[2019] UKFTT 481 (TC)

TC07284

Appeal number: TC/2017/08032

INSURANCE PREMIUM TAX – compensation paid to customers because of mis-selling – whether or not compensation was repayment of deemed insurance premiums leading to IPT credit – held not – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HOMECARE INSURANCE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT

Sitting in public at Taylor House, London on 16 July 2019

Roderick Cordara QC, instructed directly, for the Appellant

Eleni Mitrophanous, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal against a decision of HMRC dated 28 September 2017 rejecting a claim by the appellant, Homecare Insurance Limited ("Homecare"), for a credit of insurance premium tax ("IPT") in the amount of £358,522.68.

2. The credit claimed relates to compensation payments made to Homecare's customers ("the Consumers") by Card Protection Plan Ltd ("CPPL") under a Scheme of Arrangement under Part 26 of the Companies Act 2006 ("the Scheme") in respect of identity protection policies which were sold in the period 24 March 2010 to March 2011 ("the Claim Period").

3. Following an investigation by the Financial Services Authority ("the FSA"), it was considered that CPPL had mis-sold the insurance and it was agreed that CPPL and various banks and others ("CPPL's Business Partners"), who had introduced the Consumers to CPPL, should provide redress to the Consumers. The Scheme was approved by Proudman J on 14 January 2014: *Re Card Protection Plan Ltd* [2014] EWHC 11 (Ch).

4. The key issue is whether Homecare can show that part of the payments made to the Consumers are properly characterised as a "repayment of a [deemed] premium", which would entitle Homecare to a credit for the IPT on that deemed premium.

THE LAW

5. Section 49 Finance Act 1994 provides that IPT is a tax that is charged on receipt of a premium by an insurer if the premium is received under a taxable insurance contract on or after 1 October 1994. The tax is payable by the person who is the insurer in relation to the contract under which the premium is received (s52 FA 1994). The relevant rate of tax during the Claim Period was 5% until 3 January 2011 and 6% after that.

6. Section 70(1) FA 1994 provides that any contract of insurance is a taxable insurance contract, as long as it does not fall within one or more of the paragraphs of Part I of Schedule 7A of the FA 1994, which do not apply here.

7. A premium is defined in section 72(1) FA 1994, in relation to a taxable insurance contract, as:

> "…any payment received under the contract by the insurer, and in particular includes any payment wholly or partly referable to –

(a) any risk,

(b) costs of administration,

(c) commission,

(d) any facility for paying in instalments or making deferred payment (whether or not payment for the facility is called interest), or

(e) tax."

8. Section 72(1A) FA 1994 then provides:

"Where an amount is charged to the insured by any person in connection with a taxable insurance contract, any payment in respect of that amount is to be regarded as a payment received under that contract by the insurer unless –

(a) the payment is chargeable to tax at the higher rate by virtue of section 52A above; or

(b) the amount is charged under a separate contract and is identified in writing to the insured as a separate amount so charged."

9. In respect of whether the amount charged is under a separate contract (pursuant to section 72(1A)(b) above), subsections (1AA) to (1AE), which took effect from 24 March 2010, provide as follows:

"**(1AA)** A contract ("the relevant contract") is not to be regarded as a separate contract for the purposes of subsection (1A) above if conditions A to D are met.

(1AB) Condition A is that the insured is an individual ("I") and enters into the taxable insurance contract in a personal capacity.

(1AC) Condition B is that I –

(a) is required to enter into the relevant contract by, or as a condition of entering into, the taxable insurance contract, or

(b) would be unlikely to enter into the relevant contract without also entering into the taxable insurance contract.

(1AD) Condition C is that –

(a) the amount charged to I under the relevant contract in respect of any particular services is not open to negotiation by I, or

(b) the other terms on which particular services are to be provided to I under the relevant contract are not open to such negotiation.

(1AE) Condition D is that the amount charged to I under the taxable insurance contract is arrived at without a comprehensive assessment having been undertaken of the individual circumstances of I which might affect the level of risk."

10. Section 55(1) FA provides:

> "Regulations may provide that where an insurer or taxable intermediary has paid tax and all or part of the premium or taxable intermediary's fee (as the case may be) is repaid, the insurer or taxable intermediary shall be entitled to credit of such an amount as is found in accordance with prescribed rules."

11. Regulation 17 of the Insurance Premium Tax Regulations 1994 ('the Regulations') provides:

> "(1) This Part applies where –
>
> (a) an insurer has paid tax and all or part of the premium on which the tax was charged is repaid; or
>
> (b) a taxable intermediary has paid tax and all or part of the fee on which the tax was charged is repaid.'
>
> (2) Where –
>
> (a) an insurer receives a premium in an accounting period and repays that premium or part of it in that accounting period; or
>
> (b) a taxable intermediary receives a fee in an accounting period and repays that fee or part of it in that accounting period,
>
> this Part shall apply as if the tax on the premium or fee (as the case may be) had already been paid by him."

12. Regulation 18(1) provides:

> "Where this Part applies, the insurer or, as the case may be, taxable intermediary shall be entitled to credit of an amount which represents the difference between the amount of tax paid by him and the amount of tax he would have been liable to pay had the premium or fee received by him been reduced or extinguished, as the case may be, by the amount of the repayment."

THE FACTS

13. I received a witness statement and oral evidence from Jason Walsh, CEO of CPPL, together with a bundle of documents. The basic facts are for the most part agreed between the parties and I make the following findings of fact.

14. CPPL sold insurance (Card Protection and Identity Protection insurance) to Consumers from January 2005 to March 2011. It sold the Identity Protection insurance as agent for Homecare and but sold the Card Protection insurance as agent for a different insurer. The Card Protection Insurance is not relevant to this appeal, which I understand may be the subject of a separate appeal in due course. This appeal claim relates solely to sales of Identity Protection insurance with Homecare.

15. Homecare and CPPL are part of the same group (the CPP Group Plc) and are registered at the same address. When selling insurance, CPPL acted both as agent of

Homecare (for which it was paid a commission) and as an intermediary for the Consumer (for which it charged the Consumer a fee – "the CPPL Fee") on the basis that it

(1) Introduced the Consumer to Homecare,

(2) Acted as intermediary in connection with the making of the Insurance Contract, and

(3) Collected payments and paid the premium to Homecare on behalf of the Consumer.

16. The Consumer therefore entered a contract with Homecare for the insurance and a contract with CPPL for the intermediary services. The Consumer's payments to CPPL consisted of the premium for Homecare's insurance, including IPT, and the CPPL Fee which, during the Claim Period, also included IPT. It was common ground that the CPPL Fee was a deemed premium within the provisions of s72(1A) FA 1994, as set out above. The premium and the deemed premium were also due on any renewal of the insurance contract

17. CPPL sold insurance in three ways:

(1) Directly to Consumers,

(2) Directly to Consumers following an introduction to them by CPPL's Business Partners, and

(3) Indirectly when the Business Partners sold policies as agent for CPPL.

18. The CPPL fee was charged whichever method of selling was used. The Scheme documents suggest that Identity Protection Insurance was sold by all three methods and this was not challenged by Homecare at the hearing.

19. The CPPL Identity Protection insurance cost approximately £84 per annum and was made up as follows:

(1) CPPL received approximately £68 for its insurance intermediary services and paid a specified percentage to its Business Partners where they had introduced the Consumer to CPPL, and

(2) A premium of approximately £16, including IPT, was paid to the insurer, Homecare.

20. Following a disciplinary investigation into CPPL, in 2012 the FSA determined that in selling insurance, CPPL had breached certain of the FSA's Principles for Businesses and had mis-sold the insurance products. The key findings were, inter alia:

(1) CPPL sold the product by emphasising to Consumers that one aspect of the product would be that they would benefit from up to £50,000 or £100,000 of insurance when in fact customers did not need this cover (because any losses would in most cases be covered by the bank which issued the credit or debit card in question).

(2) CPPL failed to explain the very limited circumstances in which Consumers would need the cover,

(3) CPPL overstated the risks and repercussions of identity theft, and

(4) The insurance contracts were renewed automatically, in a way which, in the view of the FSA, did not give the Consumers sufficient time or information to allow them to give their consent to the renewal fairly.

21. In accordance with a Final Notice issued by the FSA on 14 November 2012, the FSA fined CPPL £10.5 million and CPPL and its Business Partners agreed to offer redress to the Consumers. CPPL and its Business Partners therefore set up the Scheme to make payments to the Consumers who had been mis-sold insurance policies ("the Redress Payments").

22. The FSA also wrote to CPPL and five of its Business Partners on 3 October 2012 setting out "the basis on which it had agreed to continue discussions about a Scheme of Arrangement for customer redress in respect of sales and renewals of CPP's products." This letter set out details as to how the Scheme of Arrangement was to be set up. The letter also set out details of the amount of redress as follows:

> "The amount of redress will be **<u>the total amount the customer has paid in respect of the policy</u>** since 14 January 2005 (including all renewal payments) until the date of the calculation of redress for the specific customer (less any payments actually received by the customer in respect of their policy), plus interest (it is noted that the FSA standard approach to interest is 8% simple per year)."

23. In an earlier letter, dated 14 October 2011, the FSA had stated:

> "The test mailing is likely to result in a number of customers receiving **<u>full refunds of their premiums</u>** plus interest. As set out in my letter to you on 4 October 2011, based on our own preliminary financial analysis, it appears likely that the firm will not be able to afford to meet its redress liabilities to the full population of customers. In light of this, we think it would be premature to proceed with a test mailing at this stage at a time when the FSA is still considering what the appropriate way forward is in respect of redress.
>
> Leaving aside the potential legal issues of preferring some customer to others, as a matter of basic fairness, it does not appear appropriate at this stage for some customers to receive full compensation which is likely to deplete the available funds for payment of redress to the remaining population of customers and could result in the inconsistent treatment of customers."

24. A press release from the FCA, as the FSA had become, dated 22 August 2013, referring to the redress package which had been agreed for the Consumers, stated:

> "We believe this will be a good outcome for customers who may have been mis-sold the card and identity protection policies. Subject to CPP's customers

approving the scheme, these policy holders will be able to claim **a full refund of premiums with interest**."

25. The calculation of the Redress Payments is set out in the Scheme Agreement which was approved by the High Court as part of the Scheme of Arrangement under Part 26 Companies Act 2006. In those documents it defines Redress as being:

> "any compensation or refund (of any description) in respect of, related to, or connected with, a Scheme Claim".

26. It then defines the Redress Amount as being the amount of Redress to be paid to a Scheme Creditor with an agreed scheme claim **equal to**: (A + B) – (C +D), where:

> (1) A is the total amount of payments made by a Scheme Creditor (ie, a Consumer) in respect of … a Scheme Identity Protection product on or after 14 January 2005.
>
> (2) B is an amount calculated as if it were simple interest at 8% per annum on the amount of each of the payments referred to in [(1)] above.
>
> (3) C is the total amount of payments made to a Scheme Creditor under … a Scheme Identity Protection product on or after 14 January 2005 (ie, any claims paid out by the insurer to the Consumer).
>
> (4) D is an amount calculated as if it were simple interest at 8% per annum on the amount of each of the payments referred to in [(3)] above.

27. Even though the Redress Amount for insurance policies sold directly through CPPL included an amount equal to the CPPL Fee plus the Premium paid onto Homecare, Homecare retained the Premium it had received. It did not repay any of this to CPPL. No part of the Redress Amount paid by CPPL to the Consumer was a repayment of the actual insurance premium paid to Homecare. CPPL accounted to Homecare for that Premium (including IPT) and Homecare retained that Premium, accounting to HMRC for the IPT on both its Premium and the Deemed Premium, ie, the CPPL Fee.

28. As regards Redress Amounts paid by the Business Partners the Court Order covering the Scheme, which was approved by the High Court, clearly provides under clause 5.1.2:

> "CPP shall procure that each **Business Partner shall pay on behalf of itself** and to the extent appropriate each of its Business Partner Affiliates the Redress Amount **to each Scheme Creditor** with an Agreed Scheme Claim who:
>
> (A) …
>
> (B) purchased their Scheme Identity Protection Product from CPP following an introduction by that Business Partner or a Business Partner Affiliate of such Business Partner "

29. This provision is quite clear that the Business Partners were responsible for paying the Redress Amount relating to insurance contracts which had been sold via them. Therefore, in cases where the Business Partners made the Redress Payments, the CPPL Fee (ie, the deemed premium) cannot have been repaid to the Consumer, because in these cases the CPPL Fee was retained by CPPL.

30. The Redress payments made by the Business Partners are not of course part of the claim under appeal.

31. When Consumers made a claim for redress their insurance contracts were stated to be cancelled. These were in many cases ongoing contracts, which had been renewed on an annual basis, because new sales of these contracts had ceased some time previously. This cancellation did not therefore mean that the contracts were somehow void ab initio but simply that they were terminated at the time at which the claim was made.

32. The Redress Amount calculation made specific provision for amounts which might have been paid out on claims and therefore it cannot be that the contracts were to be treated as rescinded or otherwise void from the outset, as if they had never existed. If they had been treated as cancelled ab initio then there could not have been any valid claims to be taken into account as part of this calculation. The contracts were simply cancelled going forward.

DISCUSSION

33. This case turns on the very simple question as to whether the amounts paid by CPPL to the Consumers, the Redress Amounts, were repayments of the Deemed Premium, ie, the CPPL Fee, or a compensation payment under which the premiums and fees had lost their original identity and become merely generic compensation.

34. There is no doubt that the documents presented to me, and recorded above, use the words "compensation", "redress" and "repaid" somewhat interchangeably, certainly in the earlier stages of discussions with the FSA, and this is potentially very confusing.

35. Mr Cordara's sole argument, on behalf of Homecare, was that, as a simple matter of fact, the relevant premiums had been repaid and Homecare should therefore receive an IPT credit under Regulation 17(1)(a) of the IPT Regulations. Any alternative argument was, he submitted, simply at odds with what had actually happened.

36. For HMRC, Ms Mitrophanous, accepted that if the premiums or fees had been repaid as part of the cancellation of the insurance under its normal contractual terms, then that refund would have been eligible for an IPT refund, but this is not, she said, what had happened. The insurance contracts contained cancellation clauses but these were not activated as part of the claims procedure. The payments were not therefore refunds of insurance premiums under the terms of the insurance contract.

37. There are many circumstances under which a premium might be repayable as a result of the normal operation of contract law, such as where there has been a total failure of consideration, or a misrepresentation leading to a rescission ab initio, or where there has been a rescission for some other reason ab initio, or a mistake so that the contract is void. There are of course many such circumstances in which such a refund might be due but this is not what happened in this case. The parties have not agreed to rescind the contract with a recovery of the money paid, nor was there any argument that the contracts should be regarded as void ab initio. None of those events has happened in this case.

38. Ms Mitrophanous submitted that these payments were of a fundamentally different character to the simple repayment of premiums envisaged by the legislation, in that they were compensation or redress payments and not refunds of the premiums received.

39. I agree with Ms Mitrophanous that these were not repayments of a deemed premium under the terms of the insurance contract. The insurance contracts did contain a right to termination which would produce a partial refund of any premiums paid in prescribed circumstances, but the contracts were not cancelled under this provision.

40. In contrast, these were payments under a Scheme of Arrangement under Part 26 Companies Act 2006. The terms of such a scheme are binding on all parties even though they may not have voted for it, and irrespective of whether or not they make an actual claim for redress. In this respect therefore it was not a normal contract entered into freely by the parties to it.

41. Although earlier documents in the negotiation and settlement with the FSA use the words "compensation", "redress" and "repayment" almost interchangeably, all the later documents, including, most importantly the Court Order as approved by the High Court and the claim forms which Consumers were required to complete, referred to the payments as "compensation" or "redress" payments. The words "compensation" and "redress" are quite properly interchangeable as a matter of plain English. Repayment is a different matter entirely.

42. The Court Order refers to the Redress Amount including "an amount equal to" the monies paid to CPPL. This is not the same as saying that the Redress Amount includes the repayment of the monies paid to CPPL. The Court Order could have used this simpler form of wording but it did not. I must therefore assume that this subtle difference in wording was intentional and that the two possible forms of wording were intended to have a different effect.

43. The insurance contracts were cancelled on the making of a claim, irrespective of whether or not the claim was admitted and any monies were paid out. Importantly only the insurance contracts were cancelled. There was no corresponding cancellation of the contract under which CPPL had rendered its services to the Consumers, which might lead directly to a repayment of the CPPL Fees.

44. The Redress Amounts paid by the Business Partners were calculated in exactly the same manner, and in accordance with exactly the same documentation, as those paid by CPPL and yet it could clearly not be argued that these payments represented the repayment of the fees paid to CPPL, because they were paid by the Business Partners. I consider this to be a very important point. In my view it would be wrong to suggest that the Redress Amounts paid by the Business Partners were fundamentally different in character from those paid by CPPL, but this is the conclusion to which Homecare's arguments unerringly lead.

45. Having considered these arguments carefully, and taking into account a number of potentially conflicting factors, I have, for the reasons set out above, come to the conclusion that the Redress Payments were not a refund of the IPT relating to the CPPL Fees.

DECISION

46. For the above reasons therefore I decided that this appeal should be DISMISSED.

47. 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.

PHILIP GILLETT

TRIBUNAL JUDGE
RELEASE DATE: 25 JULY 2019