, and in a decision dated 25 September 2014 the FTT (Judge Herrington) upheld the barring order.

In November 2014, the Upper Tribunal ([2014] UKUT 496) allowed HMRC's appeal against the barring order, on the basis that:

- HMRC's skeleton argument opposing the barring application had remedied the defects in its case; and
- the prejudice suffered by BPP was real but not so great that it could not be remedied in costs.

However, in March 2016, in a judgment that was highly critical of HMRC's conduct, the Court of Appeal ([2016] EWCA Civ 121) subsequently reinstated the barring order.

Although the Court of Appeal had by this stage clarified the *Mitchell* guidance in its decision in *Denton and Others v TH White and Others* [2014] EWCA Civ 180, it did not consider that the tribunal had made an error in law by placing significant weight on the need for compliance with rules, practice directions and orders during the course of its deliberations.

In giving the leading judgment, the Senior President of Tribunals (who had requested specifically to hear the appeal) described HMRC's approach to compliance as 'disturbing'. In considering HMRC's argument that, as a public body, it should benefit from a more lenient approach to compliance, the senior president added: 'At times, it came close to arguing that HMRC, as a state agency, should be treated like a litigant in person and that the constraints of austerity on an agency like the HMRC should in some way excuse unacceptable behaviour … A state party should neither expect to nor work on the basis that it has some preferred status – *it does not*.' (emphasis added)

### HMRC's appeal to the Supreme Court

In a single judgment delivered by Lord Neuberger, the Supreme Court has unanimously dismissed HMRC's appeal against the Court of Appeal decision, considering that the FTT's original decision was not unreasonable and was not one that an appellate court should interfere with.

The Supreme Court noted that the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, directions and orders, is equally as important in proceedings before the tribunal as it is to proceedings being conducted under the CPR. As such, there was no reason to depart from the *Mitchell* line of authority, as subsequently clarified in *Denton*, or to apply a more lenient test in the context of FTT litigation.

> The crucial aspect of the decision is the Supreme Court's clear pronouncement on the standard of conduct to be expected of HMRC and other public bodies when conducting litigation

In support of its appeal, HMRC contended that the FTT should have taken into account the fact that the barring order would prevent HMRC from carrying out its public duty in this case to ensure that the correct amount of tax was collected. Lord Neuberger considered that this argument, if accepted, could set a 'dangerous precedent'. He then went on to reiterate the need for public bodies to live up to at least the same standards expected of private individuals in the conduct of litigation, going so far as to suggest: 'There is at least as strong an argument for saying that the courts should expect higher standards from public bodies than from private bodies or individuals.'

In its conclusions, the Supreme Court indicated that it considered the FTT's decision in this case to have been 'tough' and not far from the permissible limit of harshness. However, the Supreme Court did not consider that the FTT's decision was on the wrong side of the line, 'given the combination of the nature and extent of HMRC's failure to reply to BPP's request, the length of the delay in rectifying the failure and the length of the consequential delay to the proceedings, the absence of any remedy to compensate BPP for the delay, and the absence of any explanation or excuse for the failure, coupled with the existence of other failures by HMRC to comply with directions'.

### Comment

The decision is significant for a number of reasons. First, it represents a rare example of the Supreme Court hearing an appeal against an exercise of judicial discretion on a point of procedure, and it is worth noting that neither *Mitchell* nor *Denton*, the two leading authorities on procedural compliance under the CPR, went beyond the Court of Appeal. The fact that the Supreme Court granted HMRC permission to bring the appeal suggests that it wished to hear the arguments and put the issues to bed once and for all.

During the course of the hearing, the Supreme Court made clear that it was not concerned with any alleged flaws in the reasoning of the Court of Appeal or the Upper Tribunal, and was tasked solely with looking at the FTT's decision to grant the barring order. The Supreme Court considered carefully whether the FTT had carried out the appropriate balancing exercise, and concluded that although it was harsh, the decision was one that the FTT had been entitled to make. This was particularly so when one considered the sanctions available to the FTT. It was clear that a sanction in costs would not have been sufficient, and having ruled out that option, the only other weapon in the FTT's armoury was to bar HMRC from further participation in the proceedings.

The Supreme Court decision thus raises the question of whether other sanctions, stricter than costs but less harsh than barring, might appropriately be introduced to the tribunal rules, and if so what those other sanctions might be. It is, however, worth noting in this regard that the existing tribunal rules are already weighted in favour of HMRC in cases involving non-compliance, where the equivalent sanction on an appellant taxpayer would not be a barring order but a striking out of the appeal in its entirety.

The crucial aspect of the decision is the Supreme Court's clear pronouncement on the standard of conduct to be expected of HMRC and other public bodies when conducting litigation. Far from adopting the more lenient approach to compliance advocated by HMRC, the Supreme Court has gone further than the Court of Appeal in suggesting that it might be appropriate to hold public authorities to a higher standard of account than private parties. The extent to which these observations translate to changes in practice remains to be seen. ■

*The authors' firm advised the taxpayer in this case.*

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