DRN-5385224

The complaint

Mr and Mrs F have complained about the advice they received from EQ Investors Limited, trading as EQ Wealth ('EQ'). They say EQ didn't meet the investment objective of wealth preservation in real terms which was hindered by the capital gains tax ('CGT') incurred. They also say EQ should have considered their personal tax and the implications of the discretionary activity in their portfolios. They would like the CGT they have paid returned to them.

What happened

Mr and Mrs F received advice on their portfolio for several years from a predecessor business that was brought out by EQ. Their adviser was the same with both businesses and Mr and Mrs F were invested on a part discretionary basis since 2011. In 2016 Mr and Mrs F were advised to rebalance their £1m portfolio – part of which was managed on a discretionary basis and the other on an advisory basis – within two joint EQ discretionary managed model portfolios.

As a result of the advice Mr and Mrs F incurred CGT liabilities of around £40,000. They raised their concerns about the management of their investments and the tax position with EQ who responded on 24 August and 12 October 2023 not upholding the complaint. It said;

- There hadn't been any reference to tax in the maintenance of a real rate of return and its service agreement made clear it wouldn't be responsible for assessing any tax implications for transactions undertaken.
- It detailed the performance of the portfolio to demonstrate the performance against inflation over the previous six to seven years.
- An alternative adviser managed Mr and Mrs F's CGT allowances.
- Mr and Mrs F had raised concerns about the discretionary portfolio CGT, but Mr and Mrs F didn't take any action further to EQ's response.
- In July/August 2022 Mr and Mrs F were offered a switch to an advisory portfolio, but they declined this. And in July 2022 alternative investment options were offered to Mr and Mrs F, but these were discounted.
- Mr and Mrs F had complained that the impact of tax should have been considered as had been agreed, but EQ couldn't find any evidence of this.
- The discretionary portfolio service was suitable for Mr and Mrs F from 2011 and was aligned with their attitude to risk and investment objectives. But EQ wouldn't take account of their personal taxation.
- The portfolios were actively reviewed, EQ had provided the services it said it would, and statements were sent monthly.

Mr and Mrs F weren't happy with the outcome so brought their complaint to the Financial Ombudsman Service. Our investigator who considered the complaint didn't think it should be upheld. He said;

- He focused on advice meetings in 2016, the establishment of two joint discretionary portfolios which were to preserve Mr and Mrs F's wealth in real terms and the complaint that EQ should have considered the tax implications in the discretionary management of their portfolios.
- The portfolios were considered in isolation from Mr and Mrs F's other assets. Mr and Mrs F took advice elsewhere and didn't want to discuss estate planning, protection policies and retirement planning.
- The investment objective of the two portfolios was to maintain capital values in real terms. Mr and Mrs F didn't want to use the capital in the short to medium term as they had sufficient cash elsewhere.
- Mr and Mrs F hadn't suggested what other course of action they would have taken, and the CGT liability only occurred when the investment performance was positive and not necessarily due to a failure of discretionary management.
- EQ's service agreement confirmed it would give advice without consideration of CGT. It was for the customer to seek that advice elsewhere and the investigator thought Mr and Mrs F were happy with that arrangement. EQ had provided commentary about the CGT position, but the investigator didn't think it constituted advice.
- Mr and Mrs F had been offered the option of moving to an advisory relationship and while that may have prevented chargeable gains it would have led to less active management and attentive investment strategy, so they declined.
- Mr and Mrs F moved to a new discretionary portfolio service and the charging and fee structure was agreed at the time.

Mr and Mrs F didn't agree with the investigator. They said;

- EQ had always charged a fee of 1% of the portfolio value.
- They didn't use an 'umbrella taxation adviser'. The other firm referred to only provided taxation advice/commentary about its own recommendations.
- EQ was employed as their expert adviser. It wasn't right that the investigator had referred to statements made by EQ that it was contractually advised to provide and to other statements where it wasn't contractually obliged.
- The other firm Mr and Mrs F used had the larger portfolio and made use of ISA allowances and often CGT allowances and it was made clear that Mr and Mrs F wanted to maintain capital values in real terms in the absence of tax relief allowances. EQ hadn't advised they couldn't deliver this.
- It was wrong to say EQ could rely on the general service agreement as their specific requirements took precedence over that.
- It was reasonable for them to have been reassured by EQ that discretionary management was the most appropriate for them to deliver real growth.
- EQ was happy to provide taxation advice, but the discretionary managed portfolio would create a tax burden of around 100% for them. Without the use of an ISA or trust wrapper the use of the discretionary portfolio wasn't a sensible recommendation.
- Their adviser understood their situation but recommended the discretionary portfolio service which generated high tax liability because of the constant portfolio rebalancing. They would have been better off with the previous approach with a lower tax level and EQ would have known this. EQ negligently provided advice and recommendations that weren't appropriate and eroded their real wealth.

As Mr and Mrs F's response didn't change the investigator's mind and the complaint remains unresolved, it has been passed to me for a decision in my role as ombudsman.

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.

After doing so, I've reached the same conclusion as the investigator and broadly for the same reasons. I'll explain why.

I'm aware I've set out the background to this complaint in less detail than the parties and I've done so using my own words. The Financial Ombudsman Service was set up to be a quick and informal alternative to the courts. And the purpose of this decision is to explain what I think is fair and reasonable in the circumstances, not to offer a point by point response to everything the parties to the complaint have said. So, I will not refer to every submission, comment, or relevant consideration. Instead, my decision sets out what I think are the most important points to explain my decision in a way that is intended to be clear and easy to understand.

And where I have incomplete or contradictory information or evidence, I have based by decision on the balance of probabilities and what I think most likely happened.

Mr and Mrs F's complaint relates to the advice they were given in 2016 to fully transfer to EQ's discretionary model portfolios. I should say Mr and Mrs F haven't raised a complaint about the investments or their attitude to risk but rather the management of their investments without consideration of the tax implications and the preservation of their wealth in real terms. So, while I have a large file of correspondence, much of it relating to earlier meetings and advice, I have focused on those issues and the advice given in and around 2016.

On 16 February 2016 Mr and Mrs F's adviser wrote to Mr F further to a meeting held the previous day to summarise the discussion and agreed actions. Investment objectives had been reviewed and were summarised as 'maintaining your lifestyle' and that the investments to be managed by EQ were seen as 'one of preserving capital value in real terms for possible use at some point in the future.' Mr and Mrs F's attitude to risk was between balanced and cautious.

Mr and Mrs F had a large cash reserve of £1.5m they were happy to draw down to maintain their lifestyle. Mr and Mrs F's other investments were a much larger portfolio held elsewhere, and it was that business which generally had 'first call' on their ISA and CGT allowances and where higher risk investments such as Venture Capital Trusts ('VCTs'), Seed Investment Schemes ('SEISs') and Enterprise Investment Schemes ('EISs') were advised upon.
Mr and Mrs F also sought advice from another EQ colleague about private equity investment but for the purposes of the EQ discretionary service, it was only the two portfolios that were to be reported on.

Structured products had been discussed at the meeting but discounted because of the risk and its recorded Mr and Mrs F didn't want to add to their estate planning. Action points included Mr and Mrs F reviewing and signing the EQ Discretionary Portfolio Management Service Agreement and Services and Payment Agreement.

A further meeting took place at the end of July 2016 a summary letter was issued.
Investment objectives were recorded as being;

> 'We also reviewed your objectives which can be summarised as maintaining capital values in real terms within the confines of your attitudes to risk. You would like to pass more wealth to your sons, but neither of them has a need for it at this time. You are reluctant to establish a trust for now.'

Risk was assessed as being at a lower level than the external portfolio but bearing in mind its exposure to VCTs and EISs etc, this sounds reasonable. Regarding investment and tax planning;

> 'I know [the external adviser] looks after your ISA and similar tax planning investments and so I limited our discussion to looking to change investment tact to try to improve the overall return you are receiving from the […] based portfolios.'

For the EQ investments it was recommended that the two funds held should be rebalanced equally and funds were to be taken out of the Best Ideas portfolio and added to the Positive Impact Portfolio, so they were valued at around £510,000 each. It was noted the switch would likely give rise to a small capital gain which would be within their joint allowances but that would depend on gains realised elsewhere.

The above suggests to me that the adviser was just adding commentary about the CGT for the EQ investments in this instance and in isolation. No consideration was given to investments held elsewhere or the overall tax position. And while Mr and Mrs F have said the adviser did receive 'full reports on my assets and circumstances' from 'time to time' I can't see, or agree, it would have been possible for EQ to have managed the CGT position with so much of Mr and Mrs F's investible assets held outside of the discretionary portfolio. It wouldn't have known Mr and Mrs F's overall tax position at any given time, only for those investments it managed.

And I think the fact that an individual's tax position wouldn't be a consideration in the management of the model portfolio was made clear under section 14 of the agreement about taxation where it said;

> 'In providing this service we will not take into account your tax position and we will not be responsible for assessing any of the tax implications of transactions undertaken. Primarily we will make investment decisions without consideration of any taxation (primarily Capital Gains Tax) implications for do. We may however, as part of our services to you, offer Capital Gains Tax ("CGT") and/or other tax computations or information. Such computations and/or information will be provided in good faith, but we do not give any representation or guarantee as to their accuracy or completeness. We accordingly do not accept responsibility for the consequences of any action(s) that you may take in reliance on it and we expect that you will seek independent expert advice as appropriate for your requirements in this area.'

But Mr and Mrs F have said they weren't asking EQ to provide taxation advice but for it to consider the tax consequences of its investment advice against the agreed investment goals. And because of this, Mr and Mrs F say the advice to invest into the discretionary model portfolios wasn't sensible. However, I can't see there was any discussion about this over and above the agreement in correspondence about the preservation of capital in real terms within their agreed attitude to risk which this was without any reference to the tax position.

Mr and Mrs F say that they also made it clear that the alternative financial adviser was managing a larger portfolio which made full use of their ISA allowances and usually the CGT exemption and they needed an;

> '…investment strategy that could maintain capital values in real terms despite the absence of tax relief allowances.'

And that;

> 'At no time have EQ advised us that they are not capable of delivering, or not prepared to try to deliver, against the declared and agreed brief.'

Mr and Mrs F also say in UK contract law specific requirements take precedence over a supplier's general terms of business – the Discretionary Portfolio Management Service Agreement – in the event of a conflict of interest between the two. And in this case, they say they had a specific requirement – as quoted above – which was acknowledged by EQ and which it completely ignored.

But I can't find any evidence of this so I don't have anything which would lead me to conclude it had been agreed with the adviser that he would provide advice to maintain capital without knowing Mr and Mrs F's annual capital gains tax position. Looking at the size of their portfolio and wide variety of investments, I think this would be difficult to do in any event, and from what I have seen, the alternatives would only have been investments for tax mitigation/limitation and estate planning purposes etc.

I also note that when Mr and Mrs F signed EQ's discretionary management agreement on 8 August 2016 the agreement made clear the investments would be held within 'model' portfolios, so the portfolio itself wouldn't be managed on a bespoke basis. Mr and Mrs F held the investments under a discretionary mandate in the model portfolios which would constantly be monitored and rebalanced to ensure they stayed within the realms of the pre-agreed investment objectives of the portfolios.

And bearing in mind I think it more likely that it was the adviser's awareness the alternative adviser generally had 'first claim' on any tax allowances which led him to conclude CGT implications wouldn't be a primary consideration unless advised otherwise, and I can't see that he was. I say this because of reference to the alternative provider and tax in earlier correspondence. As an example, the review summary of 27 July 2015 said;

> '**Investment / tax planning** – you mentioned you receive specialist tax advice and will maintain tax and investment planning through [the alternative provider]. You mentioned in practice this is more likely to be VCT and ISA planning with [the alternative provider] than further EIS investment...'

I've looked at the service that Mr and Mrs F agreed to, and the 'Service & Payment Agreement' signed in February 2016 referred to the ongoing services that would be provided and which included 'Review your use of tax allowances.' But bearing in mind the other alternative adviser Mr and Mrs F used, it's clear that adviser had 'first claim' on Mr and Mrs F's CGT allowance and so I don't think it was unreasonable for EQ to conclude that tax allowances were dealt with elsewhere. I acknowledge it was referred to during the advisory letter to rebalance the investments within the model portfolio and at other times, but I can't see it was an ongoing service that EQ said it would offer or provide.

So, I'm not persuaded, in the absence of evidence to the contrary, it was likely that Mr and Mrs F did agree with their EQ adviser that he should consider the tax consequences of its investment advice against the agreed investment goals.

Mr F, in particular, was a very experienced investor, so I find it surprising that he signed his agreement to use the services of the model portfolio without a full understanding of what that service was – that their investments would be pooled and rebalanced as necessary. For this type of portfolio, the control over the tax position is negligible and it wouldn't be unlikely for a CGT liability to come about as a result. And I haven't seen anything to indicate this would have been different for Mr and Mrs F's portfolios.

EQ had been managing a discretionary investment model portfolio for Mr and Mrs F since 2011 and I can't see any significant change in how EQ managed its portfolios, its trading policies or its client agreement that it allowed it to do so. And having invested in ISAs, VCTs and EISs elsewhere, Mr F would have been aware of the tax benefits and reliefs of those types of investments when compared to other investments, such as the model portfolios, that wouldn't benefit from tax allowances/mitigation and so would attract the usual tax liabilities. And it has to be borne in mind capital gains are evidence of the discretionary fund manager, successfully acting in that role, and realising profits for the underlying investors or when rebalancing the investments. So, the discretionary portfolio succeeded in line with its investment objectives.

While I appreciate Mr and Mrs F are higher rate tax payers and so CGT was more punitive for them but if Mr and Mrs F had wanted a service that limited any capital gains, while their adviser didn't have access to any of their tax allowances, then I would have expected for them to have clarified and agreed this with their adviser. Mr and Mrs F have said that the agreement should be recorded in the documents that have been provided. But I haven't seen anything to that effect and can only make my decision based on the evidence and information presented to me. And in the absence of such evidence, I have to reach a conclusion based on what I think most likely happened. But for the reasons given above, I'm not persuaded such an agreement was in place, so it follows that I don't uphold this point.

In response to the investigator, Mr and Mrs F said EQ accepted the brief to 'maintain capital in real terms' within the confines of their attitude to risk and that they had requested wealth preservation net of costs ie after all costs of management etc and including any tax payable. They also said that after accounting for income, dividend tax and CGT, less EQ's fee they received a 1% return which was less that inflation and so didn't constitute preservation of capital in real terms.

However, I can't see there was any discussion about wealth preservation net of all costs including tax in the brief that was agreed with their adviser. The only agreement I can see in correspondence is the preservation of capital in real terms within their agreed attitude to risk. And my understanding of 'preservation of capital in real terms' is ensuring the value of the investments hold their value despite inflation. I can't see any reference to wealth preservation net of costs including tax and Mr and Mrs F haven't provided me with anything to persuade me otherwise, so I don't agree with Mr and Mrs F on this point.

And regarding the portfolios I see that in June 2020 Mr F asked EQ for copies of the CGT reports and he was pleased the portfolio had recovered so well since March 2020. In October 2020 he emailed his adviser;

> '…we're paying CGT on the gains from our [discretionary] portfolios because [the alternative provider] usually manages our other investments to mop up annual CGT allowances. This year, it's quite a significant sum since there are around £50000 of unprotected gains. This has set me thinking: if as rumoured, CGT rates are aligned with income tax then we'll be paying 40/45% tax on gains and that will have a material impact on overall portfolio performance. Is EQ proposing to refine its portfolio management policies to mitigate this effect, or do I need to think about withdrawing from the discretionary funds?'

The above suggests to me that Mr F acknowledged there were unprotected gains within the portfolio because of the good performance but didn't express any issue with this, in and itself, or that EQ had acted outside of any agreed brief over and above those I've already referred to. My reading of the above is it was only the potential change to CGT rates that caused Mr F to reassess the CGT position on the EQ portfolio at a time when he was already aware how the portfolio was being managed ie on a model basis that could incur CGT. And it looks to me that it was only because of the potential changes to CGT rates that prompted Mr F to question whether EQ would make any changes to its management policies.

And I note EQ did respond saying amongst other things that Mr and Mrs F could change from the discretionary service;

> '…but usually changes [within the model portfolio] are made to either protect capital or seek more profit. By turning off discretionary management we are effectively exposing the portfolio to higher risk of loss or less chance of making profit, in an environment that is likely to see governments around the world encouraging equity investment. If this is the case, this may not prove to be a good time to reduce portfolio flexibility.'

I can't see that Mr and Mrs F took any further action at the time so there's nothing to suggest they were dissatisfied with how their portfolios were being managed to such an extent that they would consider changing the discretionary basis of management.

I note that on 3 July 2022 Mr F contacted EQ as he was disappointed with the performance of his EQ portfolios, and he asked whether he should withdraw from the service and what the options were. Mr F's adviser responded with the opportunity to meet to discuss alternatives and to meet one of the portfolio managers. Mr and Mrs F's adviser replied with three options that were available including the option of switching to an advisory service. Disadvantages as well as advantages were listed for each option. A meeting was agreed for August and further to that Mr and Mrs F's adviser emailed on 11 August 2022 to reiterate he would;

> 'switch off the discretionary model at your request. If this is something you would like, just let me know. I should flag that we will be rebalancing your portfolios next week. This will cause a number of trades to occurs. If you would rather this did not happen, please let me know.'

Mr F responded to say, 'Don't switch of[f] the discretionary model at present' and the adviser said he would take any further action unless instructed but I can't see there was any reply at the time. So, I'm satisfied EQ did respond to Mr and Mrs F's concerns as and when they were raised but I haven't seen any evidence that EQ didn't act as agreed at the outset. And Mr and Mrs F were given the opportunity withdraw from the discretionary service or consider alternative options to reduce CGT liabilities.

Overall, I haven't seen sufficient evidence to persuade me it was agreed with EQ that it should have considered Mr and Mrs F's personal tax positions in the management of the discretionary portfolios. And in my opinion, it seems an unlikely scenario for a discretionary manager to agree to, bearing in mind its role of managing pooled client funds. And I think Mr and Mrs F had sufficient investment experience with investments in general as well as discretionary managed portfolios to be aware this wasn't how discretionary investment worked and wasn't happening.

I've also seen no evidence EQ agreed to preserve Mr and Mrs F's wealth in real terms net of costs. I don't think it's unreasonable to say that it's a generally accepted understanding that EQ's remit of 'maintaining capital values in real terms' was to prevent the value of the capital being eroded by inflation or other economic factors. There's no reference to the fact the value should have been net of all costs including tax.

If follows that I don't uphold Mr and Mrs F's complaint. No doubt they will be disappointed by this – it's clear they feel strongly about it – and I'd like to thank them for the time and effort they have made in bringing their complaint. But I hope I have been able to explain how and why I have reached the decision that I have.

My final decision

For the reasons given, I don't uphold Mr and Mrs F's complaint about EQ Investors Limited trading as EQ Wealth.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs F to accept or reject my decision before 6 June 2025.

Catherine Langley
Ombudsman