[2022] UKFTT 00106 (TC)

TC 08437/V

INCOME TAX – liability for higher rate tax on compensatory interest received from RBS under the interest rate hedging products redress scheme – terms of such scheme provide for relevant banks to compensate for consequential losses suffered – Appellants submit that they should not be responsible for paying this additional tax, at a higher rate than would have been payable if the misselling had not occurred, until they are put in funds by RBS – tax returns had been completed using white box space and tax calculation had not included these amounts – whether discovery assessment validly issued – held – discovery assessments valid – Appellants liable for tax assessed – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/07153
TC/2019/07162

BETWEEN

MARK ROSSER

HELEN ROSSER **Appellants**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The hearing took place on 7 March 2022, and further written submissions were received on 9 and 10 March 2022. With the consent of the parties, the form of the hearing was video on the Tribunal video platform, with Mr Bradly joining by telephone. A face to face hearing was not held as a result of the COVID-19 pandemic. The documents to which I was referred are described in this decision notice.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

The Appellants in person

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

DECISION

INTRODUCTION

1. Mr and Mrs Rosser are appealing against discovery assessments issued to them by HMRC under s29 Taxes Management Act 1970 ("TMA 1970") in respect of the tax year 2014-15, with the amount in dispute now being £1,252 each.

2. Mr and Mrs Rosser received compensation from The Royal Bank of Scotland plc ("RBS") under the interest rate hedging products compensation scheme (the "IRHP Scheme") established by the Financial Conduct Authority (the "FCA"). Whilst many aspects of the tax treatment of these amounts is agreed between Mr and Mrs Rosser and HMRC, the amount in dispute represents the higher rate income tax which HMRC submit is payable on the interest received by Mr and Mrs Rosser from RBS in 2014 (over and above their basic rate of 20%).

3. For the reasons set out below, I have concluded that the discovery assessments were validly issued by HMRC. The interest received under the IRHP Scheme is taxable as interest in the tax year 2014-15 at their marginal rates of tax, which in this context is at the higher rate of 40%. This liability is imposed by statute and is unaffected by the status of their claims against RBS, including RBS's refusal to compensate them for these amounts. Similarly, it is irrelevant whether or not RBS are correct in the position they have taken in relation to the characterisation of these payments.

FACTS

4. I was provided with a hearing bundle, which included the self-assessment returns filed by Mr and Mrs Rosser, their correspondence with HMRC and with RBS, and an authorities bundle which included not only relevant statutory provisions and cases but also HMRC and FCA guidance on the IRHP Scheme. In addition, I was separately provided with the decision of the Upper Tribunal in *Moore*, notes thereon which had been produced by Mr and Mrs Rosser, some additional correspondence with HMRC and both parties' skeleton arguments, including an annotated version of HMRC's skeleton which had been prepared by Mr and Mrs Rosser. After the hearing both HMRC and Mr and Mrs Rosser provided additional material, and I have taken that into account in so far as I considered it relevant.

5. At the hearing Mr and Mrs Rosser represented themselves. Mr Rosser gave evidence of fact in his submissions, and explained that he and Mrs Rosser had taken the various actions together such that his explanations applied equally to both of them. I accept that.

6. On the basis of the evidence before me, I make the following findings of fact. Additional findings are made throughout this decision notice.

7. On 2 April 2003, Mr and Mrs Rosser entered into two interest rate swaps with RBS. Those swaps were expected to hedge their interest rate exposure on a re-mortgage of property forming part of their rental business although, as matters transpired, that re-mortgage with RBS did not proceed.

8. Mr and Mrs Rosser received redress from RBS under the IRHP Scheme.

9. Compensation payable to customers of the relevant banks under the IRHP Scheme can include:

(1) Basic redress – a refund of the sums the customer paid under the swaps.

(2) Interest at 8% – this was described by the FCA as being the opportunity cost 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 costs or interest rates.

The FCA stated that receiving interest at 8% would avoid the need for many customers having to put together consequential loss claims.

(3) Consequential losses – these include loss of profits, bank charges, certain legal expenses and tax (where the customer had to pay tax on the redress received and the amount of the tax liability was greater than that the customer would have suffered had the mis-selling not occurred). Claims for consequential losses could result in the interest amount being adjusted – customers were not able to claim both a loss of opportunity or profits and interest where this would amount to double recovery.

10. Mr and Mrs Rosser received £630.60 and £112,932.78 (separate amounts being payable for different swaps) from RBS on 13 May 2014. Those amounts each included basic redress and interest at 8% (from which tax at 20% had been withheld).

11. Mr and Mrs Rosser subsequently made a claim against RBS for consequential losses relating to lost rental income, capital appreciation and tax losses. That included a claim for compensation on the basis that the payment of 8% interest in 2014-15 attracted income tax at a higher rate than would have been applicable to interest paid to them in earlier years of assessment.

12. Part of their claim for consequential loss was accepted, and they received a further £112,947.05 on 9 May 2016, which included both the consequential losses awarded plus 8% simple interest thereon (from which tax at 20% had been withheld).

13. RBS had set out the details of this offer in a letter dated 15 December 2015. From that letter:

(1) In calculating the total redress payable to Mr and Mrs Rosser, RBS had clawed back some (£9,566.52) of the interest which had been included in the 2014 payments, as well as crediting the tax deducted thereon (of £1,913.30). This was in accordance with the principle that there should be no double recovery.

(2) Appendix 1 sets out RBS' position on the various heads of consequential loss which had been claimed. Mr and Mrs Rosser had claimed £14,118.31 for tax losses, but RBS accepted £9,916.75 of this. They explained this as follows:

> "We accept that had the IRHP payments not been paid in the relevant previous tax years, the taxable income for you would have been greater and result in an increased tax charge at the prevailing rate for those relevant tax years. Due to the differences in tax allowances and/or the relevant tax rate for the year in which you will receive the redress payment, a tax loss may be suffered. You have calculated this value to be £14,118.31.
>
> We do not agree with this as the tax assessment includes the 8% simple interest from your provisional basic redress offer. The interest element is designed to compensate you for the opportunity cost of being deprived of the funds used to make IRHP payments. It is a response to the problem of demonstrating exactly how the IRHP monies would have been invested and is intended to be simple and fair to the customer. However, this is a hypothetical return and it does not amount to an admission that you would have, in fact, earned a return of 8% per annum on the money that you used to make the IRHP payments in the previous relevant years. Therefore, the bank will not compensate you for the tax consequences of receiving the 8% interest in one tax year rather than receiving the hypothetical return in the previous years."

14. There was further correspondence between RBS and Mr and Mrs Rosser in 2016, but RBS have not changed their position on this amount.

15. Mr and Mrs Rosser filed their self-assessment returns for 2014-15 on 26 January 2016. They both took the following approach:

(1) The amounts received as redress from HMRC were not included as property or business income, interest or other income.

(2) Both returns included the following text in the "white space" in box 19 on page TR7:

> "I have had difficulty in copying and pasting text into this area and so please see attachments for explanation of additional tax liability due"

(3) The Tax Return Tax Calculation Summary page (the "Tax Calculation Summary") records total tax of £1,309.60 for Mr Rosser and £1,308.45 for Mrs Rosser.

(4) The attachments referred to in the "white space" each contained three tables, the first of which read as follows:

	Due	Paid	Owed	RBS Credit	Net due to IR
Mark	36,581.02	18,303.60	18,277.42	-2136.135	16,141.29
Helen	13,013.84	2,053.80	10,960.04	-2136.135	8,823.90
Total	49,594.86	20,357.40	29,237.46	-4,272.27	24,965.19

(5) The second and third tables were headed "Mark Rosser Tax computation" and "Helen Rosser Tax computation" respectively, and on their face set out columns for taxable income and then liability to income tax for the years 2008-09 to 2013-14. These tables each included rows titled "IRHP Redress £47,912" and "Interest @ 8% £10,681" and in these rows the sums in question were spread across the six tax years 2008-2009 to 2013-14. The amounts set out as "Owed" in the first table (shown above) are highlighted on those second and third tables.

16. Mr and Mrs Rosser then paid both the amount shown in the Tax Calculation Summary (ie the number automatically generated when they populated the return) and the amount specified in the "Net due to IR" column from the attachments. They each made two payments, one equal to the amount shown in the Tax Calculation Summary and the other specified as the "Net due to IR". I accept the explanation which Mr Rosser gave that they split the payments this way so that HMRC could track what had been paid and identify the amounts by reference to both the face of the return and the amounts shown on the attachments.

17. In February 2017 these amounts attributable to the "Net due to IR" column were refunded by HMRC to Mr and Mrs Rosser. HMRC did not adduce direct witness evidence, although an explanation from Euan Robertson, an officer of HMRC, in correspondence dated 23 August 2018 was that the self-assessment system had processed both payments, netted the total off against known liabilities on the system, leaving an overpayment on their accounts. Overpayments are usually either repaid on request by the taxpayer or eventually dealt with automatically by the system when the next self-assessment return is processed. Mr and Mrs Rosser had not requested that these amounts be repaid to them, and I accept that this refund was automatically generated by HMRC's system.

18. HMRC did not open enquiries under s9A TMA 1970 into Mr and Mrs Rosser's returns for 2014-15.

19. Following various correspondence with different officers of HMRC, Ms Tait, an officer of HMRC issued the following discovery assessments under s29 TMA 1970:

(1) discovery assessments dated 13 March 2019 in respect of the tax year 2014-15 in the amounts of £18,602.15 (for Mr Rosser) and £15,442.55 (for Mrs Rosser); and

(2) discovery assessments dated 1 August 2019 in respect of the tax year 2016-17 in the amounts of £4,870.85 (for Mr Rosser) and £3,164.30 (for Mrs Rosser).

20. Mr and Mrs Rosser appealed against all four of those assessments.

21. Mr and Mrs Rosser continued to pursue their claims for consequential loss in correspondence with RBS.

22. On 31 May 2019 Mr and Mrs Rosser confirmed (by a letter to HMRC) that they had made payments to HMRC of £17,452 (for Mr Rosser) and £14,194 (for Mrs Rosser). These amounts were returning to HMRC the amounts which had first been paid in January 2016 and then automatically refunded to them one year later. They were higher (considerably so for Mrs Rosser) than those refunds, as they included at this stage tax which had been assessed for the tax year 2016-17 and for which they had been reimbursed by RBS as consequential losses.

23. On 26 May 2020 RBS offered to pay Mr and Mrs Rosser £8,606 to settle their claim for a potential CGT liability that had arisen for the tax year 2016-17. However, RBS rejected their claim for £2,399 for higher rate tax payable on the 8% interest element of the redress which they had received in 2014.

24. Mr and Mrs Rosser withdrew their appeals against the discovery assessments in respect of the tax year 2016-17 on 6 June 2020. That withdrawal was confirmed by them at the hearing of this appeal

ISSUES

25. HMRC has issued two discovery assessments to both Mr and Mrs Rosser as described above. The appeal now relates only to the discovery assessments issued in respect of the tax year 2014-15, which were issued in the amounts of £18,602.15 to Mr Rosser and £15,442.55 to Mrs Rosser. All of the parties were clear in their skeleton arguments that they disagree as to £1,252 of this amount (in respect of each of Mr and Mrs Rosser). Mr and Mrs Rosser have accepted liability for the remainder of the amounts assessed and paid those amounts to HMRC.

26. It must be said that, on the basis of the evidence before me, it is not straightforward to reconcile the numbers.

(1) In the attachments to their return, the "Net due to IR" was calculated as £16,141.29 for Mr Rosser and £8,823.90 for Mrs Rosser.

(2) The discovery assessments issued by HMRC are for different (higher) amounts. Mr Bradley explained that there was a very small difference in the numbers used by HMRC for the basic redress, but the main difference was a result of:

(a) The attachments had included all of the interest received from RBS in 2014, whereas HMRC allowed a credit for the claw-back which was effected when they received a payment for their consequential losses later in 2016. On its own, this approach would have reduced the amount assessable. HMRC took no position now as to whether or not that had been correct, but did not seek to resile from that approach and which remained reflected in the agreed position between the parties that the amount in dispute was £1,252 under each of the discovery assessments.

(b) The "Net due to IR" had been calculated by spreading the interest across the six previous tax years and applying tax at their marginal rate in those years, whereas HMRC assessed tax on the basis that the full amount was taxable in a single tax year, 2014-15, and thus at 40%.

(3) Rather than working back from the discovery assessments, it is apparent how the amount in dispute has been arrived at based on the interest received by Mr and Mrs Rosser. The net compensatory interest received by them was £10,017.15 (this being the total of the interest amounts paid in 2014, less that clawed back in 2016, and after tax at 20% had been withheld). The gross interest was thus £12,521.44. Mr and Mrs Rosser had accepted that they were liable to pay tax at 20% on this amount, the difference in principle was the difference between tax at 40% and 20%, this being £1,252.14 each.

27. I have proceeded on the basis that £1,252 is the amount in issue for each of Mr and Mrs Rosser (albeit that as this assessment has been raised by HMRC by way of a discovery assessment, if I conclude that the discovery assessment was not validly issued, then it must be invalid in its entirety).

28. It was common ground that:

(1) the basic redress is chargeable to income tax as profits of the relevant trade or business in the year in which it is received; and

(2) the interest is chargeable to income tax as interest. Whilst Mr Rosser stated that he accepted that this was also chargeable in the year in which it is received, it was apparent that the parties disagreed as to what this meant, particularly as regards calculation of the liability.

29. There were thus two issues before me:

(1) liability to pay the additional tax to HMRC on the interest at 40%, including the relevance of RBS's position in relation thereto and thus whether Mr and Mrs Rosser are required to pay this amount to HMRC before they have received these amounts from RBS; and

(2) the validity of the discovery assessments.

30. The burden of proof is on HMRC to establish that the discovery assessments were validly issued, and the standard of proof is on the balance of probabilities. Once HMRC have met this burden, Mr and Mrs Rosser bear the burden of establishing that they are not liable for the additional tax.

31. Mr and Mrs Rosser's position can be summarised as follows:

(1) They can only be liable to HMRC once RBS has settled its liability to them under the terms of the IRHP Scheme

(2) They are subject to but not party to the contract between the FCA and RBS which establishes the IRHP Scheme and, under the terms of that contract, customers are prohibited from legally challenging the scheme administrator's decision, ie RBS' decision. RBS have refused to accept liability. HMRC are aware of this.

(3) HMRC have a duty to advise RBS of the error in their position. HMRC officers have in correspondence expressed the view that RBS's reasoning is wrong. HMRC have not persuaded RBS to compensate them, and RBS have failed to provide Mr and Mrs Rosser with a satisfactory explanation for their position.

(4) When filing their self-assessment returns for 2014-15 they included an entry in box 19 on page TR7. They followed HMRC's published guidance on "How to enter the redress payment separately on a tax return" which says "it may be helpful for you to draw attention to the redress payment when you submit your tax return". No additional specific guidance had been given as to which box to put the information in. The tax return did therefore take into account the redress received.

(5) They took great care when preparing their returns, by recording the redress, including a table separating their payments. They had read the published guidance They could not reasonably have been expected to know how the self-assessment system worked (as the guidance did not include suggestions to put the amounts in the "other income" or "taxed interest" box) or the reason for the repayment.

(6) They paid both the amounts of tax self-assessed and the additional amounts specified in the "Net due to IR" column of the table. They made separate payments of these amounts. It should have been completely clear to HMRC how they had calculated and paid their liability.

(7) The very purpose of the IRHP Scheme will be undermined if their appeal is unsuccessful, as it will create an iniquity from which they cannot find relief.

RELEVANT LEGISLATION

32. Section 8 TMA 1970 provides in so far as material:

> "8. Personal return.
>
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—
>
> (a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required…
>
> (2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete…"

33. Section 9(1) TMA 1970 provides in so far as material:

> "9. Returns to include self-assessment
>
> (1) Subject to subsections (1A) and (2) below, every return under section 8 or 8A of this Act shall include a self-assessment, that is to say—
>
> (a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and
>
> (b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source…"

34. Section 29 TMA 1970 provides in so far as material:

> "29. Assessment where loss of tax discovered
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax...

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment...

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquires into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board..."

35. Section 118(5) TMA 1970 provides:

> "For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation."

36. Section 369 of the Income (Trading and Other Income) Act 2005 ("ITTOIA 2005") imposes a charge to income tax on interest. Section 370 provides:

> "Tax is charged under this Chapter on the full amount of the interest arising in the tax year."

37. Section 371 provides:

> "The person liable for any tax charged under this Chapter is the person receiving or entitled to the interest."

38. Section 50(6)-(7) TMA 1970 set out the Tribunal's jurisdiction in these appeals:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is overcharged by a self-assessment;
>
> (b) that any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is undercharged to tax by a self-assessment;
>
> (b) that any amounts contained in a partnership statement are insufficient; or
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly."

DISCUSSION

39. The issues have been set out above. I address first the question of liability and then the validity of the discovery assessments.

Liability to pay tax at higher rate on interest received

40. Mr Bradley submitted as follows:

> (1) It is common ground that the interest element of the redress is chargeable to income tax as interest under s369 ITTOIA 2005.
>
> (2) The persons "receiving or entitled to" the interest, and therefore liable for the tax in accordance with s371, are Mr and Mrs Rosser. This is the end of the matter.
>
> (3) HMRC takes no position as to whether or not RBS are correct in the conclusions they have reached on consequential losses, and that this Tribunal has no jurisdiction in relation to such matters.

41. Mr Rosser has emphasised the iniquity which they face if they are required to pay these amounts to HMRC in circumstances where it is clear from the correspondence that RBS will not compensate them. However, as a creature of statute this Tribunal only has the jurisdiction which has been conferred on it by statute. I agree with Mr Bradley that this Tribunal has no jurisdiction to determine Mr and Mrs Rosser's rights against RBS (or indeed the FCA), or the resulting fairness or otherwise of that outcome. The only question before me, if I am satisfied that HMRC have established that the discovery assessments were validly issued, is whether or not I am satisfied that Mr and Mrs Rosser have been overcharged by those assessments. If I am, then the assessments shall be reduced accordingly; otherwise, they stand good.

42. The interest at 8% received by Mr and Mrs Rosser in May 2014 was taxable in 2014-15. The calculation of that tax liability does not require or permit any pro-rating across preceding tax years to calculate what would have been the liability if it had been received in those earlier years. The full amount is taxable in 2014-15 and, in line with their marginal rates of tax, this

has the result that it is taxable at 40%. RBS's decision not to compensate them for this amount cannot change this conclusion on liability.

Validity of discovery assessments

43. HMRC bears the burden of proof to establish, on the balance of probabilities, that the discovery assessments in respect of the tax year 2014-15 were validly issued.

44. Mr Bradley submitted that:

(1) Section 8(1) TMA 1970 provides that a person may be required to make a return "for the purpose of establishing the amounts" in which that person is chargeable to tax for a year of assessment. Section 9(1) requires that every such return shall include a self-assessment, ie an assessment of the amounts in which the person making the return is chargeable to income tax and capital gains tax for the year. These provisions thus emphasise that the self-assessment is of the amount in which the person is chargeable to tax.

(2) Section 29(1) is satisfied as an officer made a discovery that income (in this case the redress) which ought to have been assessed to income tax had not been assessed, or that an assessment to tax was or had become insufficient. Such a discovery had been made by Ms Tait.

(3) Whilst s29(3) requires that one of two alternative conditions is satisfied, it was HMRC's position that both were satisfied.

(4) The situation, ie the insufficient assessment of tax, was brought about carelessly by Mr and Mrs Rosser (for the purposes of s29(4)).

(5) Alternatively, at the time when HMRC ceased to be entitled to open an enquiry, the officer could not reasonably have been expected, on the basis of the information available to him before that time, to be aware of the insufficient assessment of tax (for the purposes of s29(5)). HMRC accepted that the attachments to the returns were information which had been made available to HMRC.

45. Mr and Mrs Rosser denied that there had been any insufficiency of tax, and that either of the alternative conditions were satisfied. Mr Rosser said what is relevant is whether there had been an insufficiency in payment and there had been no such insufficiency. They had not been careless in preparing their returns – they had followed HMRC's guidance, and enclosed the attachments showing how the liability had been calculated. Furthermore, those attachments meant that HMRC had all the information they needed available to them at the end of the enquiry window.

46. What constitutes a "discovery" was considered by the Upper Tribunal in *Charlton & ors v HMRC* [2013] STC 866 at [37]:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself."

47. This description was approved by the Supreme Court in *HMRC v Tooth* [2021] UKSC 17 at [63] to [65].

48. On the basis of my conclusions as to liability above, I am satisfied that Ms Tait made a relevant discovery, in that it appeared to her, acting honestly and reasonably, that there was an insufficiency in the assessments of Mr and Mr Rosser as recorded in the Tax Calculation

Summary which had been calculated in their self-assessment returns. The requirements of s29(1) are thus met. HMRC also need to establish that either of the conditions in s29(4) or 29(5) were met.

Situation brought about carelessly or deliberately

49. The question of carelessness requires the taxpayer's conduct to be assessed by reference to a prudent and reasonable taxpayer in his position and in the context of the statutory obligations in question (here, those in s8 and 9 TMA 1970) (*HMRC v Hicks* [2020] UKUT 12 (TCC) at [120]-[121]).

50. Mr Bradley submitted that the insufficiency of the Mr and Mrs Rosser's self-assessments was attributable to their failure to return the redress and interest as income of 2014-15, which they would have done had they taken reasonable care. That is, in circumstances where they understood that the redress was chargeable to income tax, they ought reasonably to have known that their self-assessments (of £1,309.60 and £1,308.45 respectively) were insufficient.

51. Mr Rosser emphasised that they had put considerable effort into preparing their returns, had read and relied on HMRC's guidance, prepared the schedules setting out their calculations, referred to those attachments in the "white space" and then made payments of the two amounts separately so that they could be readily reconciled. He contrasted this with taking advice from a "man in a pub" (referring to the situation in *Moore*, below).

52. In *Moore v HMRC* [2011] UKUT 239 (TCC) Mr Moore had adopted the incorrect approach in his tax return in accordance with what the Tribunal had recorded as "informal advice given at a social occasion". Before the Upper Tribunal Mr Moore had explained that this was from his acquaintance with an accountant, but given over dinner rather than in an accountant's office. As a result, he understated his income in the relevant boxes in his return, but sent with each return a sheet of paper on which he set out exactly how he had calculated the figures he had entered. The Tribunal found that Mr Moore had not followed he guidance provided with the returns.

53. The Upper Tribunal set out the following:

> "15. There can, I think, be no doubt that any taxpayer completing a self-assessment return has a duty to take care when doing so: the obligation upon him is plainly to submit an accurate return. Mr Moore did not suggest otherwise; his argument was that he endeavoured to do so, and that, taken together, the return and the added sheet discharged the obligation. The First-tier Tribunal evidently did not accept that proposition, preferring the view that the duty of care required Mr Moore to enter accurate figures in the boxes.
>
> 16. It seems to me that in order to test that conclusion it is necessary to look closely at what sub-s (4) provides. It allows an officer to assess where 'the situation mentioned in subsection (1) … is attributable to … negligent conduct on the part of the taxpayer'. The 'situation mentioned in subsection (1)' includes, among others, that 'an assessment to tax is … insufficient'. The assessments in this case—Mr Moore's self-assessments—were based not upon what he wrote on the additional sheets, but on what he entered in the boxes. In my judgment it follows, despite the initial attraction of Mr Moore's argument to which I have referred, that the tribunal's evident conclusion about what the duty of care entailed was right. His setting out the information on an additional sheet would have given Mr Moore the protection of sub-s (5), but not of sub-s (4) and, as sub-s (3) makes clear, an assessment may be made if either one of the two conditions is fulfilled. "

54. These paragraphs thus address both of the alternative conditions in the circumstances of that case, finding as the self-assessments were based upon what Mr Moore (incorrectly) entered

in the boxes, the Tribunal was right to conclude that he was guilty of negligent conduct, but that setting out the information on an additional sheet would have given Mr Moore the protection of s29(5).

55. Both parties took me to HMRC's published guidance on the tax treatment of compensation received under the IRHP Scheme, which had been published on 25 July 2014 (the "2014 Guidance") and additional guidance on 24 January 2017 (the "2017 Guidance"). The 2014 Guidance is just one page long and included:

> "The redress will usually be paid out as a single payment that is taxable in the year it is received. This will mean that there is no need to amend your previous years' tax returns. The payment is taxable because you would have previously claimed tax relief for the payments under the Interest Rate Hedging Product as an allowable business deduction. When the redress payments are made to you they must be treated as business income and reflected in your business accounts."

56. Mr Rosser's evidence was that he had read some guidance from HMRC (and accepted he should follow it). He had referred to guidance in his correspondence with HMRC (eg on 13 September 2018). Giving evidence, Mr Rosser said that the guidance he had relied upon was not that in the bundle produced as the 2014 Guidance. However, he recognised that the 2017 Guidance was published after they had submitted their self-assessment returns (and after the due date for submission of such returns) for 2014/15.

57. After the hearing HMRC provided further information as to the various guidance on the IRHP Scheme which had been available at different times. They identified a version of the guidance which had been available at the end of 2015 (the "2015 Guidance"), ie before the submission of the returns in January 2016. That included both the 2014 Guidance and an additional document, labelled "detailed guidance" which was similar to that later released as the 2017 Guidance. Mr Rosser has acknowledged that this aligned with their recollection. The 2015 Guidance includes a paragraph on "When is the redress payment taxable", stating that redress is taxable in the year in which it is recognised in the business' profit and loss account, stating that this will usually be when it is paid by the bank. I am satisfied that Mr and Mrs Rosser had read the 2015 Guidance and it is this guidance to which they were referring when they referred to HMRC's published guidance in correspondence with HMRC.

58. I am satisfied that Mr and Mrs Rosser did prepare their returns with care – they had read the 2015 Guidance, produced attachments showing the redress received under the IRHP Scheme, and referred to those in the "white space". The difficulty is that s29(4) requires consideration of a different question, namely whether the situation in s29(1), ie the assessment of insufficient tax, was brought about carelessly.

59. I find that Mr and Mrs Rosser were well aware when they submitted their returns of the significance of the different approaches to calculating their tax liability on the redress received, ie that tax would be payable at a higher rate if it was all part of their income in a single tax year rather than spread across preceding tax years. This was evidence from:

(1) Tables which had been prepared by RBS and sent to Mr and Mrs Rosser with the letter of 15 December 2015. It was this letter which set out RBS's position on consequential loss. Appendix 2 to that letter set out various working tables which had been used in calculation of the amount of redress due. Tables 3 and 4 related to Mrs Rosser, Tables 5 and 6 to Mr Rosser. Tables 3 and 5 set out the tax liability with the redress assessed in 2013-14 (although I infer this is a mistake and should have stated 2014-15). Those tables taxed all of the redress in that year. Tables 4 and 6 showed the same amounts taxed in the previous tax years. These tables showed lower amounts of

tax due in respect of that same income and it is evident from those tables that for Mrs Rosser none of the redress would have been taxable at 40%. Mr and Mrs Rosser paid careful attention to all of the details of their correspondence with RBS and I find that they would have read these tables and recognised the differences between them.

(2) In correspondence with RBS in January 2016, shortly before submission of the returns for 2014-15, Mr Rosser had referred to the tax due on the redress being calculated based on applying the refund in full to the tax calculation during the year that the refund was received.

60. When preparing their self-assessments, they believed the amounts they calculated as the "Net due to IR" were part of their tax liability for 2014-15. This was Mr Rosser's evidence and I accept it. However:

(1) They did not record the redress they had received in any of the income boxes in the self-assessment in a way in which they could be added-up to form part of the total taxable income. Mr Rosser challenged how they were supposed to know how to record this – but the guidance referred to treating it as business income; and they could have decided to declare it as "other income" in the absence of being able to identify a more obviously appropriate box.

(2) The automatically generated tax calculation, in the Tax Calculation Summary, was of an amount far less than that which they had calculated they owed. They were aware of this as they then made separate payments of both sums.

61. Moreover, their method of calculating the tax due in respect of the redress (ie calculating the amounts in the "Net due to IR" column) failed to take account of the published guidance which clearly said that it was taxable in the year of receipt. They had calculated it by reference to spreading the amount across six preceding tax years, with an obvious consequence of this then being taxable at lower rates, a point of which they were aware. However, I do note that the additional guidance which formed part of the 2015 Guidance did include a paragraph on timing, referred to above, which is potentially less clear – referring to the year in which the redress is recognised, saying this is "usually" when it is paid.

62. The consequence of this is that Mr and Mrs Rosser self-assessed an amount of tax (in the Tax Calculation Summary) that was lower than that which they knew they owed (based on their calculation of the "Net due to IR"), and also lower than would have been calculated if they had entered the redress as income in one of the appropriate boxes (as their own calculation was not based on the redress all being taxable in the year of receipt and therefore at the higher rate).

63. Mr Rosser drew attention to the fact that, in a letter of 11 April 2019, Ms Tait had referred to HMRC's powers to issue penalties for inaccuracies in tax returns under Schedule 24 Finance Act 2007, but set out that she had taken into consideration that they took reasonable precautions to ensure they had paid the right amount of tax in relation to the redress payment and did not intend to pursue penalties.

64. Penalties under Schedule 24 can be applied where a tax return includes an inaccuracy which amounts to or leads to an understatement in the amount of a tax liability. The drafting is thus different, but there is considerable overlap with s29(4), in that both provisions focus on the impact of the inaccuracy, ie that it is or results in an under-assessment of a tax liability. The conclusion reached by Ms Tait in the context of Schedule 24 does not bind me, and it is an opinion of which I only have indirect evidence. Nevertheless, this illustrates that an HMRC officer has reached a conclusion that the inaccuracy was not careless.

65. Considering all of the evidence before me, HMRC have not established that the insufficiency was brought about carelessly. There were two different inaccuracies which resulted in the insufficiency, namely a failure to put the redress in one of the taxable income boxes (and they had drawn attention to this in the "white space" and by including the attachments) and the incorrect calculation of the liability in those attachments (which, whilst wrong, was carefully and knowingly based on Mr and Mrs Rosser's position as to how the tax should be calculated). Assessing their conduct by reference to the actions of reasonable and prudent persons, the insufficiency was not brought about carelessly by them.

Information available

66. In the light of my conclusion that the condition in s29(4) is not satisfied, HMRC must establish that, at the time when the enquiry window closed, a hypothetical officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the insufficiency of tax.

67. Mr Bradley submitted that this condition in s29(5) will be satisfied unless the hypothetical officer would reasonably be made aware, by the information contained in the return and accompanying documents, of an actual insufficiency in the assessment, not merely made aware of a situation needing further investigation, referring to *Langham v Veltema* [2004] EWCA Civ 193 at [32]-[36]. He submitted that an officer could not reasonably have been aware of an actual insufficiency of tax for 2014-15 on the basis of the information available because the attachments to the returns indicated on their face that the redress and interest arose in the years 2008-09 to 2013-14 and there was no other information in or attached to the return that suggested an insufficiency.

68. Mr Rosser maintained that the attachments set out clearly how the tax liability had been calculated, re-iterating that the earlier years are the dates for calculation. The liability to pay arises in the tax year in which the redress is received. It is HMRC's responsibility to know the tax consequences of the receipt of redress payments.

69. It was common ground that the information available to a hypothetical officer of HMRC at the end of the enquiry window comprised the self-assessment returns and the attachments submitted therewith. It is evident from the face of those returns that the amounts calculated as the "Net due to IR" had not been included in the self-assessment – those amounts are far higher than the amounts assessed in the Tax Calculation Summary. However, that was not the only inaccuracy, and does not reflect the entirety of the insufficiency. The calculation of the tax on the interest was made on the basis that the amount of the redress should be spread across several tax years. There was nothing on the face of the return to indicate that this approach was or might be incorrect. I therefore have no hesitation in concluding that the condition in s29(5) is satisfied, and that the discovery assessments were validly issued.

DISPENSATION

70. The appeals are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

71. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 22 MARCH 2022