TC03768

Appeal number: TC/2013/04669

PROCEDURE – HMRC directed to provide further and better particulars – unless order breached – whether HMRC should be barred – whether* Mitchell *applies - HMRC barred.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BPP UNIVERSITY COLLEGE OF PROFESSIONAL STUDIES **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 23 June 2014

Mr S Grodzinski QC, instructed by Simmons & Simmons LLP, for the Appellant

Mr S Singh, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 14 March 2014 the appellant, to whom I shall refer to as "UC", applied for a direction that the respondent be barred from taking further part in the appeal by reason of its failure to comply with the Tribunal's directions dated 15 January 2014.

Background

2. As I understand the background to this case, up to 2006 a company within the group of BPP Holdings Ltd ("Holdings") supplied standard rated education to students and included within that single supply was printed matter. A reorganisation of the business took place in 2006 which resulted in a separate company (BPP Learning Media Ltd – "LM")) which was not within the same VAT group making a supply of books to the students while a company ("PE") in the Holdings' VAT group continued to supply the education.

3. As the separate supply of books is zero rated under Group 3 of Schedule 8 to the Value Added Tax Act 1984 ("VATA"), LM, or more accurately UC, as the representative member of the VAT group to which LM belongs, did not account for VAT on the supply.

4. With effect from 19 July 2011 the law was amended by s 75 Finance Act 2011 ("FA 11") to introduce Notes (2) and (3) into Group 3. These notes provided as follows:

> "(2) Items 1 to 6 do not include goods in circumstances where –
>
> (a) the supply of the goods is connected with a supply of services, and
>
> (b) those connected supplies are made by different suppliers.
>
> (3) For the purposes of Note (2) a supply of goods is connected with a supply of services if, had those two supplies been made by a single supplier –
>
> (a) they would have been treated as a single supply of services, and
>
> (b) that single supply would have been a taxable supply (other than a zero-rated supply) or an exempt supply."

5. From 19 July 2011 the appellant accounted for VAT on the supply of the printed materials.

6. On 29 November 2012 HMRC issued two alternative assessments on LM and Holdings of approximately £6 million for the period September 2008 to 18 July 2011 on the grounds that VAT should have been charged on the supply of the books on the bases either:

(a) There was a single composite supply; or

(b) There was an abuse of law under *Halifax.*

7. On 6 December 2012 HMRC issued a decision to UC and Holdings that as from 19 July 2011 the supplies of printed material by LM, where PE supplied educational courses, was standard rated.

8. The two assessments and the decision were appealed in time. The three appeals were joined and directions issued for a joined statement of cas ("SOC") to be served on 2 October 2013. HMRC applied for a short extension of time when the joined SOC was served late on 21 October.

9. The appellants did not consider that the SOC satisfactorily explained the factual and legal basis for the two assessments and decision. The appellants applied direct to HMRC for further and better particulars on 11 November 2013. There was some correspondence and calls between the parties in which the solicitor acting for HMRC appeared to accept in principle that HMRC ought to give the replies requested but would not (yet) commit HMRC to a time frame in which the replies would be provided.

10. As they had said they would, the appellants then applied on 22 November 2013 to the Tribunal for an order that unless replies were provided within 14 days of the date of the order HMRC would be barred from proceedings. A hearing was convened for 9 January 2014.

11. By the end of December the parties were agreed that the replies were to be provided by 31 January 2014. However, HMRC would not consent to order proposed by the appellant as it was in the form of an "unless" order which stated that HMRC would be barred if the replies were not provided by the agreed date of 31 January 2014.

12. The hearing convened to hear the appellants' application therefore went ahead on 9 January. The directions issued by Judge Hellier record that HMRC had agreed to provide the further and better particulars by 31 January 2014. The Judge refused the appellants' application for an "unless" order under Rule 8(1), but he made an "unless" order under Rule 8(3)(a). In other words, the Direction provided:

> "UPON the Respondents having agreed to provide by 31 January 2014 replies to each of the questions identified in the Appellants' request for further information dated 11 November 2013;
>
> And UPON hearing Counsel for the parties, the following Directions are made:
>
> 1. If the Respondents fail to provide replies to each of the questions identified in the Appellants' Request for Further Information by 31 January 2014, the Respondents may be barred from taking further part in the proceedings…."

13. On 31 January 2014 HMRC served a reply to the Request for Further Information. I will refer to this as the Reply.

14. On 24 April 2013 HMRC notified the appellants that they were withdrawing the assessments which were the subject of the first two appeals. The letter made it clear

that HMRC was not withdrawing the decision the subject of the third appeal, which related to the post 18 July 2011 position.

15. I consider the documents in more details.

The statement of case

16. The SOC dealt with all three appeals. As the assessments for the first two appeals are now withdrawn and the appellant has been notified by the Tribunal that its appeals have been allowed, what the SOC said in respect of the first two of the three appeals is (largely) otiose and in so far as the application to bar HMRC from proceedings related to those first two appeals it has been superseded by events.

17. What is highly relevant to this appeal is how the SOC dealt with the third appeal which is still extant. Some paragraphs of the SOC give very brief background to the three appeals. So far as the third appeal was concerned it really only stated the various dates of the decision letter, review letter, notice of appeal and a brief reference to the legislation as amended by s 75 FA 11. The substantive part of the SOC which dealt with 'The Respondent's case' on the third appeal ran to three paragraphs.

18. Paragraph 17 stated:

> "The Respondents based their decisions on the understanding that the arrangements set out in the decision letters of 29 November continued without material change after 19 July 2011."

19. Paragraph 18 amounted to no more than a statement that LM's supplies were standard rated by the new Notes to Group 3:

> "The Respondents consider that there is a single composite supply of standard rated education services and/or the supply of printed matter by LM 'is connected with' the supply of education services by Holdings and that those supplies are made by different suppliers within the meaning of Notes 2 and 3 of Schedule 8 to VATA. The effect of this is that items 1 to 6 of Group 3 do not apply and the supply of printed matter falls to be standard rated."

20. Paragraph 19 said that the same analysis applied to the tripartite arrangements between Holdings, LM and UC, irrespective of the fact that UC's supplies of education were exempt whereas Holdings' supplies were standard rated:

> "The Respondents contend that this analysis applies equally to similar tripartite arrangements between LM and BPP entity, UC, who assert that its supplies of education are exempt from VAT, by way of Note (e) to Item 1 of Group 6 of Schedule 9 to VATA. It is not admitted that University College makes exempt supplies of education or that LM could benefit from any such exemption, because of the effect of section 43(1AA) of VATA. The effect of Notes 2 and 3 of Group 3 of Schedule 8 to VATA is that supplies or printed material are standard rated regardless of whether the education services are taxable or exempt."

21. From this I find that §§18 & 19 of the SOC made no reference whatsoever to any *facts* on which HMRC relied to support their stated legal position that Notes 2 & 3 applied to make LM's supplies of printed matter standard rated.

22. The only reference to facts, so far as the third appeal was concerned, was in §17. And that reference to facts was by reference to the facts contained in the decision letter of 29 November 2012. This letter including its annexes ran to 20 pages. It contained a fairly detailed explanation of HMRC's understanding of the appellants' corporate structure and the supplies made by each company. It considered matters such as the nature of the supply, advertising, prices and terms and conditions.

23. It went on to state that based on these facts, the pre-2006 position was a single supply of standard rated education based on the law as set out in *Levob*, *CPP*, *College of Estate Management,* and *Weight Watchers UK Ltd*, *Purple Parking* and *Deutsche Bank*. It then went on to conclude (very briefly) that as customers received the same package after 2006, that supply was a single composite supply of standard rated education.

24. The letter then went on to consider whether there was abuse of law in the *Halifax* sense. It then set out a detailed calculation of two alternative assessments and notified a right of appeal.

The Request for Further Information

25. The Request for Further Information ("the Request") in so far as it related to §18 of the SOC and read as follows:

> "[16] HMRC are request to identify, with the same degree of particularity as will be relied upon at the hearing of these appeals, each and every matter on which they rely in support of their argument that:
>
> A 'There is a single composite supply of standard rated education services'
>
> B The supply of printed matter by LM is 'connected with' the supply of education services by Holdings, within the meaning of Notes 2 and 3 to Group 3 Schedule 8 of VATA (as amended by s 75 FA 11)."

26. There was a similar request for facts in relation to §19 of the SOC and HMRC's position that UC's supplies were not exempt but it does not need to be repeated as HMRC in their Reply HMRC conceded that UC's supplies were exempt. That part of the third appeal therefore fell away.

The Reply

27. The second paragraph of HMRC's Reply stated:

> "[2] Contrary to the Appellants' apparent understanding in their request for further information, there is no obligation on the Respondents under the Rules or elsewhere to set out in their SOC or in a reply to a request for further information concerning that SOC, every

> fact, matter and submission they will rely upon at the hearing of the appeals. Indeed such a task is impossible, given that matters may emerge from the Appellants' disclosure and witness evidence and future Tribunal/Court decisions that the Respondents will seek to rely upon at the hearing…..
>
> [3] The Respondent's SOC already sets out their position in relation to the appellants' case. In this reply the Respondents will elaborate upon that position in response to the Appellants' request for further information, but they do not accept that at the hearing of these appeals they will be confined to relying only on those facts, matters and submissions set out in this reply……"

28. The Reply went on to give replies to specific questions asked in respect of the first two appeals which are no longer extant.

29. Paragraphs §21-24 of the Reply dealt with [16] of the Request (set out at §25 above).

30. Paragraph 21 contained a reply to [16(a)]. [16(a)] related to HMRC's case that there was a single composite supply post 18 July 2011 and HMRC's reply referred the reader to HMRC's reply to question [10(a)(i)[. That question had dealt with HMRC's case that there was a single composite supply pre 19 July 2011. As the SOC had done, it referred the reader to the letter of 29 November 2012. It also contained a few paragraphs which dealt with HMRC's view that the facts established that there was a tripartite arrangement and that Holdings acted as agent for LM, although it did not state on what primary facts it relied in support of these propositions.

31. This reply is now (largely) irrelevant as Mr Singh informed the appellant that HMRC no longer pursue this part of the decision. In other words, of the entire SOC the only element that remains outstanding is HMRC's case that the post July 2011 supplies were caught by the amendments to Group 3 introduced by s 75 FA 11. And that was [16(b)] of the Request.

32. Paragraphs 22-24 contained a reply to [16(b)]. Paragraphs 22-23 only set out in full Notes 2 & 3. The Reply was in §24. It said:

> "The supply of printed matter by LM is 'connected with' the supply of education services by Holdings within the meaning of Notes 2 and 3 because if those supplies had been made by a single supplier, they would have been treated as a single supply of services and that single supply would have been a taxable supply."

Other alleged failures

33. I have already noted that the SOC was served just over two weeks late.

34. The January directions also required that both parties carry out a further disclosure exercise by 30 April and file a disclosure statement and further list of documents on the other no later than that date. There is no suggestion that the appellants did not comply. HMRC did not comply until 8 May 2014. On that date a

disclosure statement was served together with a list of documents, which included no new documents. No application was made until 5 June for an extension of time on the basis (says HMRC's email of that date) because there were no further documents to disclose.

35. HMRC's letter of 6 June, sent in response to the appellants' criticisms of HMRC's disclosure statement, apologised for misunderstandings about the extent of the HMRC's search. It was agreed at the hearing HMRC would serve a new disclosure statement setting out the full extent of their search and I have issued directions to that effect.

36. In passing I record that at the hearing Mr Grodzinski complained that the search had not brought to light HMRC's notes of a meeting between an HMRC officer (Mr Tasker) and a representative of the appellant (Mr F Homes) and the appellant was particularly keen for these to be disclosed as it was the appellant's position that Mr Tasker had made statements in that meeting to the effect that Notes 2 and 3 were not meant to catch persons in the appellant's position. In discussion at the hearing, Mr Grodzinski said that the appellant was not intending to make out a case that they had relied on any representations made by HMRC and, as he put forward no other case as to what relevance such representations might have to their case, Mr Grodzinski agreed that the appellant no longer sought a copy of these notes.

Did HMRC comply with the Unless order?

37. It is the appellant's case that HMRC did not comply with the Unless order. The appellant says this for two reasons:

- In terms the Reply stated that HMRC would not list all the facts and matters that HMRC at that time intended to rely on at the hearing;
- The Reply actually failed to state any the facts on which HMRC at that time intended to rely at the hearing in respect of the one outstanding live issue remaining between the parties;

38. <u>first complaint:</u> The first of these complaints relates to the preamble to the Reply which I set out at §27 above. Strictly, I do not consider the criticism justified in that §2 of the Reply was a statement of what a Statement of Case must contain and it is true that it is not required to contain every fact matter and submission that a party will make at the hearing and indeed it would not be possible for it to do so. §2 was not a statement that the Reply would not comply with Judge Hellier's directions of January 2014.

39. Similarly, on its face §3 was not (necessarily) a refusal to comply with Judge Hellier's directions in that, although it stated HMRC did not intend to be confined at the hearing to what they stated in their Reply, it must be the case that facts and matters coming to their attention after the Reply could be relied upon (if necessary after an amendment to the SOC) even though they cannot have been included in the Reply.

40. However, §3 did not make that distinction and could certainly be read as saying HMRC would only 'elaborate' on their SOC in their Reply but without going so far as was required by Judge Hellier's direction which was to 'identify, with the same degree of particularity as will be relied upon at the hearing of these appeals, each and every matter on which they rely in support of their argument…' Indeed, it seems that that is the intended meaning of §3 of the Reply as Mr Singh made that submission in his skeleton argument and he was the author of the Reply.

41. I agree with the appellants, therefore, that this complaint is well founded. While pleadings in general do not require each party to identify every fact, matter and submission with the same degree of particularity as will be relied on at the hearing, nevertheless it is open to the Tribunal to direct more detailed pleadings than ordinarily required and in this particular case, in accordance with the parties' agreement, that is what the Tribunal did.

42. That this is the correct position in law is clear from a case cited by the appellant, *Fearis v Davis* [1989] 1 Fleet Street Reports 555. In that case the Court of Appeal ruled where a party consented to provide a reply to a request for further and better particulars then they were required to provide the reply in the agreed terms even if it went further than pleadings would ordinarily require.

43. I find it was not open to HMRC to say that they were not obliged to fully comply with the Direction: a party must obey a direction, appeal it, or seek to have it set aside. HMRC did not seek to appeal or set aside the direction (which would have been a difficult course to pursue bearing in mind it *agreed* to provide the Reply on the directed terms). HMRC may now consider it unwise to have agreed to a direction which required such detailed pleadings but HMRC were professionally represented by their own solicitor's office and cannot be heard to resile on their agreement now.

44. <u>Second complaint:</u> the main compliant is that the Reply did not comply with the unless order.

45. The appellant's case is that the Reply failed to identify a single fact on which HMRC relied, let alone all the facts on which HMRC at that point relied.

46. To recap Notes (2) and (3) excluded a supply from the benefit of zero rating if it was 'connected with' an exempt or standard rated supply of services. Note (3) provided that a supply would be 'connected with' another supply if 'had those two supplies been made by a single supplier – (a) they would have been treated as a single supply of services'.

47. That part of the reply (§§22-24) (set out at §§29-32 above) which dealt with HMRC's case on Notes (2) and (3) merely recited the law and gave HMRC's opinion that Notes (2) and (3) applied.

48. But that reply must be considered in its context. The question whether the supply of printed matter was connected with the supply (by a separate supplier) of standard rated or exempt education depended on whether, if those two supplies made by a single supply, they would be treated as a single supply of services.

49. Part (a) of HMRC's case was that, irrespective of Notes (2) and (3), the two supplies were a composite supply. Their reply (§21) to that part of the case was, as I have said at §30 above, to refer the reader to their reply to that exact same case for the pre- July 2011 supplies which was dealt with at §10(a) of the Reply. That section of the Reply referred the reader to the letter of 29 November 2012.

50. As I have said, that letter contained a very detailed summary of what HMRC considered the factual position to be. However, it did not identify a list of specific factors on which HMRC relied to support its conclusion that the supplies were in law a single composite supply.

51. So on a reading of the Reply favourable to HMRC, the Reply indicated that the supplies post July 2011 were connected for the same reason as HMRC had for saying that, despite the suppliers being different legal entities, the supplies were a single composite supply even before 2011. And that reason was set out in the letter of 29 November 2012.

52. The problem with such a benign reading is that the link with the letter of 29 November 2012 is not clearly made in §§22-24 in respect of the Note (2) and (3) point and in any event the letter of 29 November does not clearly list the facts on which HMRC were relying. The letter contains pages of alleged facts: but does not state on which HMRC rely in support of their case.

53. In my view the Reply (so far as Notes (2) and (3) were concerned) contained no facts at all; and even if the Reply incorporated the letter of 29 November 2012, that letter contained *all* the facts known to HMRC and failed to identify those on which HMRC relied. One was too much and the other too little. In any event the letter predated the SOC and the Direction: if the letter was an adequate statement of HMRC's position then HMRC should not have agreed to provide the Reply and the Tribunal would not have issued the unless order which it did.

54. I find that the Reply did not comply with the Directions of Judge Hellier. It failed to identify each and every matter on which HMRC intended to rely in support of their argument that the supply of printed matter by LM was 'connected with' the supply of education services by Holdings, within the meaning of Notes 2 and 3. HMRC were in breach of Judge Hellier's directions.

What is the appropriate sanction if any?

55. The appellant relied on the *Mitchell* line of authority. In brief, in the case of *Mitchell v News Group Newspapers* [2013] EWCA 1537 one party had failed to submit its cost budget by the due date and the CPR provided that the effect of that was that it was to be treated as claiming only its court fees. It applied for relief from this sanction. New rule CPR 3.9 provided:

> "on any application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders."

56. Lord Dyson said at §36 that the new Rule 3.9…

> …"reflected a deliberate shift of emphasis. These considerations [ie CPR 3.9 (a) and (b)] should now be regarded as of paramount importance and be given great weight. It is significant that they are the only considerations which have been singled out for specific mention in that rule.
>
> [37]….But (subject to the guidance that we give below) the other circumstances should be given less weight than the two considerations which are specifically mentioned.
>
> …..
>
> [40] …If [the non-compliance] can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly….
>
> [41] If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The Court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted…But mere overlooking a deadline….is unlikely to be a good reason….
>
> …
>
> [43] …In short, good reasons are likely to arise from circumstances outside the control of the party in default….
>
> …..
>
> [45] On an application for relief from a sanction, therefore, the starting point should be that the sanction has been properly imposed and complies with the overriding objective….
>
> ….
>
> [48]…In line with the guidance we have already given, we consider that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial….

57. Mr Singh did not suggest that *Mitchell* per se was irrelevant to proceedings in the tax tribunal. The Upper Tribunal has held in *McCarthy & Stone* [2014] UKUT 196 (TCC):

> "[45] …In my view, the reasons given by the Court of Appeal in *Mitchell* for a stricter approach to time limits are as applicable to proceedings in the [Upper Tribunal] as to proceedings in courts subject to the CPR. I consider that the comments of the Court of Appeal in *Mitchell* on how the courts should apply the new approach to CPR 3.9

> in practice are also useful guidance when deciding whether to grant an extension of time to a party who has failed to comply with a time limit in the [Upper Tribunal] rules."

58. I also note that the guidance from *Mitchell* has been applied by the FTT. See the decisions in *Compass Contract Services UK Limited* [2014] UKFTT 403 (TC). It may well be that when a tribunal takes into account all relevant factors on an application for relief from sanction, it will consider the party's level of sophistication and more lee way will be granted to an unrepresented party than one represented by solicitors. I do not have to consider that in this case where HMRC were represented by their own solicitors' office.

59. What Mr Singh did say was that the *Mitchell* line of authority was not relevant to an application to strike out a party under Rule 8(3)(a). Strictly, Mr Singh is right. The *Mitchell* line of cases (including *McCarthy & Stone* and *Compass)* relate to what considerations the court apply when there is an application for relief from sanctions. Comparable considerations to those in *Mitchell* might apply where this Tribunal is considering an application for reinstatement after an appeal has been automatically struck out following breach of Rule 8(1) unless order.

60. Here, in contrast, no sanction has as yet been applied to HMRC. HMRC is in breach of the January directions but it has not been barred or had any other sanction applied. HMRC are not applying for relief from sanction. On the contrary, it is the appellant's application that the Tribunal bar HMRC out for breach of a Rule 8(3)(a) unless order. The question for me is whether I ought to apply the sanction of barring.

61. I consider, however, while *Mitchell* is not strictly relevant, nevertheless it contains some useful guidance that when considering the overriding objective of dealing with cases fairly and justly.

62. At §45 of *Mitchell* Lord Dyson said that the court must proceed on the assumption that the sanction was properly applied and the applicant must justify its claim for relief. That guidance is obviously inapplicable to this situation. No sanction has yet been applied and I must not assume that barring is the appropriate sanction for the breach of the unless order.

63. But I consider that the guidance in *Mitchell* is relevant in this appeal in so far as it stresses that in consideration of the overriding objective, significant weight should be given to the factors (a) and (b) of CPR 3.9 to ensure fair and just hearings.

64. What did he mean by this? While Lord Dyson at [36] & [37] said these two factors were of 'paramount importance' and that other circumstances should be 'given less weight' nevertheless, even where CPR 3.9 was concerned, it was clear he did not mean that these two factors would always outweigh other factors as CPR 3.9 itself said all relevant factors must be considered.

65. I conclude that in considering whether to grant the appellant's application to bar HMRC from further participation in this appeal I must consider all relevant factors. I will include in my consideration factors (a) and (b) from CPR 3.9 and accord them

significant weight as part of my consideration of the overriding objective to deal with cases fairly and justly.

66. I go on to consider all relevant factors.

Effect of non- compliance

67. The appellant's complaint at root is that, until service of Mr Singh's skeleton argument, it did not know HMRC's case against it on the one ground that HMRC still maintains. Is this complaint made out?

68. Mr Singh's skeleton argument accepts that the pleadings do not set out HMRC's case. It says:

> "the respondents' case on Notes 2 and 3 is clear enough from their correspondence when read alongside their pleadings. However, the Respondents take the point that their arguments should be set out in a single document so that the Appellants know precisely what case they have to meet…"

69. It goes on to 'elaborate' on HMRC's case in some 16 paragraphs. It refers specifically to 5 (alleged) facts ranging from parts of the terms and conditions, aspects of the advertising, pricing, how the course is ordered online, collection of course monies and what the typical customer purchases. It goes on to explain briefly why the cases mentioned at §23 above are considered to support HMRC's case.

70. I accept that this would certainly be sufficient detail for the SOC and would appear to have been sufficient compliance with the January directions other than the fact it is very late.

71. Other than that I find the SOC and Reply failed to identify the facts on which HMRC relied to support its case on Notes (2) and (3). Even if a somewhat broad reading is adopted so that the letter of 29 November 2012 is read into the reply on Notes (2) and (3), that letter summarised in some detail the overall factual situation but did not identify the particular facts on which HMRC relied to support their view that there was (or would be) a composite supply of education and printed materials.

72. Mr Singh's skeleton argument served shortly before this hearing does contain a statement of HMRC's case on the Notes (2) & (3) case. It is the first and only time HMRC has listed the facts and matters on which they rely to support their case on Notes (2) and (3) in this appeal. Mr Singh says that all the points made in the 16 or so paragraphs of his Skeleton which set out HMRC's case on Notes (2) and (3) can be found at various points in letters from HMRC. However, he only showed a few examples of this, so I am unable (without conducting a time wasting trawl of a large bundle) able to assess whether this is right. In any event, it is no answer even if true. As HMRC accept, the appellant was entitled to have a single statement of HMRC's case. They needed to know which of the points made in voluminous correspondence were still a part of HMRC's case. They did not get this until Mr Singh's skeleton was served.

Prejudice to appellant

73. There is very clear prejudice to the appellant in not knowing HMRC's case. Litigation is not to be conducted by ambush. The appellant has the right to be put in the position so that it can properly prepare its case: it needs to know HMRC's case not only before it gets to the hearing but before it prepares its witness statements and really before it prepares its list of documents.

74. It accepts that, since Mr Singh's skeleton was served, it now knows HMRC's case, but it knows it very late. So the real prejudice to the appellant is in the delay. Only now can the parties proceed to exchange list of documents and witness statements. While the Directions were issued in January, they were issued to correct a failure in the SOC. The SOC was due on 2 October 2013, so it is in my view fair to say that HMRC's continued failure to make a proper statement of their case has delayed the progress of this appeal by about 8 months.

Reason for default

75. I did not leave the hearing with any clear understanding of why this default had occurred. HMRC knew in mid-November 2013 that the appellant was not satisfied with their SOC and HMRC appeared fairly quickly to accept that that complaint was justified, as I have found it was, because they consented to provide the Reply. They were also aware (from 14 March 2014 when the appellant applied for them to be barred) that the appellant was not satisfied with the Reply that was provided on the due date and I consider that anyone reading the Reply should have known it was inadequate as, so far as the Notes (2) and (3) point, as well as other issues, it failed to state a single fact on which HMRC relied.

76. Mr Singh's skeleton has rectified the position. What I do not understand is why HMRC did not take steps to rectify it more promptly. I do not understand why it was not apparent to HMRC until (presumably) immediately before Mr Singh submitted his skeleton argument that the Reply was inadequate as a statement of the facts and matters on which HMRC relied in respect of their case on Notes (2) and (3).

77. I can appreciate that the Notes (2) & (3) issue might have been overlooked when HMRC dealt with the issues in the other (now withdrawn) appeals. But HMRC don't suggest that this was the reason for the error and in any event the Notes (2) and (3) issue was clearly identified in the Reply. It was not overlooked. It was just that HMRC did not state its case in respect of it. Moreover the Reply as a whole failed to deal with the factual matters HMRC relied on to establish that there was a single supply for the pre-2011 position as well as post 2011 position.

78. HMRC were represented by HMRC solicitors' office throughout. I consider it should have been obvious to a lawyer that the Reply delivered on the due date did not comply with Judge Hellier's Order.

79. The only reason apparently suggested by HMRC is that it ought not to have been required to state *every* fact and matter on which it relied. I have dealt with the

fact why this submission is wrong, but the reality is that the Reply failed to state *any* fact or matter on which HMRC relied on the Notes (2) and (3) issue.

80. My conclusion is that I do not know the reason why the default occurred; I presume that whatever the reason was, it was not one which could even partly justify the default.

ongoing administration of appeal

81. I find that HMRC have not shown a great respect for time-limits in this appeal. The SOC was delivered late. The disclosure statement and list of documents was delivered late. HMRC only applied for an extension of time for compliance when prompted by the Tribunal.

82. While none of these other delays are particularly significant, HMRC does not appear in this appeal to have appreciated the importance of adhering to directions.

Draconian remedy

83. Barring is a draconian remedy. The difficulty for the Tribunal is that it is virtually the only sanction that the Tribunal has. No one suggests in this case that costs would be an adequate remedy. The case has been unnecessarily delayed by 8 months due to HMRC's failure to properly state its case. Costs won't compensate the appellant.

84. Mr Singh did not suggest that there was an alternative sanction: his solution is that (now HMRC have provided a full statement of their case) that the appeal should simply be allowed to proceed. Indeed, HMRC's view was that barring was too draconian remedy and therefore the Tribunal could not apply it, even in the circumstances when the Tribunal has not been given a good reason for the default.

85. Indeed Mr Singh suggested that the Tribunal should only bar HMRC where the breach was incapable of remedy or had not been remedied. I agree with Mr Grodzinski that this is not the right test, before or after *Mitchell.* Very few breaches are irremedial and an inability to bar litigants other than where the breach was irremedial would be a licence for any litigant to drag on proceedings for years.

86. I consider the fact that the breach was remedial and was in fact eventually remedied does not preclude the Tribunal from barring HMRC.

87. The appellant had applied for a different sanction in the alternative: that was that HMRC be restricted in the hearing to relying on the facts pleaded in its Reply. Mr Grodzinski considered that in effect this would be the same as a barring order as no facts were pleaded in the Reply. I also agree with him that this is an unsatisfactory sanction as it might lead to dispute about the precise scope of what HMRC could do in the hearing.

Importance of case to HMRC

88. HMRC say that barring is especially an inappropriate remedy as this case is in effect a test case of the application of notes (2) and (3) as it will be the first case in which the Tribunal will consider the s 75 amendment of Group 3. Other cases will be affected by the outcome of this appeal.

89. I can't accept that. Firstly, if HMRC are barred it is open to them to concede the appeal so that a reasoned ruling is never issued and then to bring on another case as the test case. Secondly, if they do not chose to concede the appeal so that the appellant has to appear and raise a prima facie case, any decision of the Tribunal (assuming it favours the appellant) will be considerably less persuasive than otherwise on a later FTT hearing a different case as it will be clear that the first tribunal did not have the benefit of argument from the respondents.

90. It seems to me that if HMRC are barred, they will simply have to find another test case. Just because HMRC regard this as a test case is no good reason for the Tribunal accepting a different standard of conduct from a litigant than otherwise.

Effect of barring on appellant's ongoing legal position

91. This appeal is against a decision of HMRC's. Mr Singh suggests that if HMRC are barred, they are likely to lose the appeal and this would in effect 'licence' the appellant to treat HMRC's decision as wrong ad infinitum, when, assuming that HMRC bring and win another test case with a different appellant, all other educational providers in the appellant's position will not be entitled to the same favourable VAT treatment. This, says Mr Singh, will lead to distortion of competition.

92. Neither party were prepared to address me on whether Mr Singh was right in law: res judicata does not apply in the tax tribunal but litigants are not entitled to abuse the tribunal's process. Whether HMRC would be able to issue a new decision covering historic or future VAT return periods is a matter for another Tribunal to decide in the event HMRC is barred and the appellant goes on to win its appeal.

93. I consider that the issue is not relevant to the question of whether HMRC should be barred. To say otherwise would mean HMRC (and perhaps appellants) have a licence to ignore Tribunal rules and directions where an HMRC decision in principle rather than an assessment or voluntary disclosure is the subject matter of the appeal.

Only a Rule 8(3) Unless order

94. Mr Singh in his submissions put some weight on the fact that the appellant sought an Rule 8(1) Unless order (automatic strike out for non-compliance) whereas Judge Hellier only imposed a Rule 8(3) unless order (discretionary strike out for non-compliance). I consider the fact that the appellant unsuccessfully applied for a Rule 8(1) unless order is an irrelevant factor when considering whether to exercise my discretion under Rule 8(3). What matters is that Judge Hellier did impose a Rule 8(3) Order. He did not consider it appropriate to impose a Rule 8(1) unless order but that does not carry any kind of an implication that he did not intend the Tribunal to strike

out HMRC under Rule 8(3) if there was non compliance. He intended the Tribunal to have a discretion; and that discretion is what I exercise.

Conclusions

95. There is no presumption that I will order HMRC to be barred. I must simply weigh all the factors: if I am in doubt whether barring is appropriate, I think I must err on the side of not barring HMRC. My objective in exercising my discretion is the overriding objective of dealing with cases fairly and justly.

96. While the factors identified in *Mitchell* are not directly relevant, for the reasons I have given, I have to give significant weight when considering the overriding objective to the importance of compliance with directions of the tribunal and avoiding unnecessary delays and expense. On any view the delay here is 5 months; in reality it was a delay of 8 months in HMRC giving a proper statement of its case. Moreover the appellant has been put to some expense (various letters and two hearings) in chasing HMRC to deliver a proper statement of its case.

97. This delay was significant. I have to take account of the reason for it. But I do not know the reason for it so I assume that it was not one that might be advanced as justification for the default.

98. I have to consider the extent to which HMRC has respected the rules of the Tribunal. And I agree that while this is by far the most serious breach, it is not the only one. Moreover, HMRC were given a very clear warning by the unless order that a failure to comply with the directions might lead to them being barred. They can scarcely complain having failed to comply that they did not know they were at risk of being barred. They had more than one opportunity to correct their failure and I find it very difficult to understand why the 16 paragraphs of so contained in Mr Singh's skeleton could not have been delivered to the appellant in January when HMRC were clearly on notice that their SOC was inadequate.

99. On the other hand this is not a case where HMRC have ignored the Tribunal entirely. HMRC did submit its Reply and on time. But the Reply did not come even close to complying with the Unless order.

100. I have come to the conclusion that HMRC should be barred. There has been unnecessary delay and expense. Tribunal directions have been breached. There is clear prejudice to the appellant in having to wait 8 months for a proper statement of HMRC's case and not barring HMRC would leaves the appellant without a remedy for this prejudice. There was no good reason for the delay in stating its case, the failure lasted for a significant period of time, and HMRC were clearly on notice from the first that the appellant did not consider their SOC satisfactory, and clearly on notice from January that a failure to comply might lead to a barring order yet they did not correct the position for another 5 months. Barring is the appropriate sanction.

101. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal

against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 1 July 2014