DRN-4528840

The complaint

Mr I has complained that IG Markets Limited ('IG') is withholding US$3,937.50 of share proceeds further to a merger of a US denominated investment. He would like for those funds to be paid to him.

What happened

In June 2021 Mr I's holding of 1,000 shares in Extended Stay America Inc was delisted because of a merger. The merger consideration was a total of US$20.50 per share made up of US$1.75 per share in the form of a special dividend plus a capital payment US$18.75 per share.

The gross proceeds for Mr I's holding were US$18,750. IG withheld US$3,937.50 of those proceeds as it says the payment was subject to Foreign Investment Real Property Tax ('FIRPT') at a rate of 21%.

Mr I says FIRPT doesn't apply to publicly listed shares where the shareholder owns less than 5% of the capital. He should only have been taxed at 15% on the special dividend payment as per the US/UK double taxation treaty and not paid any tax on the capital consideration.

IG confirmed in June 2023 that the opportunity to make a tax reclaim had passed in 2021 so it couldn't help. Mr I complained to IG who responded and said;

- It had confirmed with its custodian that proceeds resulting from the Extended Stay America corporate action were subject to FIRPT because of its Real Estate Investment Trust ('REIT') status in the US. This meant it was possible for non-resident beneficial owners who owned less than a certain percentage of shares to claim the withheld tax.
- Mr I had owned less than the affected percentage rate but because IG offered an 'omnibus account model' it couldn't mandate that account model to tailor tax treatment to any individual owner.
- This pooled model allowed it to reclaim at its election but in practice it didn't do this, and it didn't have an obligation to do so or inform its customers of reclaim opportunities.
- If Mr I had asked for IG to make the reclaim in 2021 it might have done so for a fee. But the 'reclaim window' had closed so it wasn't in the position to help him.
- It advised Mr I of the relevant terms in its Customer Agreement.
- IG did acknowledge Mr I had received poor customer service when he raised the reclaiming issue in 2022 and offered him £250 as a gesture of goodwill.

Mr I wasn't happy with the outcome. Mr I brought his complaint to the Financial Ombudsman Service. Amongst other points he said he didn't receive the tax statement of his account until 2022, withholding the funds was unjustified and the statute of

limitation for refunds under FIRPT was three years. Our investigator who considered the complaint didn't think IG needed to do anything more. He said;

- After looking at the terms and conditions he thought that it was for Mr I to make his own decisions on his execution only account.
- Mr I would have read and understood those terms.
- He was satisfied the Extended Stay America shareholding fell within the REIT status so the 21% withheld was done automatically and at source. It was the custodian who only paid out the net amount – less 21%. This was in line with the terms and conditions.
- The earliest Mr I had enquired about the tax reclaim was 17 months after the event and there was nothing IG could do to help. Again, in line with the terms and conditions.
- IG hadn't withheld the tax. It had been paid on Mr I's behalf to comply with US tax regulations.
- It was up to Mr I whether he wanted to accept the offer of £250.

Mr I didn't agree. He said;

- Publicly listed shares were excluded from FIRPT law.
- It was wrong to say that IG's custodian only paid out net of 21% tax and as such it wasn't IG's responsibility.
- He wasn't too late to make the claim in line with the statute of limitations which allowed three years.
- It was the custodian who made the determination about the FIRPT rule, but it was IG that declined to take remedial action.
- The consolidated tax certificate wasn't evidence that the withheld funds were paid to the US revenue. It only evidenced that the money was withheld.
- He wanted evidence that IG had paid US$3,937.50 to the US revenue authority so he could file a tax return and reclaim the funds.

Mr I also referred to other US REIT sales he had made via IG and that no FIRPT was withheld. He maintained that IG had improperly withheld the Extended Stay America proceeds and it is liable for them. He says it has admitted as such by saying that it is too late for him to reclaim the money. Mr I wanted evidence that the money was remitted to the US tax authorities.

Mr I's comments didn't change the investigator's mind. As the complaint remains unresolved, it has been passed to me for a 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.

After doing so, I have reached the same outcome as the investigator and broadly for the same reasons.

When considering what is fair and reasonable, I'm required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where

appropriate, what I consider to have been good industry practice at the relevant time. But I would also say this service is informal in its nature as a free alternative to the courts and where there is a dispute about what happened, I've based my decision on the balance of probabilities.

And in this case, it is not this service's role to interpret US tax rules. Rather I have looked at the relationship Mr I had with IG, its terms and conditions and whether it complied with those when dealing with Mr I as its customer.

Mr I had an execution only dealing account with IG. Such an account meant that all investment decisions etc were Mr I's own responsibility. In the Share Dealing Customer Agreement under section '1. Introduction' it refers to the agreement itself;

> '(4) Our Share Dealing service is not suitable for everyone. A full explanation of the risks associated with our Share Dealing service is set out in the Risk Disclosure Notice and you should ensure you fully understand such risks before entering into this Agreement with us.'

And it continues;

> '(5) Before you invest, you should read this Agreement carefully, including the Product Details, Summary Order Execution Policy, Summary Conflicts Policy, Risk Disclosure Notice, Privacy Notice and any other documents that we have supplied or in the future do supply to you.'

The above makes clear an execution only account isn't suitable for everyone and that potential customers should make sure they have read and understood the agreement before continuing with opening such an account. As Mr I went onto to open the account, I don't think it is unreasonable for me to assume that he read, understood, and agreed to the terms of the agreement.

The Share Dealing Customer Agreement goes on to outline the services it would provide to Mr I;

> '2. The services we will provide and dealings between your and us';
>
> …
>
> '(4) Dealings with you will be carried out by us on a non-advised basis (i.e., an 'execution only' basis) and you agree that, unless otherwise provided in this Agreement, we are under no obligation:
>
> (a) to satisfy ourselves as to the suitability of any Instrument or Transaction for you;
>
> (b) to monitor or advise you on the status of any Instruction to Deal;
>
> (c) to monitor or advise you of the status of Instruments held by us on your behalf; or
>
> (c) (except where the Applicable Regulations require) to cancel any Instructions to Deal or sell any Instruments you have purchased and that we hold on your behalf.'

I'm satisfied that the above makes clear that any transaction, and the status – however that may present itself – of any resulting investment, is the responsibility of the investor.

The subject of this complaint is how IG treated the merger proceeds of Mr I's holding in Extended Stay America. The monetary terms of that takeover were a mix of capital and income payments, and Mr I's complaint revolves around the tax treatment of the capital payment of US$18.75 per share. He doesn't agree that payment should be subject to FIRPT charged at a rate of 21%.

But Mr I's account is managed on a pooled or 'omnibus account model' basis which means that Mr I's own investments are pooled with all of IG's other clients who hold the same investment. And in its management of those pooled accounts IG makes clear there are limitations on what actions it will carry out and that those actions wouldn't be on an individual basis. In the Share Dealing Customer Agreement under section '11. Provision of information, voting rights, interest, dividends and corporate events' it says;

> '(8) As we will hold your Instruments in one or more pooled accounts, you may receive dividends or distributions net of applicable Taxes which has been paid or withheld at rates that are less beneficial than those that might apply if the Instruments were held in your own name or not pooled.'

This makes clear that an individual customer might be disadvantaged in using the pooled service as that service wouldn't take account of any individual customer's own tax position. And I think that is relevant in this case as Mr I has said that for a non-US investor who owned less than 5% of the shares would not be subject to FIRTP.

So, I think Mr I was given fair warning that he might be disadvantaged by holding his assets within a pooled nominee as any action he may have wished to have taken personally, or that was relevant to his personal tax status, may not have been possible.

Withheld tax

IG confirmed with its custodian that Extended Stay America had REIT status in the US which would mean that its possible for non-resident beneficial owners to claim back the withheld tax. However, as explained above, IG doesn't offer a bespoke service dependent upon an individual investor's tax status. This means that just because Mr I is a non-resident – and would potentially have the opportunity to reclaim the withheld tax – it doesn't mean that IG, or its custodian, could take an individual approach with the capital payment that came about as a result of the merger.

Equally, IG doesn't have an obligation to inform its client of any reclaim opportunities. This is the responsibility of the customer and is in line with the execution only relationship Mr I had with IG.

Mr I has referred to other REIT status investments he has sold via IG and they weren't subject to FIRPT. I can't consider those investments in this decision as it's not my role to interpret REIT status of any particular investment. I am only considering the circumstances of this complaint.

Mr I isn't satisfied that IG – or its custodian – has paid the tax it has withheld onto the US tax authorities. He says the consolidated tax certificate he has only shows that the funds were withheld. He wants evidence that the withheld funds were passed on to the tax authorities. We asked IG for this but IG's custodian can't provide a tax certificate – or similar – in the name of only one of IG's clients. This is because the custodian would only see IG's account as a pooled or omnibus account so wouldn't know whose IG's underlying clients were to provide that individual information.

Bearing in mind the pooled status of the underlying asset, I don't find that this is an unreasonable explanation. But the custodian, acting on IG's behalf, would be under regulatory obligations to act appropriately and comply with any tax authority obligations. So, while I appreciate it is frustrating for Mr I not to have the evidence for him personally, I find, on the balance of probabilities that it is most likely that the withheld tax has been passed on to the US tax authorities and not withheld by IG.

Mr I has said that IG doesn't dispute that the funds were wrongfully withheld. But I don't agree. I haven't seen any evidence that IG is of this opinion. It said that it could have potentially helped him with reclaiming the tax for a fee but when he sought guidance in November 2022 the 'reclaim window' had already closed in 2021.

And in its response to the complaint IG has explained that it operates on a pooled basis. Its underlying customers have their own personal tax positions, and it wouldn't be for IG to operate a service which acted for different investor's taxation circumstances. Under the pooled or omnibus basis of providing an execution only account its terms and conditions make it clear that it is for IG to decide what elections to make, but generally it didn't do this. So, I'm satisfied that IG didn't do anything wrong in this respect.

Tax reclaim

Mr I has said that he requested the tax be refunded in November 2022 and it wasn't until April 2023 that IG said the capital payment was identified as subject to FIRPT. Mr I argued that the tax doesn't apply to listed shares when the holder owns less than 5% of the capital. In its response IG had contacted its custodian to reclaim the tax but that the 'reclaim window' had closed so it wouldn't be able to help.

Again, I don't agree that IG has acted outside of its agreement with Mr I. I say this because I consider this again flows from the terms of its agreement that it will be acting on a pooled nominee service basis only and wouldn't be taking account of individual customer's tax circumstances or status. It wasn't under any obligation to inform customers of any reclaim opportunities. On a pooled basis it wouldn't know the tax status of its underlying customers so wouldn't be in the position to inform them of the possibility in any event.

Mr I has said the claim that the tax reclaim window had closed is incorrect and has referred to the statute of limitations for FIRPT refunds being three years after the filing. But while I'm not in the position to interpret this rule, it's possible that might be different from a reclaim in respect of withheld tax by the custodian – the custodian might administratively have its own terms with regard to reclaiming withheld tax without overriding the three-year rule referred to by Mr I. Mr I might want to seek his own tax advice about the statute of limitations in order to reclaim the tax.

I accept that Mr I disagrees with the tax being withheld in the first instance, but it's not my role to interpret the legal tax status of either the investment itself or whether tax on the capital payment should have been withheld under US tax law. As mentioned above, this service is an informal alternative to the courts, and Mr I may wish to take tax advice about this point as well as the three-year statute of limitations he has referred to if he wishes.

Taking all of the above into account, I don't agree that IG needs to do anything more. I am satisfied that IG hasn't acted outside of its terms and conditions, as agreed by Mr I. The execution only service it offers is on a pooled basis and there are certain downsides to this. Clearly Mr I has experienced such a downside here but that doesn't lead me to the conclusion that IG has done anything wrong. It follows that I don't uphold Mr I's complaint and it is for him to decide whether to accept the £250 that IG has already offered.

I appreciate my decision will come as a disappointment to Mr I. Its clear he feels strongly about his complaint. But I hope I have been able to explain how I have received my decision.

My final decision

For the reasons given, I don't uphold Mr I's complaint about IG Markets Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr I to accept or reject my decision before 8 March 2024.

Catherine Langley
Ombudsman