

## **ADR: what's it all about then?**

Paul Clarke explains which type of disputes are suited to the Alternative Dispute Resolution, and shares some examples of where it has worked

You have a long-standing dispute with HMRC – it is bogged-down and going nowhere. Sound familiar?

Where do you go from here? You believe you're right but can't get HMRC to see your point nor accept your argument?

That is typically the situation that will be well-suited to the Alternative Dispute Resolution ('ADR') process. It seeks to arrive at a resolution to a dispute with HMRC that might otherwise have to end up in a Tax Tribunal without all the costs and delay of a Tribunal Hearing.

ADR has been around for a long time for resolving commercial and matrimonial disputes; now it is available for resolving tax disputes. To alleviate the log-jam of appeal cases waiting to go to Tribunal, a few years ago HMRC trialled the ADR process and liked what they saw. In 2013, ADR became part of HMRC's 'normal business'.

It can be summarised as:

- Most tax disputes are eligible in principle for ADR.
- The process is confidential.
- It does not prejudice or compromise your case, if you don't like where it's heading, you can call a halt to the process.
- It is quicker, cheaper and less formal than litigation.
- Your anonymity is maintained.

Typical situations that can benefit from ADR are:

- Cases where there is some uncertainty over the facts and additional information is unlikely to be found.
- The dispute has a range of possible outcomes as there is limited historic factual information due to the passing of time.
- Positions have become entrenched based on early conclusions or assumptions.
- There is scope to explore alternative technical interpretations given the circumstances of the case.

Cases that are not suited to ADR are:

- What HMRC call 'red-line' cases that have to be settled by Tribunal.
- Where the issues have a wider (industry-wide) application.
- Where they can only be resolved by HMRC departing from established technical or policy view.
- Cases being dealt with by HMRC's Criminal Investigations.

Successful applications for ADR therefore tend to relate to factual disputes.

Cases that will not be accepted for ADR include those in which there is already an established HMRC technical view, whether as a result of binding case law or its published guidance. HMRC is bound by the Litigation and Settlement Strategy in relation to ADR, as well as appeals that proceed to litigation.

An application is made online to HMRC using an electronic form wherein you provide a summary of why you believe the case is suitable for ADR. HMRC seek to respond within 30 days confirming whether the application is successful. This then starts the process whereby a trained HMRC mediator will get in touch to arrange a date for the meeting. The mediator is typically a HMRC person but, and they are at pains to stress this, they are unfamiliar with the case, have no input into the issues in dispute and whose role it is to facilitate a resolution to the case.

The meetings have, until we all entered the era of Covid-19, always been held face to face. Suffice to say, the meetings are now confined to being held either by telephone or, preferably in my view if these are the only options, by video-conferencing using Microsoft Teams, not least as the vast majority of HMRC staff are currently working from home.

Slightly surprisingly, the use of mediation to settle tax disputes in the past year or so has declined, with the number of cases falling from 553 in 2017/18 to 417 in 2018/19 according to data obtained from HMRC.

### **ADR in action**

There is a real role to be played by ADR to resolve disputes with HMRC.

Examples that I have worked on (some currently) include:

- Company controlled by a few shareholders/directors, HMRC enquiries into several years' company tax returns and directors' personal returns, company and directors had always submitted all returns on time, issues over personal expenditure and entertaining had already been resolved, the big issue outstanding was the deductibility for corporation tax purposes of spouses'

remuneration, giving rise a large tax liability in dispute with the parties dead-locked. Resolved via ADR.

- Owner Managed Business (OMB) – P11D issues over car and car fuel benefits in kind, a misunderstanding over the facts and dead-locked. Resolved via ADR.
- Individual sold a property, enquired into by HMRC, later HMRC sought to raise an additional assessment out of time. Disputed. Resolved by ADR.
- OMB – VAT penalty became the subject of a Personal Liability Notice on one of the individuals. Dispute over the facts.
- OMB – large overdrawn director's loan account. HMRC seeking to raise a significant penalty based on 'deliberate' behaviour. Dispute over the circumstances.

The only instances I have experienced where HMRC wouldn't agree to ADR were two unconnected cases where a tax avoidance scheme was involved. I appreciate HMRC will not ordinarily countenance ADR for such cases but I was seeking to demonstrate that there were specific factors that were central to these particular cases such that the facts hadn't been properly understood. Interestingly, in one of these cases the ADR mediator was agreeable to accept the case into ADR but he could not obtain the agreement of the Counter Avoidance officers who refused to take part.

The message overall though is, whilst ADR is not a panacea, it is well worth considering in many cases where there is a dispute with HMRC. It is relatively quick to proceed with, is comparatively inexpensive and leads to a resolution in the majority of cases. What have you got to lose?

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