

ADR enters a new era

Doug Sinclair provides an update on Alternative Dispute Resolution process.

Years ago, if it was not possible to agree a tax settlement with HMRC the only recourse available was to take the matter to a hearing at the First Tier Tax Tribunal. However, it was generally acknowledged that there were a significant number of cases registered for hearings at the Courts. This was causing difficulties as it was taking longer to arrange a date for a hearing, due to the backlog of cases. Therefore in 2014 HMRC introduced a mediation process called Alternative Dispute Resolution (ADR). The purpose of ADR was to provide an opportunity for individuals and businesses to resolve their tax disputes without the necessity of proceeding to the First Tier Tax Tribunal.

ADR rules and policy decisions

The ADR initiative was to be applauded, albeit that not all disputes can be resolved by this process. For example, cases that involve debt recovery, tax credits or default surcharges are specifically excluded. It should also be noted that anybody who wishes to utilise ADR has to make an application to the ADR team and each case is considered on its own merits. Once an application is successful, the assigned HMRC mediator works with both the originating Officer and the individual applicant to resolve the area(s) of dispute.

Where an appeal had been submitted to the First Tier Tribunal, it was still possible to make an application for ADR. However, in 2018 HMRC started to internally apply a policy that generally sought to reject applications made after HMRC had submitted their statement of case. Although HMRC indicated that applications could be accepted in 'exceptional circumstances', they omitted to explain what would constitute 'exceptional circumstances'. It should also be noted that HMRC did not publish this policy until later on in 2019. This policy was seen by many individuals and advisors to be a backward step, as it created a barrier to being able to resolve the dispute via mediation.

It is therefore pleasing to inform the readers of this article that following a statement made by the Chamber President of the First Tier Tax Tribunal, on 15 June 2020, that HMRC have amended their policy. This change now provides an opportunity for individuals to use ADR during appeal proceedings, and corrects the previous policy which had created an imbalance with the Courts' clear and consistent message, that disputes should try to be resolved between the parties before they ever reach the stage of a hearing.

It is early days to ascertain the impact of the change, but clearly the intention is to be welcomed.

'Informal ADR'

Readers may also be interested in the fact that it is possible to reach agreement on a dispute outside of the ADR process, even where matters are proceeding to Tribunal hearing. In recent months, the author of this article has been able to resolve two long-running disputes where appeals had been submitted to the First Tier Tax Tribunal and HMRC Solicitors Office were involved. In one case, HMRC had initially raised discovery assessments and penalty determinations totalling in excess of £1.1m.

Various grounds of appeal had been submitted and HMRC had even submitted their statement of case. The author compiled a file containing documents that he had obtained following research into various HMRC manuals, tax cases and external publications, and prior to the policy change, produced this at an all-day meeting where the originating officer and two individuals from Solicitors Office were present.

This meeting ultimately formed the basis for resolving the disputes between the parties without recourse to the Tribunal and the settlement that was reached was slightly in excess of £165k. The second case is similar to the first, with the exception that after Solicitors Office issued their statement of case, they strongly advised that the parties should attempt to resolve matters first, prior to them having a greater involvement in the case. Similar to the first case, an all-day meeting was held which formed the basis for agreeing the settlement at £50k, instead of the £200k HMRC had originally assessed.

Range of options

The change in policy by HMRC in relation to generally not allowing applications for ADR to be accepted once a statement of case had been issued, now falls in line with the primary objective of ADR. It is therefore anticipated that the number of cases which will now be resolved through ADR as opposed to the Courts, will increase.

This will also assist in the second objective of ADR; to allow disputes to be resolved without the potential (often significant) professional costs associated with proceeding to a Tribunal hearing. However, ADR is not the only option in trying to resolve a tax dispute with HMRC and individuals and advisors alike need to consider the most appropriate approach to ensure the best outcome.

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