complaint

Mr V complains that Innvotec Limited did not have sufficient regulatory permissions to promote the film partnerships he invested in.

Mr V also complains that the information provided by Innvotec regarding film partnership investments was misleading in that the risks of the film partnership investments, in particular relating to tax, were not adequately explained.

background

- Mr V is represented by solicitors who have submitted complaints on behalf of Mr V and other investors in the same film investment schemes.

- In 2004 Mr V was a client of an accountancy firm. It introduced Mr V to an independent financial adviser.

- The IFA provided Mr V with Information Memoranda issued by Innvotec for film partnership schemes – both sale and lease back and film production schemes. Both were unregulated collective investment schemes. Innvotec was the Promoter and the Operator of the schemes.

- In 2005 Mr V invested from personal funds and borrowed to invest as part of the arrangement.

- In December 2004, HMRC published a note, BIM56360, which set out restrictions on the practice known as "double-dipping" in which two or more sets of claims for tax relief are made on the same film for example via a production investment scheme and a sale and leaseback scheme. HMRC did not impose an immediate ban. Another note was published that dealt with the transition from the pre to the post-BIM56360 practice.

- In the event HMRC did not agree to claims for tax relief in relation to the schemes. Mr V says he discovered this in 2011 when he was told this by an accountant who had, unknown to him, been negotiating with HMRC on behalf of the film partnerships. The failure of the scheme from a tax perspective triggered the complaint.

- Mr V claims his initial investment plus interest and other costs.

Mr V's solicitors complained to Innvotec in 2012 making the following points:

- The production scheme and the sale and lease back scheme constituted a single scheme that relied on double dipping a series of films – but this was not made clear to investors.

- Innvotec failed to make it clear that after December 2004 HMRC did not allow such schemes.

- Innvotec did not make it clear that it was intended after the second year to transfer the schemes offshore in the (misconceived) hope of making the tax relief permanent.

- Another business was the Managing Partner of the schemes. It was not authorised to operate collective investment schemes.

- Innvotec failed to mention that the overall scheme was substantially the same as a previous scheme, that had failed the year before and the Managing Partner was involved in both schemes.

- Innvotec failed to give the details of the scheme adequate attention and it should not have been promoted to investors.

Innvotec did not uphold the complaint and Mr V's solicitors made a complaint to the Financial Ombudsman Service. The following points were made:

- Innvotec promoted the schemes when it did not have FSA authorisation to do so. This was described as the 'overwhelming issue'.

- Innvotec promoted the schemes despite the fact that the Managing Partner, who was in reality to be the Operator of the schemes not being authorised to operate collective investment schemes.

- Innvotec promoted the schemes misleadingly and has admitted that it was common practice for an Information Memoranda not to include the detail of how a tax mitigation scheme would operate.

The complaint was investigated by one of our adjudicators who thought the complaint should not be upheld and made a number of points including the following:

- The Information Memoranda and the Operator Agreement, both recited that Innvotec was entitled to promote the film partnerships. There was no evidence that this was not correct. While there are restrictions on Innvotec's authorisation now there is no evidence they were in place then.

- The roles of the Operator and Managing Partner were separate and had been described in the Information Memoranda as separate.

- Innvotec provided sufficient warnings regarding the associated risks involved with investment in the film partnership schemes.

- Innvotec had said that Counsel's opinion had been obtained and there was no reason to believe tax relief under sections 42 and 48 would not be obtained for investors in the film partnerships.

- The adjudicator noted that the Managing Partner carried out a review to consider whether the criteria in the transitional arrangements applied and concluded that they did. The adjudicator considered it was reasonable for Innvotec to have proceeded with the promotion of the film partnerships on the basis of the transitional provisions.

- The adjudicator was not persuaded that there was sufficient evidence to suggest that the film partnership investments were an exact replica of previous film partnership investment schemes which had failed.

- The adjudicator noted that it was not Innvotec's responsibility to ensure that the film partnership investments were suitable for Mr V's circumstances.

Mr V's solicitors did not agree. They made a number of points including the following:

- Innvotec operated the film partnership schemes in name only. The responsibilities of the Managing Partner and Innvotec were essentially the same but the Managing Partner did not have the regulatory permissions to act as Operator of the film partnership schemes.

- The Partnership Agreements in effect record that the Managing Partner operated the film partnership schemes.

- The risks which were inherent in the film partnership schemes were not explained to Mr V clearly enough for an informed decision to be made about whether or not to invest. Had Innvotec explained the risks clearly, as it ought to have done, Mr V would not have invested in the schemes.

- The risk which carried the greatest financial gamble was not the risk that the investments would fail, but that HMRC would not grant the tax relief. Investors would be out of pocket by both what they had paid into the schemes but also by the amount they would be required to pay HMRC. This tax risk was not sufficiently highlighted to Mr V.

- Had the Information Memoranda clearly explained the design of the overall scheme and its risks it would have revealed that the proposed schemes would have been so antagonistic to HMRC that the investments would not have been made.

- Following the BIM56365 announcement, the investigation by the Managing Partner into whether principal photography had started - the relevant test in the transitional arrangements - was made in haste, and was carried out without a proper independent check of whether the films were in fact in production.

- The new provisions had the effect of increasing the already high tax risk inherent in the film partnerships. Had Innvotec been promoting the schemes in a way that was clear, fair and not misleading, it would have properly informed investors who were already on its books about the change in risk and amended the Information Memoranda accordingly. Had it done so, HMRC would not have allowed tax relief but this would have been obvious to potential investors.

- An adviser working for Innvotec in its promotion of the film partnerships knew that the operators intended to export the production partnership – a point that was not disclosed in the relevant Information Memorandum.

- That Innvotec had failed to provide documentary evidence to prove that it undertook operational and management activities in relation to the film partnership investments. Nor did it provide evidence that it undertook due diligence and obtained sufficient and properly directed tax advice in relation to the film partnership investments.

- The only way that Innvotec could successfully market the film partnerships was by 'obfuscating the underlying facts'.

- Innvotec downplayed the risk that tax relief may not be granted by HMRC. The tax relief safety net was subject to certain risks, but these were characterised as modest in comparison with the investment risks. Had investors known that there was a high risk not only of the films failing to turn a profit but the tax relief being turned down, they would not have invested.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

The Financial Ombudsman Service was set up so that disputes could be resolved quickly and with minimum formality by an independent person. We are required to determine a case on the basis of what the ombudsman considers to be fair and reasonable in all the circumstances taking into account various things including relevant regulations. It is not however our role to carry out a regulatory audit to see if all relevant rules have been complied with. Rather it is get to the heart of a dispute and concentrate on that. That means in a case such as this, working out what has supposed to have gone wrong, and whether any relevant wrong-doing on the part of the respondent business caused the consequence that lies at the heart of the complaint.

In this case Mr V has invested in an arrangement in which he hoped to qualify for tax relief. Tax relief has been refused and Mr V says this has caused him a loss. HMRC, not Innvotec, refused the tax relief. Further, Innvotec did not invent or design the film partnership scheme, its role was Promoter and Operator. It did not advise Mr V to invest in the scheme. It was therefore for Mr V and/or his advisers to understand film investments, and their tax treatment, in order to understand whether or not the investment was likely to be suitable for him. So how did any wrong doing by Innvotec cause Mr V to be in the position he is in?

did Innvotec have appropriate permissions to operate and promote the film partnerships?

The claim has been made – indeed was largely based on the point – that Innvotec was acting outside its regulatory permissions in promoting a collective investment scheme that it did not manage itself as this restriction is shown on the FCA register. However the regulator does not have a facility for the public to search for historic levels of permissions, it only shows current levels of permissions. Mr V's solicitors therefore, recently, made enquiries with FCA and it said that Innvotec had appropriate regulatory permissions to advise on investments, to arrange deals in investments and establish, operate or wind up unregulated collective investment schemes.

I do not therefore see that there is any basis for saying that Innvotec was not authorised to promote the film partnership investments in this case. This does therefore remove one of the central parts of the complaint – 'the overwhelming issue'.

Mr V's solicitors have also spent much time in arguing that the Managing Partner and not Innvotec was the Operator of the schemes. This argument was pursued in large part to support the point that Innvotec could not promote a scheme that it did not operate. But that point now seems to be redundant.

was the information provided by Innvotec clear, fair and not misleading?

- ***the roles of the Managing Partner and/or the Operator:***

It may be that the precise extent of the Managing Partner and Operator roles were not made completely clear. However relevant information was included in the Information Memoranda and could have been asked about by Mr V or his advisers if the point was thought to be material to Mr V's decision to invest. I cannot see that any lack of detail in the Information Memorandum on this point is material to the damage Mr V says he has suffered.

- ***tax – unclear because of what was said or what was not said?***

The other main argument is that the Information Memoranda were misleading – chiefly in not explaining the risks involved in obtaining tax approval – and if a clear explanation had been given Mr V would not have invested. There is no allegation of any material misrepresentation as such – the complaint is that the Information Memoranda are misleading as they failed adequately to deal with the risks involved in the tax efficiency of the schemes.

- ***tax – counsel's opinion:***

Innvotec sought Counsel's opinion in August 2004 about the impending announcements to be made by HMRC and was told that there was no reason to consider the tax relief sought under sections 42 and 48 would not be received. Mr V's solicitors say that Innvotec has not provided documentary evidence to prove this.

Innvotec says it no longer has a copy of Counsel's opinion. This is perhaps a little surprising but it is a number of years since it was obtained and it was obtained by a third party not Innvotec itself. However I have no reason to doubt that an opinion was obtained as it was referred to at the time. Nor is there any evidence to show that Innvotec acted unreasonably in promoting or operating the scheme in reliance on the opinion.

- ***tax – warnings given:***

The Information Memoranda were issued in August 2004 – before the BIM56365. I am satisfied that at that time, Innvotec reasonably warned about the potential risks of the schemes as they seemed then.

The Information Memoranda said:

> *"This document is prepared in accordance with tax legislation currently in force in the UK….Such interpretation may not be correct and it is always possible that legislation rules and practice may change. Any changes in legislation, the guidance notes, the bases of taxation, tax relief and rates of tax may affect the availability or the level of relief. While all reasonable steps have been taken to ensure that this proposal will utilise the tax benefits made available by section 42 or by section 48 formal clearance from the Inland Revenue can only be obtained by way of submission of the partnership tax return at the end of the tax year after the LLPs audit has been completed".*

- ***tax changes – the transitional arrangements for the end of double dipping:***

The Managing Partner undertook a review of the status of the films to consider whether, in its view, the relevant transitional provisions relevant to BIM56365 had been met.

The Managing Partner then wrote to members of various film partnerships – including the partnerships in this case, and to Innvotec - in December 2004 saying that in its view the films relevant to the schemes *"can be considered to have been in production"* as at the relevant date as principal photography had started.

Whilst the Managing Partner was of the opinion that the film partnerships were covered under the transitional provisions it did not guarantee it. The Managing Partner said:

> *"With time of the essence, independent verification as to whether principal photography has started has not been possible; accordingly this opinion is that of* [the Managing Partner] *alone and whilst* [the Managing Partner] *has taken all reasonable steps to ensure that such opinion can be supported should the Inland Revenue undertake an audit of all or some of the films for which sections 42 and 48 relief is sought, there is no certainty that the Inland Revenue will accept that this is indeed the case."*

Mr V's solicitors have argued that this assessment was not passed on to the individual investors such as Mr V. They also say the assessment was carried out in haste and no independent check was made of whether the films in question were actually in production. They also said that no expert tax advice had been obtained from either a tax specialist or from Counsel as to the interpretation of the change in the law. That may be so – but investors knew or should have known that to be the case in 2004 when the letter was sent.

Mr V may not have seen the letter. However it should be kept in mind that the assessment referred to was dealing with a very relevant matter that was in public knowledge at the time ie BIM56360 and its transitional arrangements. Anyone investing in a film partnership at that time ought to have been aware (for themself or through their adviser) of the general environment for such investments including HMRC's views generally and its public announcements. It does therefore seem unlikely that an investor and/or their adviser would reasonably be unaware of the transitional arrangements and the view taken by the Managing Partner about them in the schemes being invested in.

The Managing Partner was appointed as a film industry professional and there is no reason to consider that it was not reasonably able to make the (non-guaranteed) judgements made, or that they were not made in good faith or were made negligently. Accordingly, I cannot see that Innvotec knew, or should reasonably have known, that there was anything unreasonable about that judgement.

The situation was changing for film partnerships during the time that the film partnerships in this case were being developed and promoted but I cannot see that there was enough to say that either the schemes should not have been promoted from the outset or should have been withdrawn after BIM 56360. These were sophisticated and risky investments and not for everyone. That does not however mean they should not have been promoted – it was for investors and their advisers to decide if the investment was suitable. They should have been able to do this on the basis of the Information Memoranda as issued and reasonable due diligence in the light of the changing environment at the time of the investment.

- ***not explaining that the scheme was the same as another that had failed:***

It is also said that the scheme was in effect a copy of another scheme the Managing Partner was involved with in 2003/04 which had attracted investments the year before and that it was that other scheme that provoked HMRC to issue BIM56360. The point is made that the failure of that other scheme was apparent from about February 2004.

A point to note here is that the complaint is against Innvotec not the Managing Partner but even if Innvotec did know all about the previous scheme, it is my view that this argument is based largely on hindsight. That other scheme had not failed in August 2004 when the present schemes were being launched even if it was being challenged. And according to Mr V's solicitors the review of that scheme led to BIM56360 – but that had transitional provisions that the schemes in this case intended to make use of.

And also according to Mr V's solicitors the present schemes were different to the previous, unsuccessful scheme, in another respect relating to the timing of (rather than the fact of) exporting the LLP overseas. Whether that change was, in the event, sufficiently material to withstand HMRC's concerns is a slightly different matter – the point is that according to Mr V's solicitors change was made to try to remedy some concerns about the previous scheme. The point is therefore that even if the previous scheme, which was subject to challenge, did fail it did not follow that Mr V's schemes would inevitably fail also.

- ***tax – information memoranda deliberately obscure:***

The complaint is made that the Information Memorandum was deliberately vague about its proposals in relation to the workings of the scheme and tax. However as mention, no actual misrepresentation is alleged in this case. I return to the point that it is for those who choose to invest in such schemes to satisfy themselves about the way they work, the risks involved and the suitability of those risks for them. If they or their advisers do not consider that they have enough information to make an informed decision they clearly take a considerable risk in proceeding.

Overall, I agree with the adjudicator that the multiple risk warnings given in the Information Memoranda were sufficient for a potential investor to realise that not only was the scheme risky in an investment sense, there was also a risk that the tax relief might not be agreed.

my final decision

For the reasons given above, I do not uphold this complaint and make no award.

Philip Roberts
ombudsman