# Costs in the tribunal

**OLIVER MARRE** finds an unlikely connection between Andrew Mitchell MP and claiming the costs of an appeal before the tribunals.


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What is the connection between "plebgate" and the costs regime in the tax tribunals? It might seem unlikely that there is a link, but the application of the decision of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 to tribunal proceedings is a matter which should be of interest to anyone who litigates tax disputes.

*Mitchell* was a widely publicised decision, in which the Court of Appeal denied costs to Andrew Mitchell MP because his solicitors did not file a High Court costs budget in the time period prescribed by the Civil Procedure Rules (CPR). When the successful taxpayers in *CRC v Apollo Fuels and others* [2014] STC 1559 made a costs application to the Upper Tribunal, HMRC attempted to resist paying costs on the authority of *Mitchell*.

> ***"The job of the courts is to administer justice."***

Submissions were made on behalf of the taxpayers to the effect that *Mitchell* should not be followed by the tax tribunals. *Mitchell* concerned a particular amendment to a specific provision of the CPR, which does not apply in the tribunals; and there is no equivalent provision in the Tribunal Procedure (Upper Tribunal) Rules 2008 (UTR). There was authority, such as *Abercrombie v Aga Rangemaster Ltd* [2013] EWCA Civ 1148, for the sensible position that the job of the courts is to administer justice, not penalise people for procedural irregularities.

## KEY POINTS

- HMRC resisted Apollo Fuel's late costs application to the Upper Tribunal.
- The relevance of *Mitchell v News Group Newspapers* to costs in tax tribunal proceedings.
- A late application from HMRC was successful in *Leeds City Council v CRC*.
- Any injustice that would be suffered by either side in the granting of a costs order should be considered.

HMRC's reliance on *Mitchell* was based on the simple fact that the taxpayers' costs application was late. The Upper Tribunal decision in the *Apollo Fuels* appeal was released on 26 February 2014. Rule 10(6) of the UTR gives a month from the date of the decision for an application to be made, but the taxpayers in *Apollo Fuels* did not put in their application until 7 May. The reason for the delay was that the taxpayers' accountants had never previously litigated in the Upper Tribunal or filed an application for costs, so they were unclear about how to proceed.

While the taxpayers' application for costs was before the Upper Tribunal, the decision in *Leeds City Council v CRC* [2014] UKUT 350 (TCC) was released. In that case, HMRC were late to apply for costs, although only by four days. Judge Colin Bishopp found that the taxpayer should pay HMRC's costs. Distinguishing *Mitchell*, he said: "It does not seem to me that it is open to a tribunal judge to … apply, by analogy, changes to the CPR as if they had also been made to the Upper Tribunal rules."

## *Apollo* decision

So what did the Upper Tribunal decide in the *Apollo Fuels* costs application? Mrs Justice Rose agreed with Judge Bishopp in *Leeds*. She held that the criteria to be applied in determining an application for relief from sanctions were still those set out in the pre-*Mitchell* authority, *Data Select Ltd v CRC* [2012] STC 2195, which presented the following as the relevant considerations:

- What is the purpose of the time limit?
- How long was the delay?

- Is there a good explanation for the delay?
- What will be the consequences for the parties of an extension of time?
- What will be the consequences for the parties of a refusal to extend time?

Of these considerations, Rose J appears to give least weight to the length of delay, but that must be seen in context. As to the purpose of the rule, she said:

> "The aim of imposing a time limit for an application for costs is to require the successful party in the litigation to assert his entitlement to costs promptly and to give his opponent the assurance that after the limit has expired, no claim will be made.
>
> "However, in this case, HMRC knew that these proceedings were not yet at a close since they themselves are pursuing an appeal to the Court of Appeal …"

The judge elided the questions of the length of the delay and explanation for it, and the consequences of the extension of time. While acknowledging that the delay was considerably longer in *Apollo Fuels* than in *Leeds*, and that professional advisers do have a duty to acquaint themselves with procedural rules, she noted:

> "The reasons for the delay are understandable … The delay in bringing the application is considerably longer in this case than it was in *Leeds*. However, there will be no real injustice to HMRC in having to pay the costs as they must have expected an application to be made after the judgment was released. On the other side, there would be a serious injustice to the respondents if they are deprived of their costs to which they are otherwise clearly entitled. HMRC acknowledge that if I refused to extend the time, this will result in a windfall for HMRC."

## And the moral of the story

Several lessons can be learnt from this decision:

- *Mitchell* does not at present apply in the tax tribunals.
- The tribunals will consider the consequences of a costs decision and, in particular, any injustice that would be suffered by either side in the granting of a costs order on the basis of a late application.
- Whether or not there is to be a further appeal may be a relevant factor.
- While professional advisers must ensure they are fully aware of the relevant rules and that applications are made within the correct time limits, the tribunals should be prepared to apply the overriding objective of fairness and justice when dealing with procedural points.
- The tribunals will quite rightly be slow to award a costs "windfall" – whether to the taxpayer or to HMRC. ■

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