[2018] UKFTT 600 (TC)

TC06762

Appeal numbers: TC/2017/07776, TC/2017/07777, TC/2017/07779, TC/2017/07780, TC/2017/07781, TC/2017/07782, TC/2017/07783

INCOME TAX – compensation for mis-sold interest Rate Hedging Products basic redress and interest— whether income or capital - whether taxable

FIRST-TIER TRIBUNAL
TAX CHAMBER

V M GADHAVI	**Appellants**
A M GADHAVI	
R GADHAVI	
D GADHAVI	
J M GADHAVI	
P M GADHAVI	
C M GADHAVI	

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER
MS ELIZABETH BRIDGE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 14 September 2018

Mr Jayesh Doshi, tax advisor for the Appellant

Mr Charles Bradley, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction and preliminary matter

1. This case is about the tax treatment of compensation paid to the Appellants by their bank for the mis-selling of a financial derivative known as an "Interest Rate Hedging Product" (IRHP).

2. HMRC's view is that the compensation received is to be taxed as income. The Appellants contend that it is a capital item and is not taxable.

3. HMRC raised assessments to income tax on the seven Appellants for the tax years 2013-14, 2014-15 and 2015-16. The amounts are not in dispute. The total tax assessed on each of the Appellants, which is the subject of these appeals, is as follows:

   (1) Mr V M Gadhavi: £8,216.78

   (2) Mr A M Gadhavi: £5,288.93

   (3) Mr R Gadhavi : £4,504.53

   (4) Mr C M Gadhavi: £6,022.50

   (5) Mr D Gadhavi : £2,969.78

   (6) Mr J M Gadhavi: £8,216.79

   (7) Mr P M Gadhavi: £8,216.90

4. We had before us a bundle of documents and correspondence and we heard oral evidence from Mr A M Gadhavi (Mr Gadhavi).

5. The Appellants are not the only people concerned about this matter. A number of banks mis-sold IRHPs to retail customers on a large scale and the banks involved paid compensation to those who had suffered loss following a review by the Financial Conduct Authority (FCA).

Application by other persons

6. At the start of the hearing we were presented with a rather unusual application. Mr Jeremy Roe of Rational Tax Limited represents a number of other consumers who had also been mis-sold IRHPs. The appeal process was under way in eight cases and one of them, relating to Darren Wilkinson TC/2017/04466, had been designated as an informal lead case under Rule 5 of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009. Rational Tax wished to be able to present their arguments about the taxable nature of the compensation payments in the context of the Gadhavi appeals and to submit expert evidence from a

professor of economics and others in support of their approach. Mr Roe was content for the nature of the application to be determined by the Tribunal. It might have been dealt with by consolidating all the appeals or by making Mr Wilkinson and the others "interested parties" and allowing them to present their arguments and what they contend is factual expert evidence as part of the Gadhavi hearing. Alternatively, he suggested the hearing could proceed but with the Tribunal reserving its decision until it had heard Rational Tax's arguments.

7. In brief, Rational Tax's position is that the compensation represents the customers' "opportunity cost" which is a non-taxable capital item rather than a reimbursement of excessive expenditure which is a taxable revenue item (HMRC's view). The nature of the compensation is an issue common to all the appeals.

8. Mr Roe's concern was to achieve a fair hearing for all the appellants. In particular, Rational Tax's view is that the expert evidence relates to matters of fact and Mr Roe expressed concern that if this hearing proceeded and we made findings of fact inconsistent with their view it would prejudice the subsequent appeals.

9. HMRC opposed the application. The Gadhavis had been made aware of the Rational Tax appeals and had been given the option of staying their case behind the other appeals. They could, of course, have joined the Rational Tax group if they wished. The Gadhavis chose to proceed with their appeal. The process went smoothly and they were ready to go ahead. The Wilkinson case was progressing, but slowly and was far from ready to be heard (despite Mr Roe's contention that they could be ready by the end of September).

10. If we allowed the application, it would necessarily involve either adjourning this hearing or going part heard and either option would incur unnecessary delay and cost.

11. As to Mr Roe's concern about prejudice to the Wilkinson case, Mr Bradley submitted that the facts in one appeal cannot influence another appeal and could, indeed, be a point of distinction.

Decision on the Application

12. This hearing relates to the Gadhavis' appeals. They had the opportunity to join with the Rational Tax appellants but chose not to do so. They and their representative and HMRC were present and ready to go ahead.

13. The Ghadavis are not prejudiced if we refuse the application. They are aware of the issue and if the decision goes against them they can consider an appeal.

14. Nor would Mr Wilkinson and the other Rational Tax appellants be prejudiced. Any findings of fact we make in this case cannot influence findings of fact in a different case. A First Tier Tribunal decision, even on a point of law is not binding on another First Tier Tribunal.

15. If Rational Tax wish to present expert factual evidence to the Tribunal, that is a matter to be dealt with when their appeals progress to a hearing.

16. In the light of the above and bearing in mind the delay and cost which would be involved in adjourning the hearing or allowing it to go part heard, we decided that it was contrary to the overriding objective of dealing with cases fairly and justly to allow the application.

17. Accordingly we decided to refuse the application and proceed with the hearing of the Gadhavis' appeals.

The Facts

18. The Appellants are seven brothers who, together, ran a property letting business. Three of the brothers held the legal titles to the properties but it is common ground that they held those properties in equal shares for all the brothers.

19. We heard from Mr Gadhavi that the family came to the UK from Rwanda in 1972 and that they set up their family property business in 1987. The business was intended to be their "pension pot", but as a result of the mis-selling, they were forced to sell the properties and close down the business.

20. In 2001 the brothers approached their bank, National Westminster Bank plc (NatWest) to restructure an existing loan in order to raise capital to expand the property business. At the time, the loan was self-financing and rental values were rising.

21. Mr Gadhavi wrote to NatWest on 24 January 2014 (the Claim Letter) to set out his and his brothers' claim and this letter was adopted as his witness statement at the hearing. In the letter, he stated that the bank made it a condition of restructuring the loan that they enter into a swap agreement. NatWest sold the brothers three fixed rate amortising interest rate swaps with a fixed interest rate of 4.51%. The swap agreements were entered into on 27 June 2003, 15 August 2003 and 8 April 2004 respectively. Mr Gadhavi had no understanding of interest rate swaps or other IRHPs and was provided with little information about how they worked or the risks involved.

22. The Appellants made payments under the swaps for several years and those payments were properly deducted as revenue expenses of the property business.

23. Following the financial crash, interest rates fell dramatically, but the Gadhavis were locked into a high fixed rate under the swaps. One swap was cancelled on 1 July 2011 but the Appellants had to pay a breakage cost of £57,330. Ultimately, the costs of the swaps resulted in the failure of the business. The properties had to be sold and the business had ceased by the end of the 2011-12 tax year.

24. In 2012 the FCA identified failings in the way nine banks, including NatWest, had sold swaps and other interest rate hedging products. The banks agreed to carry out reviews of their sales of IRHPs to "unsophisticated customers" subject

to the supervision of independent reviewers appointed under the Financial Services and Markets Act 2000 (FSMA). The reviews resulted in the banks agreeing to pay redress to large numbers of unsophisticated customers including the Appellants.

25. The FCA published their review into IRHPs on their website. The review set out who was entitled to redress, what redress might be available and how some elements of that redress were to be calculated.

26. The FCA review looked in some detail at how the banks were to determine the redress due. The underlying principle was that the bank should put the customer back in the position they would have been in had the mis-selling not occurred, including any consequential loss. The review then set out the different elements that might be comprised in the redress.

> "Fair and reasonable redress means putting the customer back in the position they would have been in had the regulatory failings not occurred, including any consequential loss.
> What is fair and reasonable redress will vary from case to case and will be determined by a review of evidence and customer testimony. All redress offers will be scrutinised and approved by an independent reviewer.
> **How the banks agreed to calculate redress under the review:**
>
> **Basic Redress**
>
> The difference between actual payments made on the Interest Rate Hedging Product and those that the customer would have made if the breaches of relevant regulatory requirements had not occurred.
>
> **Interest**
>
> The opportunity cost (loss of profits or interest) of being deprived of the money awarded as basic redress. The banks will either pay 8% a year of simple interest or an interest level in line with [identifiable interest costs actually incurred].
>
> Taking into account the economic environment over the last five years, interest will avoid many customers from having to put together consequential loss claims.
>
> **Consequential loss**
>
> There are different types of consequential loss. A few examples are set out below:

1. Loss of profits over and above the interest paid on basic redress–: Customers should be aware that claims for loss of profits will require customers to show that they would have used the funds in question to generate a profit (for example, through a specific investment in the business). Any money invested in this way could not also have been earning interest in the bank at the same time and customers will not be able to 'double recover'. Claims for loss of profits could result in the customer receiving an amount that is less than 8% simple interest on their basic redress if this is their actual loss.
2. Bank charges

3. Certain legal expenses
4. Tax (if a customer has to pay tax on their redress and this differs to what they would have paid had there not been a mis-sale)

> **Basic redress**
> The objective of the review is to put customers back in the position that they would have been in, had it not been for the mis-sale. Our principles of fair and reasonable redress give rise to three possible basic redress outcomes for customers:

1. Some customers would never have purchased a hedging product and will receive a 'full tear up' of their interest rate hedging product (IRHP). These customers will receive a full refund of all payments on their IRHP.
2. Some customers would have chosen the same product they originally purchased whilst some customers may not have suffered any loss. These customers will receive no redress.
3. Some customers would still have sought or been required to enter into a product that provided protection against interest rate movements, but would have chosen an alternative product. These customers will receive redress based on the difference between the payments they would have made on the alternative product, compared with the payments they did make.

> ….
> **Consequential losses (the cost of being deprived of money and other losses suffered)**
>
> Banks agreed to automatically add 8% annual interest on top of basic redress payments to reflect opportunity costs (loss of profits or interest). Given the economic context over the past years, this has represented a straightforward and fair alternative to putting together consequential loss claims for most customers.
> If customers believe their lost opportunity amounts to more than the 8% simple interest they can put together a claim for consequential loss. All customers are invited to do this following the basic redress offer and there is no need to go to a claims management company.
> Consequential losses are assessed by reference to established legal principles relating to claims in tort and breach of statutory duty."

27. Mr Bradley pointed to the last sentence which indicates that the compensation was to be calculated on the same basis as damages in tort.

28. Mr Gadhavi stated in the Claim Letter that he should not have been forced to take any derivative product at all, so that he and his brothers were in the "full tear up" category. The letter went on to say that full redress was the minimum outcome sought and he wished

> "to take my position back to the position where the IRHP did not exist, ie I wish for the breakage cost to be refunded and the payments made under the IRHP returned.
>
> I require repayment of all payments made on the swap, and the breakage cost paid.
>
> I also require payment of compensation interest at the rate of 8% to be applied to all of the cash flows suffered by me under the swap.

I shall supply details of consequential losses for which I would also require compensation at a later date."

29. The consequential losses related in particular to the fact that the brothers had to sell their investments and were unable to take advantage of a planning permission which had been granted just before they had to sell which, had they been able to go ahead with the development, might have generated a profit of over £1million. At the hearing, Mr Gadhavi confirmed that he had made a claim for the consequential losses, but that claim was still outstanding.

30. The present appeal relates only to the basic redress, a small amount of refunded bank charges and the interest element.

31. Our bundle contained three letters from NatWest, one to each of the brothers who held the legal title to the properties. The letters were in similar form and set out a breakdown of the redress payments which had been made. Payments had been made in each of the tax years 2013-14, 2014-15 and 2015-16 and each payment had been divided equally between the seven brothers.

32. Each redress payment comprised the following elements:

    (1) "Refund of net amounts payable by you on original IRHP…**Please note**: Payment includes early exit costs…" ie the basic redress on a "full tear up" basis

    (2) "Refund of bank fees and charges"

    (3) "Interest at 8% a year simple". Tax at 20% had been deducted from the interest payment.

33. The letters also contained a statement that, subject to any claim for consequential losses, "…the total redress payment received represents full and final settlement of any claims, actions, liabilities, costs, or demands that you may have against the bank arising under or in any way connected with the sale of your interest rate hedging product…"

34. The total amount of redress paid was 358,265.09.

The Appellants' submissions

35. As the Appellants were "unsophisticated", the payment of compensation was a personal rather than a business matter and so was non-taxable in the same way as mis-sold PPI compensation.

36. The fact that the original payments made under the IRHP were deducted in computing the business profits is irrelevant.

37. The compensation was not paid in relation to lost profits but for the mis-selling. That is, the cause of the compensation was the mis-selling and it is the cause which determines the tax treatment.

38. The way in which the compensation was calculated does not determine the nature of the payment and it is wrong for HMRC to dissect the payment into its constituent components.

39. The compensation represents damages for the mis-selling and is a capital payment exempt from all taxes.

40. The interest element of the payment was not taxable as it was simply part of the "package" of damages as in *Commissioners of Inland Revenue v Ballantine* 8 TC 595.

41. The capital sum received was exempt from capital gains tax under Section 51(2) Taxation of Chargeable Gains Act 1992 (TCGA). It was not a capital sum derived from an asset under Section 22 TCGA. *Zim Properties v Procter* [1985] STC 90 did not apply as there was no real right of action against NatWest: they had only obtained redress because the FCA had made the banks pay compensation.

42. To the extent there was any right of action, there was no underlying asset and so the payments were exempt under Extra Statutory Concession D33.

The Respondent's submissions

43. The redress arose from the Appellants' business and constituted a post cessation receipt.

44. The compensation was income in the hands of the Appellants and taxable as such.

45. The interest element should be taxed as interest.

46. If, contrary to the above, the redress is regarded as capital, it is subject to capital gains tax under Section 22 TCGA, the asset being the right to sue NatWest, whether in contract or tort or under FSMA Section 138D(2).

Discussion

Basic redress

47. The objective of the basic redress is to put the customer back in the position they would have been in had they not taken out the IRHP.

48. Mr Doshi sought to argue that the compensation could not be a business receipt because the Appellants had been classified as "unsophisticated" customers. The FCA review contained the following comments on the difference between sophisticated and unsophisticated customers:

> "**What we mean by non-sophisticated customers**
> The purpose of the sophistication test was to identify those customers likely to be sophisticated. …

The sophistication criteria are therefore a proxy for financial sophistication and were chosen on the basis that small businesses and businesses entering into transactions below a certain size were less likely to have understood the risks associated with IRHPs, and were are also less likely to have had the necessary resources to obtain independent expert advice before purchasing the product and, where appropriate, to bring legal proceedings on their own behalf."

49. It is clear from this that a business can be a "non-sophisticated customer".

50. Mr Doshi further submitted that the compensation was paid to the Appellants in their personal capacity because it was a payment in respect of the mis-selling and did not arise from the business.

51. Mr Bradley argued that the payment was a post cessation receipt of the business.

52. Section 268 Income Tax (Trading and Other Income) Act 2005 (ITTOIA) imposes a charge to income tax on the profits of a property business. Section 264 of ITTOIA defines a UK property business as follows:

"264 UK property business

A person's UK property business consists of—

(a) every business which the person carries on for generating income from land in the United Kingdom, and

(b) **every transaction which the person enters into for that purpose otherwise than in the course of such a business**." (emphasis added).

53. We agree with Mr Bradley that the swaps fall into Section 264(b). The swap agreements related to loans which were taken out in order to buy properties to expand the property business. The sums paid as compensation therefore arose from the carrying on of the business.

54. Section 271E ITTOIA provides that , subject to certain exceptions, the profits of a property business are to be calculated in the same way as a trade.

55. Section 349 ITTOIA imposes a charge to income tax on the "post-cessation receipts" of a property business. This is defined in Section 353 ITTOIA as follows:

"353 Basic meaning of "post-cessation receipt"

(1) In this Chapter "post-cessation receipt" means a sum—

(a) which is received after a person permanently ceases to carry on a UK property business, and

(b) which arises from the carrying on of the business before the cessation."

56. We have found that the basic redress arose from the carrying on of the business while it existed, so that, if it is income in nature, it would be taxable as a post-cessation receipt.

57. The next question is whether the basic redress is income or capital in nature. The test was set out by Diplock LJ in *London & Thames Haven Oil Wharves Ltd v Attwooll* [1967] CH 772. The taxpayer in this case owned a jetty with was damaged by the negligent handling of a tanker owned by a company H Ltd. H Ltd paid damages to the taxpayer partly in respect of the cost of repairing the jetty

and partly in respect of the consequential loss suffered by the taxpayer because the jetty was out of use for an extended period whilst the repairs were being carried out. The taxpayers were assessed to income tax under (what was then) Case I of Schedule D on this sum on the ground that it represented a payment to the taxpayers for loss of profits, and should, therefore, have been included in the taxpayers' trading receipts. The taxpayers appealed on the grounds that no part of the total sum received from the underwriters and H. Ltd. should be treated as trading receipts, that the jetty was a capital asset and that the sums received were of a capital nature, being either in respect of physical damage or sterilisation of a capital asset. These arguments were not unlike those of Mr Doshi in this case.

58. Diplock LJ, in the Court of Appeal said:

> "I start by formulating what I believe to be the relevant rule. Where, pursuant to a legal right, a trader receives from another person compensation for the trader's failure to receive a sum of money which, if it had been received, would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him at the time when the compensation is so received, the compensation is to be treated for income tax purposes in the same way as that sum of money would have been treated if it had been received, instead of the compensation.
> The rule is applicable whatever the source of the legal right of the trader to recover the compensation. It may arise from a primary obligation under a contract, such as a contract of insurance, from a secondary obligation arising out of non-performance of a contract, such as a right to damages, either liquidated, as under the demurrage clause in a charterparty, or unliquidated, from an obligation to pay damages for tort, as in the present case, from a statutory obligation, or in any other way in which legal obligations arise.
> But the source of a legal right is relevant to the first problem involved in the application of the rule to the particular case, namely, to identify what the compensation was paid for. If the solution to the first problem is that the compensation was paid for the failure of the trader to receive a sum of money, the second problem involved is to decide whether, if that sum of money has been received by the trader, it would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him at the date of receipt, that is, would have been what I shall call for brevity an income receipt of that trade. The source of the legal right to the compensation is irrelevant to the second problem. The method by which the compensation has been assessed in the particular case does not identify what it was paid for; it is no more than a factor which may assist in the solution of the problem of identification."

59. So there is a two stage process. One must first identify what the compensation is paid for. Where compensation arises from a claim under a legal right, it does not matter what the source of the legal right is. The relevant question is: is the compensation paid because the trader has failed to receive a sum of money?

60. If the answer is "yes", one must go to the second question: if the trader had in fact received the sum of money for which he has had compensation (because he did not receive it) would that sum of money have been credited to the trading profits? If the answer to the second question is "yes", the compensation is taxable. The source of the claim is not relevant to the second question.

61. The *London & Thames* case relates to a sum of money paid to replace income which would otherwise have been received. There is authority that the same principle applies to the payment of a sum of money to make up for a liability to pay an excessive revenue expense. In *Deeny v Gooda Walker Ltd* [1996] 1 WLR 426, Lord Hoffman in the House of Lords said:

> "Mr. Vos says that these cases show that a legal right to compensation for the loss of a trade receipt gives rise to a payment which by definition arises out of the trade. He relied upon a statement to this effect by Diplock L.J. in *London and Thames Haven Oil Wharves Ltd. v. Attwooll [1967] Ch. 772* ,
> "Where, pursuant to a legal right, a trader receives from another person compensation for the trader's failure to receive a sum of money which, if it had been received, would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him at the time when the compensation is so received, the compensation is to be treated for income tax purposes in the same way as that sum of money would have been treated if it had been received, instead of the compensation."
>
> Although Diplock L.J. refers to the trader's failure to receive a sum of money which would have been a revenue receipt, his principle must apply equally to compensation for his liability to pay a sum of money which was a revenue expense: see *Donald Fisher (Ealing) Ltd. v. Spencer [1989] S.T.C. 256* ."

62. Mr Doshi argued that the compensation paid was "for" the mis-selling and the compensation paid was a "package", the amount of which was calculated by reference to the amounts paid under the swaps, the interest element etc, but that the package should not be dissected into its component parts.

63. One can certainly say that the compensation was paid "for" the mis-selling but, in Lord Diplock's terms, this simply establishes the "source of the legal right" which entitles the Appellants to compensation. It does not resolve the issue of the nature of the payment.

64. The solution to the "first problem" identified by Lord Diplock and further explained by Lord Hoffman is that the compensation was paid for the Appellants' liability to pay a sum of money, that is the amounts payable under the swaps which they had to pay because the instruments had been mis-sold to them.

65. The "second problem" is whether the liability in respect of which the compensation is paid was a liability to pay money which was a revenue expense. The answer can only be that it was. The actual swap payments were deducted, and properly deductible, from the profits of the business. They were revenue expenses. It follows that the compensation paid by reference to those expenses must be a revenue receipt and must constitute taxable income in the hands of the Appellants.

The interest element

66. The Appellant argues that the interest was not true interest, but part of the "package" of compensation and therefore is not taxable, relying on the *Commissioners of Inland Revenue v Ballantine* 8 TC 595. On the facts of that

case, it was held that an amount computed as interest was not a separate item charged on a sum, but was part of the overall award of damages and was not chargeable to income tax. The Court of Session stated that it might have been different had the damages been awarded and interest charged on the damages from the award until payment.

67. In *Riches v Westminster Bank Limited* [1947] AC 390 interest was awarded in addition to damages as compensation and the House of Lords held that the interest element was taxable. Viscount Simon said:

> "…the contention is that money awarded as damages for the detention of money is not interest and has not the quality of interest. … The appellant's contention is in … my opinion erroneous because the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied or a statute or whether the money was due for any other reason in law. In either case the money was due to him and was not paid, or in other words was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, … The essential quality of the claim for compensation is the same and the compensation is properly described as interest."

68. In the present context, the basic redress and the refund of bank charges (which we consider also to be revenue expenses) represent the damages and the banks agreed to add simple interest of 8% a year to these amounts. This is a time based payment. It was paid only for the period during which the claimant was deprived of the money which was the subject of the claim. It was not part of the package of compensation claimed. The interest payment was intended a rough and ready way of compensating claimants for the opportunity cost they had suffered by reason of the mis-selling and to avoid the need for many to make consequential loss claims. The payment did not preclude a consequential loss claim where the claimant could demonstrate specific losses and as noted, the Appellants have made such a claim which is still pending.

69. In our view the interest element of the compensation is an additional amount which has been added to the award of the Basic Redress and refund of charges because the Appellants had been deprived of that money for a period. It is interest properly so called and is taxable under section 369(1) of ITTOIA. The award letters show gross amounts for the interest from which basic rate tax has been deducted at 20%. HMRC confirmed that the Appellants would receive a credit for the basic rate tax deducted at source in computing their tax liability.

The capital gains issue

70. We have decided that the compensation paid to the Appellants for the mis-selling of the IRHPs was income, which determines these appeals. For completeness we

consider the alternative submissions on the basis that the compensation is a capital receipt rather than income and is not taxable.

71. The Appellant submitted that the payments fell within Section 51(2) of the TCGA which provides "It is hereby declared that sums obtained by way of compensation or damages for any wrong or injury suffered by an individual in his person or in his profession or vocation are not chargeable gains.". This provision applies to damages for personal injury or defamation. It has no application in the present case.

72. Mr Bradley submitted that this was a case falling within Section 22 of the TCGA on the basis that the compensation is a capital sum derived from an asset. Section 22 (1) provides:

> "…there is for the purposes of this Act a disposal of assets by their owner where any capital sum is derived from assets notwithstanding that no asset is acquired by the person paying the capital sum, and this subsection applies in particular to—
> (a) capital sums received by way of compensation for any kind of damage or injury to assets or for the loss, destruction or dissipation of assets or for any depreciation or risk of depreciation of an asset,…"

73. The asset in the present case would be the Appellants' claims against NatWest for compensation and there would be a deemed disposal of that asset on the payment of the redress. It was held in *Zim Properties Limited v Procter* [1985] STC 90 that a "right to sue" could constitute an asset. Warner J said:

> "…it would in my view be inconsistent with the decision in *O'Brien* (*Inspector of Taxes*) *v Benson's Hosiery* (*Holdings*) *Ltd* to hold that a right to bring an action to seek to enforce a claim that was not frivolous or vexatious, which right could be turned to account by negotiating a compromise yielding a substantial capital sum, could not be an 'asset' within the meaning of that term in the capital gains tax legislation. I propose, for the sake of convenience, to refer to the right that the taxpayer company had, in that sense, to bring an action against the firm as its 'right to sue' the firm."

74. In other words, such a "right to sue" *is* an asset for the purpose of Section 22 TCGA.

75. Mr Doshi sought to argue that there was no reality to the Appellants' right of action against the bank because of the disproportion in the resources and economic power of the parties and that the Appellants would never have received compensation were it not for the intervention of the FCA. It may well be the case that the Appellants would not have been able to pursue their rights had the FCA not provided a mechanism for them to do so but that does not detract from the existence of those rights.

76. In our view, the Appellants' rights of action against NatWest constituted an asset within the *Zim* principle and the compensation received would be a capital sum derived from that asset.

77. Accordingly, if the compensation is regarded as a capital item (which we do not consider to be the case) it is subject to Capital Gains Tax under Section 22 TCGA.

78. Mr Doshi argued, in his correspondence with HMRC, that the compensation was capital and that it was *not* taxable under Section 22 TCGA because it fell within the terms of Extra Statutory Concession D33 which exempts certain types of compensation from a charge to tax, notwithstanding the *Zim* case. To the extent that Mr Doshi relies on this as a ground of appeal, we must point out that this Tribunal has no jurisdiction to consider the application or non-application of an extra statutory concession. That is a matter for judicial review proceedings.

Decision

79. For the reasons set out above, we have decided that the whole of the redress payments received by the Appellants as compensation for the mis-selling of the IRHPs is a revenue receipt of their property business. It is subject to income tax as a post-cessation receipt of that business, but subject to a credit for the basic rate tax deducted at source on the interest element.

80. Accordingly we dismiss the appeal and affirm HMRC's decision.

81. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 10 October 2018