

The complaint

Mr O complains, with the help of a representative, that James Hay Administration Company Ltd (James Hay) accepted the in-specie transfer of Elysian Fuels shares into his self-invested personal pension (SIPP) without undertaking appropriate due diligence, ensuring the shares were independently valued or having proper procedures in place for transactions of this nature.

What happened

Mr O established a SIPP with James Hay. A SIPP application form noted that an employer contribution of £100,000 was to be paid into the SIPP. The application form was signed by Mr O on 16 July 2012. An additional initial cash contribution of £1,495 was paid into the SIPP by cheque by Mr O's company.

Mr O bought 100,000 shares in Elysian Fuels in his personal capacity by way of paying a 16p per share cash contribution and with the 84p per share balance financed by a limited recourse loan. He then sold these shares to his company at £1 per share, in connection with this sale, £100,000 was paid to him by his company. Later, on 3 October 2012, these shares were transferred in-specie into his SIPP by way of an employer contribution from his company.

Mr O later purchased a further 96,000 shares in a later tranche of Elysian Fuels in his personal capacity in the same manner as set out above. He then sold these shares to his company at £1 per share, in connection with this sale, £96,000 was paid to him by his company. These shares were transferred in-specie into his SIPP by way of an employer contribution from his company on 4 April 2014. This complaint relates only to this transaction.

James Hay has told us that no tax relief was claimed at source in respect of these contributions.

The Elysian Fuels scheme has since failed, and the shares transferred into Mr O's SIPP are valued at nil.

Background to the complaint

Mr O complained to James Hay on 7 January 2020. James Hay issued a final response letter on 17 January 2020 explaining that it thought the complaint had been referred to it late. Unhappy with James Hay's response, Mr O referred his complaint to this service.

As noted above, Mr O purchased and sold two separate tranches of Elysian Fuels shares which were transferred into his SIPP by way employer contributions at different times. This complaint relates only to the second tranche of shares, what happened in relation to the first tranche of shares is being considered under a separate complaint. James Hay objected to us considering these two separate events as separate complaints, one of our investigators explained why it was appropriate to do so under the circumstances.

The investigator went on to look into Mr O's complaint. She concluded that the complaint had been raised within six years of the event complained about and so had been raised in time and was one we can consider but, in her view, Mr O hadn't suffered a loss as a result of James Hay's actions. She concluded that:

- Mr O had purchased the Elysian Fuels shares in his personal capacity at 16p per share (with the rest of the purchase being funded by a limited recourse loan) and then sold them at £1 per share to a company (of which he was a director). James Hay had no involvement in this transaction. From this Mr O gained the tax-free release of monies from his business.
- His business then transferred those shares in-specie to Mr O's SIPP by way of an employer contribution. Any impact the transactions may have had on the company, financial or otherwise, is not relevant here as Mr O has complained in his personal capacity.
- In any event, Mr O had failed to evidence any adverse tax implications resulting from this transaction. Despite us having requested copies of correspondence from HMRC.
- Overall, there's no evidence that Mr O has suffered any loss in his personal capacity as a result of James Hay's acceptance of the in-specie transfer of Elysian Fuels shares.

Mr O disagreed and made further submissions, he said:

- He had incurred fees that he wouldn't have if James Hay hadn't accepted the in-specie transfer. And fees were charged for services that James Hay failed to undertake.
- Mr O's employer would have paid a £96,000 cash contribution into his pension, if James Hay hadn't accepted the Elysian Fuels shares as an in-specie transfer.
- The tax implications associated with this transaction have caused Mr O distress.

The investigator confirmed that the submissions didn't change her view of the complaint and they had been added to Mr O's case for the ombudsman's consideration.

Because agreement couldn't be reached, this complaint was passed to me for review. I sent the parties to this complaint my provisional decision, explaining why I didn't think Mr O's complaint should be upheld. Mr O disagreed with my decision and made further submissions. Briefly, he said:

- He has incurred costs that he wouldn't have incurred if James Hay had not accepted the in-specie transfer of Elysian Fuels shares to his SIPP.
- He was charged stamp duty on each of the in-specie transactions.
- He wouldn't have incurred the fees associated with the establishment and ongoing administration of the SIPP if James Hay hadn't accepted the in-specie transfer of the Elysian Fuels shares.
- The various consequences of the transactions that are the subject of this complaint have caused him stress and inconvenience.

James Hay didn't make any further submissions.

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 reconsidered all of the information we've received, along with the submissions made in response to my provisional decision, my findings remain as set out in that decision. I've largely reiterated these below.

The parties to this complaint have provided detailed submissions to support their position and I'm grateful to them for taking the time to do so. I've considered these submissions in their entirety. However, I trust that they will not take the fact that my decision focuses on what I consider to be the central issues as a discourtesy. The purpose of this decision is not to address every point raised in detail, but to set out my findings, on what I consider to be the *main points*, and reasons for reaching them.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

The Elysian Fuels scheme in this case was an unusual arrangement. It often involved buying shares largely with a limited recourse loan and then selling those shares to the SIPP so that funds were paid out of the pension scheme to the investor. This is, as I have said, an unusual arrangement and on closer inspection HMRC was not happy with it. It found that such payments were unauthorised payments and imposed unauthorised payment charges, surcharges and interest. It has also denied a number of different tax reliefs claimed in connection with the Elysian Fuels scheme. However, in this instance it's of note that the shares were transferred into the SIPP by way of an in-specie transfer, so no monies were released from the SIPP – and, whilst Mr O may have purchased the shares in the manner set out above, the party (Mr O's business) transferring the shares to his SIPP had actually paid £1 per share.

There are numerous examples of investment schemes that are set up to make use of tax concessions which push, with varying amounts of aggression, at the boundaries of the purpose of the concession. Sometimes people invest in those schemes without understanding there is a risk that HMRC might challenge the scheme. Sometimes people invest in those schemes understanding and accepting the risk HMRC might challenge the scheme. And over recent years, as seen for example with film partnerships, HMRC has been more and more active in challenging the schemes it thinks are tax avoidance schemes.

We've been provided with redacted correspondence from HMRC in which it said, in relation to the Elysian Fuels scheme, that:

"Elysian Fuels is an undisclosed mass marketed multi use tax avoidance scheme which HMRC considers one of the main purposes of the arrangements was to secure a tax advantage. You have entered into a scheme where the tax benefit exceeds the potential return from the underlying business plan. You did not pay a cash contribution of the purported £1 per share and the loan finance was provided on uncommercial terms in addition the loan finance was never in your control being paid directly to the special purpose vehicle. The funding of the whole scheme is of a circular nature and the funds were never available for the underlying purpose.

The promoter of the scheme has recently confirmed that no formal valuation of the shares was carried out and did not consider any third parties had sufficient information or access to documentation to carry independent valuations. There was a valuation of the underlying business assets which were owned by another entity but neither the Elysian Fuels LLP nor the Special Purpose Vehicle funding company owned any tangible assets. This is a complex valuation issue and HMRC initial view is the shares had no value when the transaction took place."

As set out at the outset of this decision, Mr O purchased 96,000 shares in Elysian Fuels in his personal capacity. He then sold these shares to his company at £1 per share, in connection with this sale £96,000 was paid to him by his company. These shares were subsequently transferred in-specie into his SIPP by way of an employer contribution from his company. So, the activity that's the subject of this complaint was part of a wider endeavour undertaken by Mr O and I've considered this carefully in reaching the conclusions set out below.

Mr O complains in his personal capacity that James Hay failed to comply with its regulatory obligations and act in his best interests in connection with its decision to accept the in-specie transfer of the Elysian Fuels shares from his company.

I'm not persuaded that Mr O suffered adverse tax implications as a result of James Hay's decision to permit the in-specie transfer of the Elysian Fuels shares. No monies were released from Mr O's SIPP in connection with this transaction, so he hasn't been pursued for an unauthorised payment charge and James Hay has confirmed that no at source relief was claimed on this contribution.

I acknowledge that Mr O may have suffered tax implications as a result of his personal investment in Elysian Fuels shares and subsequent sale of these to his business, but I don't think this could fairly and reasonably be linked to an act or omission on James Hay's part. It's also possible that Mr O's business faced tax implications as a result of these transactions, but it is not the complainant in this complaint.

Mr O's SIPP was established some time before the transaction that's the subject of this complaint and he continued to utilise it for a number of years after this transaction. Whilst taking into account what Mr O said in response to my provisional decision, I'm not persuaded in this case that it would be fair and reasonable to direct James Hay to refund to Mr O fees charged in connection with the operation of his SIPP.

Stamp duty was paid in connection with the re-registration of the Elysian Fuels shares. This charge isn't specific to Elysian Fuels and is applied to transactions of this nature regardless of the particular asset. The re-registration did take place in this instance, and, in the circumstances of Mr O's case, I'm not persuaded that it would be fair and reasonable to direct James Hay to refund this charge. As noted above, the activity that's the subject of this complaint was part of a wider endeavour undertaken by Mr O and Mr O's company paid a cash contribution into the newly established SIPP.

I note that Mr O has also said that his employer (his business) would have paid a £96,000 cash contribution into his pension, if James Hay hadn't accepted the Elysian Fuels shares as an in-specie transfer. At the point James Hay decided to permit the in-specie transfer of Elysian Fuels shares to Mr O's SIPP, his business had already paid £96,000 to him in cash for the purchase of the shares in question. On the evidence provided to us to date, I'm not currently satisfied it's more likely than not that if James Hay had refused to accept the in-specie transfer of these shares that his business would have instead made a cash contribution of £96,000 to his SIPP.

I'm also not persuaded that James Hay has caused Mr O stress and inconvenience for which it should fairly and reasonably compensate him.

In my view, in the unusual circumstances of Mr O's case, even if James Hay did not carry out adequate due diligence on the Elysian Fuels scheme and or undertake sufficient steps before deciding to accept this in-specie transfer (and I make no finding on that point), I don't think Mr O has been caused a loss for which it would be fair and reasonable to hold James

Hay responsible. So, in the particular circumstances of his case, I do not uphold Mr O's complaint and I make no award.

My final decision

Taking everything into account and for the reasons set out above, my final decision is that I don't uphold Mr O's complaint and I make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 27 October 2023.

Nicola Curnow
Ombudsman