DRN-3979823

The complaint

Mr & Mrs M complain that Brewin Dolphin Limited made an error that meant they both missed out on their ISA allowance for tax year 2018/19 for £20,000 each. They ask to be compensated for the term they would have held this element of their investment within a tax-free wrapper.

What happened

I set out the background to this complaint in my earlier provisional decision. For clarity, I repeat it here.
Mr & Mrs M invested a significant sum of money with Brewin Dolphin. The intention was to utilise both their 2018-19 ISA allowances and for subsequent years.
Brewin Dolphin confirmed the accounts had been opened as instructed but it subsequently came to light that the ISA investment had not been completed. By the time Mr & Mrs M were aware it was too late to utilise the allowance for the tax year 2018-19.

Mr & Mrs M complained as they are very unhappy with the failure to utilise their ISA allowances and feel this will affect them financially for many years to come. They were extremely disappointed that Brewin Dolphin didn't contact them or their adviser beforehand to make them aware.

Brewin Dolphin said it received the application and cheque on 1 April 2019 but due to the timing of the cheque being received, it wasn't possible for the funds to clear before the end of the tax year, so they were unable to use their 2018/19 allowances. It said it didn't agree it had caused a delay and so didn't uphold the complaint initially.

However, Brewin Dolphin reviewed its files and the relevant HMRC guidance and as a result changed its position. It concluded it could have subscribed to Mr & Mrs M's ISAs for the tax year 2018/19. This is because HMRC rules allow the subscription date to be the date a cheque is accepted, as long as the cheque subsequently clears.

It accepted that due to its error, a proportion of both Mr & Mrs M's assets are outside of the tax-free wrapper an ISA provides. Due to the time elapsed it is unable to backdate the subscriptions and have instead offered to compensate Mr and Mrs M for this.

Brewin Dolphin calculated the potential tax liability both Mr & Mrs M will face over a ten-year period using this service's approach to compensating missed ISA subscriptions. These calculations result in a potential tax liability of £1,375 each (based on both parties being basic rate taxpayers). Brewin Dolphin agreed to pay this amount and a further amount of £250 each in recognition of the trouble and upset this matter has caused.
In his first view our investigator concluded this was in line with our approach to resolving complaints where ISA subscriptions have been missed and as such was a fair and reasonable approach to putting things right.

Mr & Mrs M disagreed.
They were not prepared to accept Brewin Dolphin's offer as they didn't feel it fairly compensates them for the loss of their ISA allowances. Mr M said he was a higher rate

taxpayer at the time of the error and has provided evidence they'll be able to utilise their ISA allowance for much longer than the ten-year period the offer has been calculated using.
Mr & Mrs M also provided a spreadsheet from their accountant demonstrating how they felt this lost opportunity would affect them financially for many years to come.
The investigator reconsidered the information provided and suggested to Brewin Dolphin that a term of 20 years would be more appropriate in calculating the lost tax benefits.
Following further discussions, Brewin Dolphin offered to recalculate the loss over a 20-year term. In summary this increased the offer to £2,750 for the lost opportunity and £250 each for the trouble and upset. This meant the revised offer was a total of £6000.
Mr & Mrs M remained dissatisfied.
In summary they said:

- Mr M was a higher rate taxpayer, and the calculation should reflect this
- Mr & Mrs M did not consider the 20-year term to be sufficient reflection of the investment term and therefore the impact the missed opportunity to shield this element of their investment from taxation would have
- Mr & Mrs M are utilising most of their CGT allowance from other investments and there is little or no scope to incorporate the capital gains from the £40,000 within their allowance.
- They do not accept £250 is a fair reflection of the trouble and upset this matter has caused for the last three years.

They asked for an ombudsman's review.

In my provisional findings, I said what I had to decide in this case is the financial loss that Mr & Mrs M have/are likely to incur because of the error Brewin Dolphin has acknowledged it has made. It's no longer in dispute that Mr & Mrs M's £40,000 deposit ought to have been protected from tax inside an ISA wrapper. What is in dispute, is how to put things right.
I explained in cases where an ISA subscription has been missed this service has a published approach to redress. It is always difficult to quantify future loss as there are many differentials that could apply. This service adopts an approach that seeks fairness to both parties.

I pointed out the position that has been put forward by all parties at this point doesn't follow our published guidance. And, aside from the length of time Mr & Mrs M would've held the investment for, I said I could see no reason to depart from the guidance. To clarify, the issue that Mr & Mrs M face is that any growth of the £40,000 investment they made will now be subject to CGT. Especially because it's clear from the evidence that both Mr & Mrs M are able to, and do, fully fund their ISA allowance each year. This means there isn't space to absorb the £40,000 into their ongoing ISA subscriptions. I explained In cases like this we make the following assumptions:

1. Any charges on holding the investment outside the ISA will not be significantly different from those that would have applied if it had been held within an ISA
2. Mr & Mrs M will pay tax on the investment at the highest rate applicable to them
3. Mr & Mrs M's tax position will remain unchanged for as long as they hold the investment
4. The tax position of the investment will remain unchanged while they hold it
5. If the investment pays dividend distributions, it will return 7.5% each year (made up of 5% growth and 2.5% dividend)
6. If the investment pays interest distributions, it will return 6% each year (made up of 1% growth and 5% interest)
7. If the investment doesn't pay either interest or dividends (e.g., growth stocks), it will grow at 7.5% each year
8. The investment will be held for 10 years before it is sold.

I explained at this point that Mr & Mrs M's investment remains invested, but not within the ISA wrapper and so I am considering the impact of the potential tax liability only.
I said I was persuaded by the evidence suggesting both Mr & Mrs M will more likely than not invest their full ISA allowances for at least the next 20 years and that Mr M's redress calculations should be based on the assumption he will be a higher rate taxpayer.

I reached my determination regarding Mr M's tax status based upon the information that for the four years preceding the investment and the tax year 2018-19 alongside the following two years, Mr M was a high-rate taxpayer. He has explained a change in business objectives has resulted in the 21/22 tax year him being a basic tax rate taxpayer but is confident in the coming year that may change subject to business performance and investment income. On balance, I said I was inclined to agree with him.

The redress is to ensure that Mr & Mrs M don't lose out when they sell their investment as if it was inside the ISA wrapper, they wouldn't pay any CGT. Ordinarily we expect investments to be sold after 10 years. However, Mr & Mrs M are in their mid-forties and own their own business. I think it's very likely they'd have no reason to cash in these investments for many years to come. Mr M has said they would hold their investments for 30 or 40 years. I think this is too long a time period to suggest.

I said I was persuaded that extending the assumed period to 20 years felt like a reasonable compromise between our usual approach and what Mr and Mrs M have proposed. It is, of course, impossible to say precisely when the £40,000 would leave the ISA but given what Mr and Mrs M have evidenced about their financial circumstances, I'm persuaded it's likely to have remained in the ISA for significantly longer than 10 years. So, it follows that I think we should use the assumption of 20 years when calculating what they have lost out on in the circumstances of this case. Other than this, I see no reason to depart from our usual approach.

I said I appreciated Mr M spoke with our investigator about the historic performance of the fund. I have listened to the telephone calls. But as our investigator mentioned historic performance isn't a guarantee of future performance and we're looking over a very long timescale here. So, I don't think it's enough to depart from our usual approach of using a return of 7.5% (5% growth and 2.5% dividend in this particular case). But I am of the view this should be calculated on a compound basis.

So, although I am in agreement that a 20-year term should be used, and the calculations should assume Mrs M to be a basic rate taxpayer and Mr a higher rate taxpayer, I reached a different conclusion, to that of our investigator, with regard to redress for the trouble and upset this matter has caused.

From what I can see this error could have been corrected far more swiftly than it was. The HMRC guidance was readily available and had Brewin Dolphin acted with more focus it is possible the ISA subscription could have been backdated.

Instead, this matter has dragged on for more than three years, and it took a considerable amount of time for Brewin Dolphin to acknowledge this was its error entirely.
Mr & Mrs M have explained the trouble and upset, sleepless nights and the amount of time and effort this matter has caused as they have sought to have this error corrected. Mr M is also right to point out there are different levels this service can apply when awarding redress for distress and inconvenience.

I said I didn't agree that £250 is a fair reflection of the trouble and upset here, and so I asked Brewin Dolphin to increase this to £750 each which I'm persuaded is a fairer reflection of the impact this error has had on both Mr & Mrs M for a significant period of time.

I said I intended to direct Brewin Dolphin Limited to calculate the potential loss that Mr & Mrs M may incur due to its error which led to £20,000 being held outside of each of their ISAs. To do so Brewin Dolphin should use the following assumptions:

1. Any charges on holding the investment outside the ISA will not be significantly different from those that would have applied if it had been held within an ISA
2. Mr & Mrs M will pay tax on the investment at the highest rate applicable to each of them. In this case an assumption of basic rate tax should be used for Mrs M and higher rate tax for Mr M
3. In both cases the tax position will remain unchanged for the assumed period of 20 years.
4. The tax position of the investment will remain unchanged.
5. If the investment pays dividend distributions, it will return 7.5% each compounded year (made up of 5% growth and 2.5% dividend)
6. Pay Mr & Mrs M £750 each for the trouble and upset this matter has caused.

I gave each party the opportunity to provide any further submissions they wished me to consider before making my final decision.

Brewin Dolphin accepted my provisional findings.

Mr & Mrs M expressed gratitude for the detailed response but didn't feel the redress went far enough. They said:

- The 20-year basis of the calculation for redress felt arbitrary and they had provided significant evidence to suggest the term should be longer.
- They were concerned about Brewin Dolphin being allowed to carry out the calculations and how would they know if they were correct
- It had been four years since the error and they feel further interest should be added, not least to counter the effects of inflation
- They wanted consideration to be given to their accountancy fees

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so I haven't been provided with any additional evidence that alters my view and so it follows my final decision will be in line with my provisional findings. But I will provide some further clarity to Mr & Mrs M.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mr & Mrs M and by Brewin Dolphin.

Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words, I have looked at what evidence we do have, and the

surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

I understand why Mr & Mrs M find it entirely reasonable that a 20-year term may not actually reflect the time they intend to leave these funds invested, but equally there is not easy way to determine and appropriate timescale. The standard used by this service is 10 years, but I have been persuaded by testimony that this should be increased to a 20-year term. As I have said it isn't role of this service to regulate or punish businesses for their conduct – that is the role of the Financial Conduct Authority. Instead, this service looks to resolve individual complaints between a consumer and a business. Should we decide that something has gone wrong we would ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred. The 20-year term will take Mr & Mrs M much nearer to normal retirement age and it feels a fair and reasonable approach in considering when the funds may usually be realised. Of course, that's not to say Mr & Mrs M will realise the funds at that time, but equally they could realise them much earlier for any number of unforeseen circumstances.

I acknowledge the length of time that has taken to settle this complaint and the toll this has taken, as clearly described by Mr & Mrs M. It's also fair to say our awards for trouble and upset are relatively modest, again reflecting the fact this is a free service and alternative to the courts. So, I have considered the impact of the delays on Mr & Mrs M, and this has been reflected in an increased award for trouble and upset. In terms of an interest payment to counter the impact of inflation, there is an interest payment – the 7.5% - over the last four years and going forward for another 16 years, which as I have said I believe to be a fair and reasonable in the circumstances of this complaint.

I also appreciate Mr & Mrs M chose to ask their accountant to project a potential loss for them, but I can't fairly hold Brewin Dolphin responsible for those costs, as it was choice on their part rather than a necessity in the settlement of this complaint.

In terms of Brewin Dolphin being asked to calculate the redress, this is standard practice and the calculation assumptions have been specified within my decision. So, whilst I understand Mr & Mrs M may have lost confidence in Brewin Dolphin, it is a mistake they have made and so one which they must put right. If however, Mr & Mrs M felt further errors had been made within the calculation they would be able to bring the matter back to this service.

I hope this decision finally settles this matter and provides reassurance to Mr & Mrs M about the redress required and the manner in which the calculations should be carried out.

Putting things right

I direct Brewin Dolphin Limited to calculate the potential loss that Mr & Mrs M may incur due to its error which led to £20,000 being held outside of each of their ISAs. To do so Brewin Dolphin should use the following assumptions:

1. Any charges on holding the investment outside the ISA will not be significantly different from those that would have applied if it had been held within an ISA
2. Mr & Mrs M will pay tax on the investment at the highest rate applicable to each of them. In this case an assumption of basic rate tax should be used for Mrs M and higher rate tax for Mr M
3. In both cases the tax position will remain unchanged for the assumed period of 20 years.
4. The tax position of the investment will remain unchanged.
5. If the investment pays dividend distributions, it will return 7.5% each compounded year (made up of 5% growth and 2.5% dividend)
6. Pay Mr & Mrs M £750 each for the trouble and upset this matter has caused.

My final decision

For the reasons I have given I uphold this complaint and direct Brewin Dolphin Limited to undertake the redress as detailed in the Putting things right section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M and Mr M to accept or reject my decision before 20 April 2023.

Wendy Steele
Ombudsman