

The complaint

Mr A complains about Chase de Vere Independent Financial Advisers limited ('Chase'). He says that he should not have been advised to invest in a UK Individual Savings Account ('ISA') as they are not profitable for US citizens. This is because of the high tax liability, the complexity of the accounting process and the United States ('US') Internal Revenue Service ('IRS') reporting requirements.

What happened

Our Investigator thought the complaint shouldn't be upheld as he thought that Chase had already made a reasonable offer to settle the complaint. Mr A, and his representative, disagreed with the Investigator's opinion. The complaint was then passed to me.

I issued my provisional decision saying that Mr A's complaint should be upheld. A copy of the background to the complaint and my provisional findings are below in italics and form part of this final decision.

What I said in my provisional decision

Mr A met with Chase in November 2017. At this time a fact-finding process took place. This showed that he was 48, single with no dependents and employed. He initially held about £42,500 in cash ISA's and £42,500 in cash savings. It was noted that Mr A was a US citizen. I understand he had dual nationality with the UK. And he completed his own IRS returns. The amount of savings Mr A had increased in 2020 when he made the further investment.

Following this, Mr A was advised to make a series of investments in stocks and shares ISA's. These were as follows:

- In December 2017 Mr A invested £68,000 in a stocks and shares ISA. This used a range of funds.*
- In January 2020 Mr A invested a further £40,000 in a stocks and shares ISA. Again, this used various funds.*

Mr A transferred to a different advising business in 2020. He says that he sold the investment in 2021 to avoid the ongoing tax charges. He did this before the end of the US tax year, which is in December 2021.

The US taxation system regards the funds that the ISA invested in to be Passive Foreign Investment Companies ('PFIC'). US investors in this type of product are subject to a special reporting regime and gains are taxed at a higher rate than ordinary investments would be in the US. This higher taxation essentially removes the advantages of investing in an ISA for a US citizen. And the special reporting regime is onerous; I'll provide some detail about this later.

Mr A complained to Chase about the advice he was given. He said it was inappropriate because:

- There is no equivalence in the US for UK based ISA investments, and he has incurred a tax liability.*
- The process for determining this tax liability is very complex and he needed to employ a professional to help him with this.*

- The second adviser, whom he was referred to after Chase could no longer look after him when he stopped being a UK citizen, has confirmed the investments were not suitable for him.
- Chase should have known that the stocks and shares ISA would have caused these problems.

And Mr A's representative has outlined the losses that it thinks Mr A has suffered which are comprised of the tax he paid, the accountants and filing fees for the IRS documentation and his legal costs. Mr A's representative feels that compensation should be about \$45,000 to account for all of this. This is comprised of various fees and charges, the main ones being a Payment of just under \$19,000 to the IRS in April 2022 relating to the tax year up to 2020, about \$12,000 in legal fees for advice relating to the complaint and the investment and about \$4,000 for accounting fees. Mr A thinks he should also receive back the fees he paid to Chase and some interest.

Mr A's accountant has provided a letter dated 10 February 2022 which says that PFIC's are generally considered inefficient investment choices for US taxpayers. The fee for the IRS filing was \$6,200. As he still owned the shares in 2021 Mr A would need to pay a further \$1,800 for the tax year ending in 2021.

Chase has considered Mr A's complaint and has upheld it. It recognised that the advice to transfer his investments from a cash ISA and savings accounts to a stocks and shares ISA, has resulted in complicated reporting requirements for Mr A. And this should have been highlighted to him before he invested. It offered to pay an invoice that Mr A had produced in respect of this tax calculation, this was £6,441, it rounded this up to £6,600.

Mr A hasn't agreed to this, and he said that he also needed to submit tax returns for the 2021 tax year as well. He said that the advice given by Chase in 2017 and 2020 had directly led to the costs he had incurred. And he didn't find out about the tax issues until 2021 when he already had to file returns for this tax year end. He only invested in the ISA due to the advice given by Chase but it was not suitable for him, and so Chase should cover all of the consequential losses.

Chase doesn't agree and says that as Mr A had transferred away from it in 2020 the new adviser should have provided advice about whether he could retain or surrender the ISAs. It didn't think it should pay any further fees.

There has been some ongoing correspondence between Mr A and his representatives, and Chase and its legal representatives. I have read all of this, and I'll summarise some of it below.

Mr A's representative said the following:

- It noted that Chase has accepted that the advice was wrong, and that compensation has been offered of £6,600 for the tax year ending in 2020.
- It felt that compensation should also be offered for the 2021 tax year. As this stems from the basis of the advice given in 2017 and 2020. This would not be affected by the new advisor.
- Mr A Should receive a distress and inconvenience payment of £500.
- And his legal fees of £7,321.80 should also be paid.

Chase's legal representatives have also considered this complaint and they have reached a different conclusion to the outcome contained in Chase's final response. They said that:

- Generally speaking, issues of foreign tax, or tax at all, would not be considered as part of the advice process unless the consumer has asked for this to be the case
- But it has acknowledged that Chase's advice gave rise to a tax charge.
- The advice was not worthless as the ISAs performed very well.
- No distress and inconvenience should be paid as this is a civil claim.
- Mr A's accountants and legal fees seem very significant for the work they have entailed.

It also didn't think a loss has been suffered. This is because it said the investment had increased. It calculated that the ISA had provided a gain of about £35,000. This seems to be calculated with reference to an index rather than the actual performance of the investment. It said that Mr A would have been able to receive interest elsewhere of just over £1,500, and it also took from this the fees

Mr A had paid to Chase, the US tax he paid and the accounting fees. This calculation showed he was £1,300 better off.

Mr A doesn't agree with this. As no agreement was reached the complaint was brought to the Financial Ombudsman Service.

One of our Investigators considered the complaint, but he did not think that Chase should do anything further. This was because:

- He thought the investments themselves were suitable for Mr A's circumstances and did not have more risk than he wanted to take, it was fine to recommend he start medium term risk bearing investments.*
- There was no indication that he was returning to the US and so he could utilise his ISA allowance over this time.*
- Mr A already completed his own US tax returns and so he should be familiar with the process.*
- He was advised to seek tax advice if he needed this. And there was an international tax section in the literature he received.*

Mr A and his representatives didn't agree. They said that:

- No reasonable person could think that the advice was suitable.*
- It said that Chase had already admitted that the advice wasn't right for Mr A.*
- It wasn't relevant that he completed his own IRS return.*
- The tax warnings were standard and failed to consider Mr A's actual tax position. Mr A should have been able to rely on Chase's advice and assume that it was not grossly negligent.*
- An investment adviser should pay regard to the tax treatment of the investment.*

As no agreement has been reached the complaint has been passed to me to consider.

What I've provisionally decided – and why

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

Our Investigator, and Mr A and his representative have talked about whether this investment was suitable for Mr A in general terms. I don't disagree that the investment funds may have matched Mr A's attitude to risk and he had enough funds to invest at both of the times he did. So, considered this way, the investments he made weren't unsuitable for him.

But I don't think this is the most relevant consideration here. I think the tax treatment of the investment is more important. It is the case that Mr A, being a citizen of the UK and US, was subject to a different tax regime than a UK citizen would be. Because of his dual nationality, the US tax treatment of the stocks and share's ISA meant there would be minimal, if any, advantages to Mr A to starting this product for taxation purposes.

I don't think it was right when our Investigator said that Mr A could have benefitted from the stocks and shares ISA's favourable tax treatment in the past, I don't think Mr A was able to receive the UK taxation benefits of an ISA at any point as the US taxation system tends to negate these.

And because Mr A invested in UK 'mutual' funds the US reporting regime he needed to follow was very onerous. I have looked into how he needed to provide the information to the IRS about the ISA.

Mr A needed to complete a certain form. The notes to this form show that that the IRS expected the form to take around 43 hours to complete with 20 hours of this engaged in research into the legal and regulatory aspects of this investment situation. And this form had to be completed for each fund, and I understand Mr A (using an accountant) filed 31 copies of it to the IRS in the 2020 tax year. I think it's reasonable to say that this is a significant and complex procedure and Mr A would either have to spend a large amount of time doing it himself or employ a professional on his behalf at significant cost, as he did. It's difficult to see how he could avoid employing a professional.

Some of the correspondence from Chase's representative has said that Chase didn't specifically advise on the taxation of the ISA, and it wouldn't normally do so. I don't think this is reasonable here. Of course, Chase couldn't have advised Mr A about the amount of tax he would pay, or the detail that surrounds this.

But I would have expected Chase to have been aware that Mr A may face complications due to investing in a stocks and shares ISA. It's well known that having dual UK and US citizenship can cause tax complications. So, Chase should have been aware, or found out, that the tax treatment of this investment could be problematic and would potentially render the advice unsuitable for Mr A. And Chase itself has said that it should have highlighted the complicated US tax regime that the investments were subject to.

I don't think this is mitigated by Mr A already completing his own IRS forms. The US reporting requirements for the ISA seem to have been a significant change and an increase in the complexity of the reporting Mr A would need to do. I think it would be doubtful that he could do this on his own as I've said above. This change has come about due the advice he was given to start the stocks and shares ISA.

So, my starting point is that Mr A shouldn't have been advised to invest in the stocks and shares ISA's in the way that he was. And he should have been given much better information about the likely taxation effects and the reporting needs. This means that I think the advice Mr A was given to start the ISA wasn't suitable for him. And if he had been given better advice, and or information, he wouldn't have invested in this way.

I have considered how this should be put right. I think it's established that Mr A has incurred accountants fees that he could have avoided if he had been advised to invest elsewhere. But I don't think this is the only point to consider in this compensation calculation.

The aim of any compensation should be to put a consumer back into the position they would have been in, had the business not made the errors that it did. I think the starting point of this is that he would not have taken out the ISAs. So, any investment loss or gain he has made should also be factored in. This is because the taxation has arisen due to the gains that Mr A has made on the investment. So, it isn't right to provide compensation in respect of the higher taxation without considering these investment gains or losses.

As I'm deciding that Mr A would not have invested in the stocks and shares ISA's if he had been advised properly, I need to consider what he would have done if he had been given better advice. Before the advice Mr A held his money in cash-based savings (some of which were held in an ISA) Given that the problems moving these to a stocks and shares ISA would cause I think he would have left the funds in cash-based areas. But I accept that he was looking to change his investments and so I can't be certain that he would have left the funds in the investments they were in.

So, I think the calculation of what he would have done if he had not been given advice should be calculated with reference to an index. Where I think a consumer would not have taken a risk, or only taken a small risk, a suitable index is the Bank of England average return from fixed rate bonds. I think that Mr A's investment should be compared with the returns he would have received if he had invested in this.

I don't think the compensation should be limited up to the point at which Mr A changed advisers. Any loss or detriment Mr A suffered was due to the advice given by Chase. I've seen no evidence that the subsequent adviser took steps, or was asked to take steps, to mitigate any losses Mr A was suffering due to this. Even if the subsequent adviser did give advice about this it doesn't seem like there was enough time for Mr A to avoid a tax charge for the tax years ending in 2020 and 2021.

Mr A has claimed some legal fees that he has said he would not have incurred if Chase had not advised him to start the ISA. These do seem to be very significant and as a starting point the Financial Ombudsman Service wouldn't make an award on this basis. This is because we are a free service to consumers and so it's not clear to me that Mr A needed to incur these costs. So, I'm not intending to make an award on this basis.

And it is clear that this issue has caused Mr A a significant amount of distress and inconvenience. And this has been a relatively long running problem which has been difficult for him to resolve. I think £500 compensation for this is reasonable.

Developments

Chase, and Mr A, confirmed that they had received my provisional decision. Both Chase, and Mr A's representative, didn't fully agree with my provisional decision.

Chase said that:

- It provided information about an offer it had made to Mr A's representative (a letter dated 27 February 2023) on the basis that Mr A should receive compensation of the tax he paid, the cost of the accountancy services he incurred, and a refund of the fees paid to Chase. This should be offset against the investment gains he made.
- It didn't, and wasn't asked to, provide advice on issues of foreign taxation. It disclosed this to Mr A and that it wasn't an expert in overseas taxation.
- The use of the fixed rate bond index wasn't reasonable as Mr A wanted to achieve capital growth and had an adventurous attitude to risk. The assets in the index would also be subject to the same US reporting regime.
- My earlier decision essentially says that the only assets suitable for a US investor would be cash which would be very restrictive and would not account for individual suitability.
- Mr A ended the agreement with Chase and so it should not be liable for any actions that took place after this.

Mr A's representative said that:

- They also did not think that the fixed rate bond index was reasonable to base compensation on as Mr A would have invested in stocks and shares in a way to avoid the taxation problems he faced.
- Chase should have realised that it lacked the relevant expertise to advise Mr A and he would have invested using a specialist firm or invested in the US. He would have likely received the same investment returns.
- So, the loss calculation should not take into consideration the investment returns he made as Mr A would have made these in any event.
- The correct loss is the tax Mr A paid, the accountants' fees he paid, plus an award for the distress and inconvenience he suffered.
- It also thought that this was a complex area, and as Chase is at fault Mr A should receive 70% of his legal fees.

As no agreement has been reached, I've gone on to issue my final decision

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.

I think it's reasonable to say that Chase and Mr A didn't raise any materially new points after receiving my provisional decision. So, I've reached the same conclusions I reached before, for the same reasons. That said I'll clarify some of my thinking around the issues that have been raised.

And just to be clear I had seen the letter dated 27 February 2023 that Chase's representative sent to Mr A's representative. And I did consider it before issuing my provisional decision.

Having considered everything again I think it's important to reiterate that Chase has upheld this complaint and it had already agreed it should have provided better information to Mr A. And if it had done this then he may have acted differently. In its final response, and the above correspondence between both parties' legal representatives, it has been agreed that some form of compensation should be calculated and paid to Mr A. As before I'll largely consider what I think is fair compensation.

Chase has again said that it shouldn't be responsible for an individual's tax situation, particularly if they are an overseas customer. It has said that the Financial Ombudsman has agreed with this approach in other decisions.

However, I am required to decide each case on its individual merits and so whilst we may have reached certain outcomes in other similar cases (if they are similar) this doesn't automatically mean that I must reach the same outcome here. But in general terms I accept that Chase is not a taxation specialist, or a firm of accountants, and would not be able to give Mr A detailed advice or information about his own personal tax liability. I'm also aware that this is something that his accountant has gone on to do.

But Chase should consider the general taxation implications of the products it advises on, in relation to a consumer's circumstances, in all of the advice it gives. And the taxation treatment of a product is usually an important part of why it has been recommended, as it was here.

And when giving advice to Mr A, Chase should have been aware of his dual citizenship within the UK and the US, and that this might cause complications with the investments it was advising him to start. This isn't specialist taxation information relevant to Mr A it is general, and widely available knowledge, that Chase should have taken into consideration when advising him. And it has accepted that this should have provided better information about this in its final response to the complaint when it recognised that it should have highlighted the complicated US taxation reporting regime around the investments it was recommending to Mr A.

And in general terms whilst I agree that the advice wasn't suitable for Mr A, the primary reason I think the complaint should be upheld is because of the information that Mr A should have been given. Rather than any specific tax advice in relation to his circumstances he could have received.

Both sides have disagreed with my use of the fixed rate bond index as a comparator in the compensation.

Chase says that these assets would also have caused the same taxation issues if Mr A had invested in the same way as the index shows. But, as I said earlier, this index is a comparator for redress only I'm not saying that Mr A would, or should, have invested in it. It gives an indication of the amount of returns that Mr A may have received in lower risk investments, but no more than this.

Both parties to the complaint have said that Mr A was a higher risk investor and so a comparison should be made with higher risk investments. So, this lower risk fund is not suitable to use.

I did consider this in my earlier decision, and I think the evidence about Mr A's investment preferences and attitude to risk are not clear cut. On the one hand it was documented that he had a higher attitude to risk. But when he met with Chase for advice his funds were held in cash. Which indicates a very low tolerance for risk. I've not seen that Mr A had much, if any, experience of risk bearing investments which I would expect to see if he had a higher attitude to risk.

Mr A invested in a mainstream UK product on the basis that it could provide some equity-based returns and it had a favourable tax treatment. I'm not persuaded that if he was given the correct information that he would have gone on to invest, either with Chase, or through other more specialist advisers. Overall, I still think it's unlikely that Mr A would have made alternative risk bearing investments if he had been informed by Chase about the complications that this could lead to. As I think Mr A's money would have remained largely in cash-based areas I think the fixed rate bond index is reasonable to use for the purposes of calculating compensation.

I still think Chase's liability doesn't end when he changed advisers. As I said in my earlier decision any loss, or detriment, Mr A suffered was due to the advice (or lack of) given by Chase. I've seen no evidence that the subsequent adviser took steps, or was asked to take steps, to mitigate any losses Mr A was suffering due to this. Even if the subsequent adviser did give advice about this it doesn't seem like there was enough time for Mr A to avoid a tax charge for the tax years ending in 2020 and 2021.

And I don't think it's reasonable to say that my decision can be applied generally across all investors. It is specific to Mr A's circumstances only.

I can see that Mr A has incurred significant fees from his representative. And whilst I accept this issue is complex, we are a free service to consumers and I don't think it's reasonable to say that Mr A wouldn't have been able to start the complaint process without the help he has received. I do think the accountants' fees he had paid should be refunded to him, but not any fees he may have to pay to his representative.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Mr A as close to the position he would probably now be in if he had not been given unsuitable advice.

I think Mr A would have invested differently, and this would have led to him receiving a different return on his investments, paying different taxation amounts, and not paying the accounting and filing fees that he did. It is not possible to say *precisely* how he would have invested differently, but I am satisfied that what I have set out below is fair and reasonable given Mr A's circumstances and objectives when he invested.

What should Chase do?

To compensate Mr A fairly, Chase must calculate any investment gain or loss that his investments have provided. To do this it should:

- Compare the performance of Mr A's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
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ISA Investment	No longer exists	Average rate from fixed rate bonds	Date of investment	Date ceased to be held	8% simple per year on any loss from the end date to the date of settlement
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Actual value

This means the actual amount paid from the investment at the end date.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Chase should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum that Mr A paid into the investment should be added to the *fair value* calculation at the point it was actually paid in.

Why is this calculation suitable to determine if Mr A's investment loss or gain?

I have chosen this method of compensation because:

- Mr A would have been likely to want to achieve a reasonable return without risking any of his capital.
- The average rate for the fixed rate bonds would be a fair measure given Mr A's circumstances and objectives. It does not mean that Mr A would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to their capital.
- The additional interest is for being deprived of the use of any compensation money since the end date.

Chase should then determine the amount of taxation and the fees that Mr A paid due on the stocks and shares ISA's he was advised to start by Chase

Chase should determine:

- How much tax Mr A has paid due to investing in the stocks and shares ISA's Chase advised him to start.
- The accountants' fees that Mr A paid to determine the tax he should pay for these ISAs.
- Any other fees or charges that Mr A has incurred in filing his IRS returns that related to the investments in the stocks and shares ISA's.

Mr A should supply this information to Chase if it asks for it.

Calculating if Mr A has suffered a loss due to the advice Chase gave him

Chase should determine if Mr A has suffered a gain or loss on the investment by comparing the performance of the investments he did make and then deducting the fair value from this as calculated as above. And then taking from this the tax and accountants fees and charges that he paid.

If Mr A has made a gain on the investment, then Chase should deduct from this gain the amount he has paid in taxation and fees. To see if Mr A has lost out overall.

If Mr A did for some reason suffer an investment loss, then the total loss would be that figure plus what he has paid in taxation and the fees.

Interest should be added to any loss at the rate of 8% simple, from the date of the loss was incurred to the date of settlement.

Chase should also pay Mr A £500 for the distress and inconvenience this issue has caused him.

My final decision

For the reasons I've explained, I uphold Mr A's complaint.

Chase de Vere Independent Financial Advisers limited should put things right by doing what I've said above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 6 September 2024.

Andy Burlinson
Ombudsman