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Supreme Court refuses to grant HM Revenue and Customs relief from sanctions for failing to comply with order of first tier tax tribunal

BPP Holdings Limited v. HMRC
[2017] UKSC 55

Article by David Bowden

Executive speed read summary

BPP supplies education and books to students on its professional education courses. It restructured its business in 2006 for VAT avoidance. One business supplied books which were zero rated and another business in its group supplied the education courses which attracted VAT at the standard rate of 20%. HMRC raised assessments to VAT. BPP challenged these in the First Tier Tribunal. BPP also challenged a HMRC decision on this issue. Following a ruling adverse to HMRC in another similar VAT case (*Kumon Educational*), HMRC withdrew the assessments. BPP sought further information from HMRC in the FTT and obtained an order. HMRC failed to comply and BPP obtained a debarring order against HMRC. Although that debarring order was overturned by the Upper Tribunal it was restored by the Court of Appeal. Lord Neuberger PSC in giving the unanimous judgment of the Supreme Court agrees that although the debarring order was *'tough'*, it had involved carrying out an '*unexceptionable balancing exercise'* following which the FTT came to the right decision in a full and very carefully considered judgment and it was not appropriate for an appellate court to interfere. This decision was given in relation to the FTT's powers under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 but the Supreme Court also looks at a civil court's powers to grant relief from sanction under rule 3.9 of the Civil Procedure Rules 1998. On this he ruled that there must be a limit to the permissible harshness, or indeed the permissible generosity, of a decision relating to the imposition or confirmation or discharge of a debarring order. As HMRC has reached the end of the line, BPP has no liability to pay any additional VAT to HMRC. The rules on this have now been changed in the Finance Act 2011.

BPP Holdings Limited v. HMRC
[2017] UKSC 55 26 July 2017
Supreme Court of the United Kingdom (Lord Neuberger PSC, Lords Clarke, Sumption, Reed and Hodge JJSC)

What are the facts of the case?

Between 1999 and 2006, BPP Holdings Limited supplied education and books to students. Following a corporate rearrangement in 2006, one company (BPP Learning Media Limited) supplied books and another company (BPP University College of Professional Studies Limited) supplied education. BPP took the view that there were now 2 separate supplies by 2 separate companies:

- one of education (which is standard rated for VAT purposes), and
- the other of books (which is zero-rated).

BPP did not account for VAT on the supplies of books.

What assessments did HMRC raise on BPP?

On 29 November 2012, HMRC issued 2 VAT assessments, prepared on the basis that BPP should have accounted for VAT at the standard rate on the supplies of books from 2006. Pursuant to a request from BPP, HMRC also issued a decision to that effect on this issue on 6 December 2012 which related to the VAT treatment of BPP's supplies from 19 July 2011. BPP appealed against both these 2 assessments and the decision issued by HMRC.

HMRC submitted that the supply of printed matter and the supply of education were indissociable from each other and accordingly chargeable to VAT as part of a composite standard rated supply of education services. In an ordinary case the supply of books and printed materials would have been zero rated under section 30 and Group 3 of Schedule 8 of the Value Added Taxes Act 1994.

What concession did HMRC later make?

However BPP's appeals against the 2 VAT assessments were later conceded by HMRC on 24 April 2014. This following another decision of the FTT in *Kumon Educational UK Company Limited v. HMRC* **[2014] UKFTT 109 (TC).** This left BPP's request to be determined.

HMRC submits that the novelty in that request arose from the fact that from 19 July 2011, section 75(1) of the Finance Act 2011 amended the notes to Group 3, Schedule 8 VATA 1994 to remove zero rating of printed matter in particular circumstances. This will mean that BPP's request will be the first case to consider the meaning of notes 2 and 3 to Group 3.

What happened in the First Tier Tribunal?

BPP issued its case in the FTT in May 2013. BPP's appeals were joined in the FTT and HMRC served a joined statement of case dated 21 October 2013 which was served 14 days late. On 11 November 2013

BPP made a request for further information which HMRC did not fulfil. Following HMRC's failure to provide this requested further information BPP applied on 22 November 2013 to the FTT for an order that HMRC supply the information in 14 days from the making of the order failing which BPP's '*substantive appeals should be allowed*'.

Judge Hellier sitting in the FTT on 9 January 2014 made an order that unless HMRC provided certain information by 31 January 2014 it would be '*barred from taking further part in the proceedings'*. Although on 31 January 2014 HMRC served a response to BPP's request, BPP maintained that it did not in fact reply to each of the questions identified in its request for further information. BPP then applied for a debarring order. In the meantime HMRC supplied a defective disclosure statement and list of documents 8 days later and were 4 weeks late in applying for an extension of time. BPP's debarring application came before Judge Mosedale at a further hearing on 23 June 2014. By her reserved judgement dated 1 July **[2014] UKFTT 644 (TC)** she granted a debarring order in the taxpayer's favour.

On 25 July 2014 HMRC applied to the FTT for a direction lifting this debarring order.

What do the procedural rules say?
The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 **SI 2009/273 (L. 1)** ('the 2009 rules') provide as follows. Rule 2 is in similar terms to the CPR and deals with the overriding objective in these terms:

> *'(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*
> *(2) Dealing with a case fairly and justly includes—*
> *(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;*
> *(b) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> *(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;*
> *(d) using any special expertise of the Tribunal effectively; and*
> *(e) avoiding delay, so far as compatible with proper consideration of the issues.*
> *(3) The Tribunal must seek to give effect to the overriding objective when it—*
> *(a) exercises any power under these Rules; or*
> *(b) interprets any rule or practice direction.*
> *(4) Parties must—*
> *(a) help the Tribunal to further the overriding objective; and*
> *(b) co-operate with the Tribunal generally*.'

Rule 8 deals with '*Striking out a party's case'* and says:

> **'*8(1)*** *The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by the appellant to comply with the direction would lead to the striking out of the proceedings or that part of them.*
> *….*
> *(3) 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 failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;*
> *(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or*
> *(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.*
> *….*
> *(5) If the proceedings, or part of them, have been struck out under paragraph (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.*
> *….*
> *(7) This rule applies to a respondent as it applies to an appellant except that—*
> *(a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent from taking further part in the proceedings; and*
> *(b) a reference to an application for the reinstatement of proceedings which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent from taking further part in the proceedings.*'

Rule 25 sets out the provisions in relation to the provision of a statement of case by HMRC. It provides:

> **'*25*.***(1) A respondent must send or deliver a statement of case to the Tribunal, the appellant and any other respondent so that it is received—*
> *(a) in a Default Paper case, within 42 days after the tribunal sent the notice of the appeal or a copy of the application notice or notice of reference; or*
> *(b) in a Standard or Complex case, within 60 days after the tribunal sent the notice of the*

appeal or a copy of the application notice or notice of reference.
(2) A statement of case must—
(a) in an appeal, state the legislative provision under which the decision under appeal was made; and
(b) set out the respondent's position in relation to the case.
(3) A statement of case may also contain a request that the case be dealt with at a hearing or without a hearing.
(4) If a respondent provides a statement of case to the Tribunal later than the time required by paragraph (1) or by any extension allowed under rule 5(3)(a) (power to extend time), the statement of case must include a request for an extension of time and the reason why the statement of case was not provided in time.'

Rule 41 sets out the procedure for a review of a FTT decision saying:
'*41.—(*1) The Tribunal may only undertake a review of a decision—
(a) pursuant to rule 40(1) (review on an application for permission to appeal); and
(b) if it is satisfied that there was an error of law in the decision.'

What ruling did the FTT make?
Judge Herrington in the FTT on 25 September 2014 **[2014] UKFTT 917 (TC)** declined to lift the barring order ruling he was not allowed to do so unless one of two conditions is satisfied:

- the judge making the direction sought to be changed was plainly in error or in overlooked or was ignorant of a material fact or a clearly relevant legislative provision or judicial authority, or
- there had been a material change of circumstance

What happened on first appeal to the Upper Tribunal?
On 3 October 2014 Judge Colin Bishopp sitting in the Upper Tribunal (Tax and Chambery Chamber) ruled in HMRC's favour - **[2014] UKUT 0496 (TCC).** However he commented that '*I find much which is unsatisfactory in HMRC's conduct in this appeal, and little to explain, still less to justify, that conduct*.'

What ruling did the Court of Appeal give?
On 1 March 2016 the Court of Appeal (Moore-Bick, Richards and Ryder LJJ) **[2016] EWCA Civ 121** allowed the taxpayer's appeal. Lord Justice Ryder observed:

'If HMRC have a difficulty with compliance they should, where possible, make application to the tribunal to be relieved of compliance on the basis of some alternative proposal which should be canvassed with the taxpayer prior to the application. The reasons for non-compliance and the merits of the alternative should be explained. HMRC had no good reason indeed no stated reason at all for their non-compliance.'

What has the Court of Appeal in England & Wales ruled is the test on applications for relief from sanctions for failure to comply with the court rules in the CPR?
Initially in *Mitchell v. News Group Newspapers Ltd* **[2013] EWCA Civ 1537** it ruled that a decision whether to grant relief from sanction under CPR rule 3.9 was the need for litigation to be conducted efficiently at proportionate cost and the need to enforce compliance with rules, practice directions and court orders. Those considerations are now to be regarded as of paramount importance and to be given great weight. Although regard should be had to all the circumstances of the case, other circumstances should be given less weight.

Then in *Denton v. T H White Ltd* **[2014] EWCA Civ 906**, it rowed back from this. It ruled that in relation to an application for relief from sanctions in a court in England and Wales, a judge should address such an application under CPR part 3.9(1) in 3 stages

- identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order,
- consider why the default occurred, and
- evaluate all the circumstances of the case, so as to enable the court to deal justly with the application.

Does the Court of Appeal ruling in *Denton* have any application here?
The FTT's decision was handed down shortly after the Court of Appeal's judgment in *Mitchell* but before it had rowed back from this in *Denton*. It is clear that the FTT was influenced by the tough approach in *Mitchell* in making the debarring order. The 2009 Rules apply throughout the United Kingdom. The FTT sought to apply the different wording in the 2009 rules. The CPR only applies in England and Wales with the Supreme Court remarking previously that '*in Scotland, the people still walk in darkness and upon them hath the light of the CPR not shined*'.

What was the issue for the Supreme Court?
Whether the Tax Chamber of the First-tier Tribunal erred in imposing an order debarring HMRC from participating in an appeal following HMRC's failure to comply with the FTT's directions.

What submissions did HMRC make in the Supreme Court?
HMRC made these 7 submissions:

- Judge Mosedale in the FTT approached the issue as if the previous order made by Judge Hellier was an order under rule 8(1) rather than rule 8(3) of the 2009 rules,
- Judge Mosedale's reliance on Mitchell was '*unsound*',
- Judge Mosedale did not consider the disadvantages to HMRC or disproportionate benefits to the taxpayer of a ruling adverse to HMRC,
- A debarring order prevents HMRC from discharging its public duty, harming the public interest and failing to recover VAT lawfully due,
- It was disproportionate for the taxpayer to seek a debarring order rather than proceeding to a full hearing instead,
- A debarring order represented an unjustified windfall for the taxpayer, and
- A debarring order was outsider the scope of what a reasonable judge could have made (even if Judge Mosedale made no specific errors).

What submissions did the taxpayer make in the Supreme Court?
Although the taxpayer submitted a full printed case in which it sought to uphold the order made in the FTT and the judgement of the Court of Appeal, at the hearing Lord Neuberger only sought assistance on whether the position under the CPR was or should be the same as under the 2009 rules. The taxpayer's submissions were very brief on this.

What conclusion did the Supreme Court reach?
All of the submissions made by HMRC were rejected. The decision to debar made by the FTT was upheld. However Lord Neuberger PSC cautioned that it was '*right to record'* that whilst the Supreme Court agreed '*with the conclusion reached by the Court of Appeal*' that it 'should not be taken as approving all its reasoning'

What observations did the Supreme Court make on the FTT's reasons?
Lord Neuberger started by saying that it was a '*full and very carefully considered judgment'* and that it would only '*be appropriate for an appellate court to interfere with it, if it could be shown that irrelevant material was taken into account, relevant material was ignored … there had been a failure to apply the right principles, or if the decision was one which no reasonable tribunal could have reached'*.

He said Judge Mosedale was '*careful to identify'* that '*she was making a decision about whether barring should be applied as a sanction rather than considering whether to grant relief from a sanction already applied'* and that she '*was plainly aware of the rule which applied'*. He said that '*tribunals have different rules from the courts and sometimes require a slightly different approach to a particular procedural issue*'. However he stressed that he '*did not accept that the Upper Tribunal should adopt a different, more relaxed, approach to compliance with rules, directions and orders than the courts'* adding that it was not for the Supreme Court to '*interfere with the guidance given by the Upper Tribunal and the Court of Appeal as to the proper approach to be adopted by the Ft-T in relation to the lifting or imposing of sanctions for failure to comply with time limits'*.

Lord Neuberger PSC ruled that Judge Mosedale's approach '*involved carrying out the unexceptionable balancing exercise which she described'*. Although there was '*force*' to the point that Judge Mosedale had not considered the disadvantages of a ruling adverse to HMRC, nevertheless this seemed to '*involve[s] an unrealistic approach to the judgment*' and it was '*fanciful to suggest'* that she did not take either disadvantages or disproportionate benefit '*into account when reaching her conclusion'*.

On HMRC's public duty to collect taxes, surprisingly Lord Neuberger countered by saying that it seemed to him that '*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'*. He added it was '*unconvincing*' to have '*have different rules for public law cases'*. He also said that the FTT order of 9 January 2014 '*specifically envisaged a debarring order being made unless HMRC complied with their disclosure obligation recited in the order by 31 January'*.

As to whether the taxpayer received a windfall by obtaining a debarring order, Lord Neuberger was scathing remarking that '*point can always be made by a party facing a debarring order, and to give the point any weight, save perhaps in exceptional circumstances, would appear to me to undermine the utility of the sanction of a debarring order'*.

Lord Neuberger accepted that the order made by Judge Mosedale was '*tough*' and that other FTT judges '*may not have made that decision'* but these decisions are made '*on certain facts'* and they are '*very much one for the tribunal making that decision, and an appellate judge should only interfere where the decision is not merely different from that which the appellate judge would have made, but is a decision which the appellate judge considers cannot be justified*'. On this Lord Neuberger was clear that HMRC could not '*cross that high hurdle in this case'*.

However so that the Court of Appeal is not unduly hemmed in when future relief from sanctions cases reach it (either tax ones under the 2009 rules or general civil cases under the CPR or family cases under the FPR), he ruled that there '*must be a limit to the permissible harshness (or indeed the permissible generosity) of a decision relating to the imposition or confirmation (or discharge) of a debarring order*' adding that it may well be that this case is '*not far from that limit'*.

Finally as to whether the 2009 rules should be amended so that the FTT is not faced with '*two unpalatable choices*', Lord Neuberger cautions in what is either his last (or nearly last judgment) as President that '*experience suggests that such ideas, while attractive in theory, can often be difficult to formulate or to apply satisfactorily in practice'*.

What will happen next with this case?
As regards BPP, this is the end of the road for HMRC. The taxpayer has succeeded in having the assessments set aside and HMRC debarred. The rules have been changed in section 75 of the Finance Act 2011. Of course it remains open to HM Treasury to change the rules again if it does not think they are drafted sufficiently tightly in a future budget, autumn statement or finance bill.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.