26 July 2017

PRESS SUMMARY

BPP Holdings and others (Respondents) v Commissioners for Her Majesty's Revenue and Customs (Appellant) [2017] UKSC 55
On appeal from: [2016] EWCA Civ 121

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Sumption, Lord Reed, Lord Hodge

BACKGROUND TO THE APPEAL

This appeal concerns whether the First-tier Tribunal ("Ft-T") was entitled to make an order debarring the Commissioners for HM Revenue and Customs ("HMRC") from defending an appeal concerning liability for VAT brought by three companies in the BPP Group of companies ("BPP").

Between 1999 and 2006, BPP Holdings Ltd supplied education and books to students. Following a corporate rearrangement in 2006, one company, BPP Learning Media Ltd, supplied books and another, BPP University College of Professional Studies Ltd, supplied education. BPP considered that this involved separate supplies by separate companies, one of education (which is standard rated for VAT purposes) and the other of books (which is zero-rated). Accordingly, BPP did not account for VAT on the supplies of books. In November 2012, HMRC issued two VAT assessments, prepared on the basis that BPP should have accounted for VAT at the standard rate on the supplies of books from 2006. HMRC also issued a decision to that effect in December 2012.

In May 2013, BPP appealed against the two assessments and the decision to the Tax Chamber of the Ft-T. HMRC served its statement of case on 21st October 2013, 14 days late, and subsequently provided disclosure, which was also late. On 11th November 2013, BPP requested that HMRC provide further information of their case, and subsequently applied to the Ft-T for an order that HMRC supply the information within 14 days of making the order, failing which BPP's substantive appeals should be allowed. On 9th January 2014, Judge Hellier made an order in terms that: "if the respondents fail to provide replies to each of the questions identified in the appellants' request for Further Information by 31st January 2014, the respondents may be barred from taking further part in the proceedings." On 31st January 2014, HMRC served a response to BPP's request. On 14th March, BPP issued an application for an order barring HMRC from taking further part in the proceedings ("a debarring order") as the response did not reply to "each of the questions identified in [BPP's] request for further information." HMRC have since withdrawn the two assessments and conceded those appeals, but BPP's third appeal against HMRC's decision has proceeded. Meanwhile, HMRC supplied a defective disclosure statement and list of documents some eight days late on 8th May, and did not apply for an extension of time until four weeks later. BPP maintained its claim for a debarring order in the surviving appeal.

On 23rd June 2014, Judge Mosedale granted BPP's application and made a debarring order. On 25 September 2014, Judge Herrington refused HMRC's application to lift the debarring order but gave HMRC permission to appeal against Judge Mosedale's decision. Judge Bishopp in the Tax and Chancery Chamber of the Upper Tribunal ("UT") allowed HMRC's appeal on 3rd October 2014. The Court of Appeal (Moore-Bick V-P, Richards and Ryder LJJ) allowed BPP's appeal and restored Judge Mosedale's debarring order for reasons given by Ryder LJ.

JUDGMENT

The Supreme Court unanimously dismisses the appeal, but does not approve all the reasoning of the Court of Appeal.

REASONS FOR THE JUDGMENT

It would be appropriate for an appellate court to interfere with Judge Mosedale's full and carefully considered judgment if it could be shown that irrelevant material was taken in to account, relevant material was ignored (unless the appellate court was satisfied that this made no difference), or the decision was one which no reasonable tribunal court have reached **[21]**.

The order made by Judge Hellier reflects the terms of rule 8(3)(a) of Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273), which provides that: "the Tribunal may strike out the whole or a part of the proceedings if – (a) the appellant has failed to comply with a direction which stated that a failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them" **[10-11]**. Judge Mosedale had correctly approached the issue on the basis that the order reflected rule 8(3), rather than rule 8(1) as HMRC had contended **[22]**.

Case law concerning time-limits and sanctions relevant to the Civil Procedure Rules does not apply directly to the tribunals: the jurisdiction of many of the tribunals extends to the whole of the United Kingdom rather than being limited to England and Wales, and they have different rules from the courts and sometimes require a different approach to a particular procedural issue. However, in general, a similar approach should be followed **[23-26]**. Judge Mosedale had made clear that her consideration of the Civil Procedure Rules and related authorities was limited to whether the guidance contained in them was relevant by analogy to the application of the overriding objective in the Tax Tribunal rules. She had distinguished the guidance before applying a nuanced version of it **[26-27]**. Further, in considering the reasoning in *Mitchell v Newsgroup Limited* [2014] 1 WLR 795, Judge Mosedale had correctly considered that whilst the case was not strictly relevant, it contained some useful guidance when considering the overriding objective of dealing with cases fairly and justly **[28], [15]**. There is no basis for concluding that she had misunderstood the guidance given in *Mitchell,* nor that any developments in the subsequent case of *Denton v TH White Ltd* [2014] 1 WLR 3926 justified upsetting her decision **[28]**.

In reaching her conclusion, Judge Mosedale had carefully considered all the relevant factors, including the disadvantage to HMRC and the arguably disproportionate benefit to BPP **[29], [12-20]**. The fact that HMRC was discharging a public duty in this case did not justify the application of a special rule or approach **[30]**. It was not disproportionate for BPP to have sought a debarring order rather than proceeding to a hearing **[31]**. The argument that the result of the debarring order would result in an unjustified windfall for BPP by improving its prospects of success in the substantive appeal could be made by any party facing a debarring order, and would, if accepted, save in exceptional circumstances, undermine the utility of the sanction of a debarring order **[32]**. The decision to make a debarring order against HMRC was tough and some Ft-T judges may not have made it. However, HMRC cannot cross the high hurdle of demonstrating that the decision was unjustifiable, 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 **[33-34]**.

References in square brackets are to paragraphs in the judgment

NOTE