

## Mediation in the modern age

*Craig Aspinall offers some practical tips for alternative dispute resolution in the new world*

Alternative Dispute Resolution (ADR) is a formal mediation process for tax which can often help accelerate a resolution with HMRC. The ADR process is available across both direct and indirect taxes. When a case is accepted for ADR, an 'independent' mediator is appointed to manage the process and ensure engagement on both sides. The mediator will be an HMRC officer who has been specially trained and who has not been involved in the dispute before. Where the tax at stake is of significant value or a client has concerns about the 'independence' of an HMRC appointed mediator, the taxpayer may choose to appoint an independent mediator, at their own expense, to work alongside HMRC's representative. I would note, however, that our experience to date of HMRC mediators is that they do operate truly independently of the enquiry team and apply the appropriate level of challenge to both parties.

ADR may help where compliance checks have reached an impasse, or where one or both of the parties has reached an entrenched position. Examples of where ADR can be beneficial include cases where communications have broken down, the facts are in dispute, the dispute is a result of a misunderstanding or where the dispute concerns a technical point or a point of law.

Since its formal introduction in 2013, the use of ADR has proven increasingly successful. Indeed, in the year to March 2020, HMRC data showed that nearly 90% of all ADR cases were resolved (either fully or partially, including clarifying positions) through the ADR process. Those taxpayers who had been through ADR gave overwhelmingly positive feedback. Nearly 100% of those questioned said they would recommend the process and nearly 90% said that their dispute would not have settled without ADR.

However, like everything in recent times, the ADR process has had to adapt in light of the Covid-19 pandemic and its aftermath. During the pandemic HMRC introduced virtual ADR to ensure continuity for the ADR service offering. The virtual ADR consists of three separate Microsoft Teams rooms being set up by HMRC's mediator: one main room where all parties come together to discuss the relevant issues, and two private rooms, one for the taxpayers only and one for HMRC representatives only. The mediator will join each of the private rooms as and when required to facilitate discussions.

From recent experience and discussions with HMRC's ADR team, it is clear that HMRC's opinion is that ADRs continue to be just as successful being held virtually as they previously did in a face-to-face environment. The published statistics from HMRC on the ADR process, published in its annual report and accounts for the year to March 2021 demonstrate that in that period 78% of ADR cases were resolved by mediation in the year, and the latest figures we have had sight of for the year to March 2022 showed this to have crept up slightly to 80%. This does represent a drop from the near 90% success rate pre-pandemic, which is not insignificant, but never-the-less does demonstrate that the ADR process can still be a very effective tool in accelerating the resolution of a long-running or complex dispute with HMRC.

As such HMRC's present position is that going forward all ADR's will be held virtually, except where exceptional circumstances require face-to-face meetings. Advisors should therefore be preparing any clients considering the ADR process to hold their mediation remotely.

Practically, our experience of remote ADR's in recent times has presented some very much '21st century' challenges that had to be overcome in order for a successful meeting to be held. While the issues of car breakdowns and train cancellations may be a thing of the past with the move to virtual mediations, the move to the online world does pose its own unique set of issues.

Robust IT facilities are now fundamental to a successful ADR meeting being held. Having access to a strong internet signal is a good start! It can be incredibly frustrating and counter-productive where one or more parties of the mediation has poor internet quality to the extent they are unable to fully participate, or where other IT failures occur. With individuals dialling in from five, six or even more different locations, the

risk of a weak link is high. We try to ensure that our client and all members of our ADR team are present in the same room (see below) which partly mitigates this risk, but our experience to date is that HMRC representatives will each dial in from their individual office/home.

This results in a 'hybrid' meeting which brings its own problems, in that it is necessary for all congregated attendees to be visible and audible to those dialling in remotely. We suggest that, where possible, using facilities with IT functionality set up for such remote meetings (large screens and conference room cameras, for example) is advisable. From experience where IT did fail us, passing a laptop around a table and crowding around the inbuilt camera is not a great experience! Another practical problem that can occur is where the lighting in an attendee's room is such that they are not properly visible and you find yourself conversing with a shadow. So we suggest lighting checks ahead of the main meeting.

The sharing of information between parties does also now have its complications. In the days of face-to-face ADR's, it was a simple case of bringing all supporting documentation along with you to the mediation to provide to HMRC throughout the day as and when relevant. In the virtual environment, document sharing is no longer so straight forward. All mediation meeting rooms are required to be set up by HMRC and one of the features of HMRC's security policy is that documents cannot be shared on screen in any way. If you are holding a mediation virtually, quickly referring HMRC to a hard copy file is no longer possible. Instead, it is absolutely vital that all documents that may need to be shared are held in a digital format ready to be emailed across to HMRC if required. The lack of ability to share documentation via the virtual meeting platform was not made known to us by HMRC in advance of the ADR we recently held, and we encountered this issue, which did cause some delays while we ensured the digital documents were in a suitable state for sharing.

Aside from the above practical considerations, our strong view borne out of experience is that a key benefit of the face-to-face ADR meetings was that it provided the right environment for those potentially difficult conversations to be very successful. Body language and the ability for a taxpayer to look HMRC in the eye (and vice versa) when explaining their arguments was often very beneficial and that dynamic is, somewhat lost or at the least diluted in the virtual world - particularly where IT or lighting issues referred to above are in play. We certainly prefer to be sat in the same room as our client whilst representing them at these meetings, as we believe the dynamic and ability to debate issues to be more fluid when in person together.

Whether the decrease in successful ADR resolutions is a result of this change of dynamic, IT/facility issues or a mixture of both of these is currently unknown. It will be interesting to see whether the success rate continues to climb back toward the 90% pre-pandemic levels as both HMRC and advisors adapt to the new remote way of working these meetings.

Given that remote ADRs are now to be the norm, it is crucial that our role as advisors adapts to properly anticipate and prepare for the different challenges posed by this new way of working. Proper preparation has always been key to the success of an ADR day and this must now include adaptations on both sides to accommodate the virtual setting. We hope this will enable ADR to remain the successful forum for settling disputes that it has been historically.

One upside to holding virtual ADRs, is that it should, in principle, be easier to bring together what can be a cast of many (client/specialists on both sides/mediators, etc.), given that travel is no longer required. Having the 'right' people available who are properly informed and have the ability to sign off on decisions is, as has always been the case, a key consideration. If it is known that a key person is not going to be available on the ADR day, a decision needs to be made as to whether to postpone the meeting until that person is available, or whether it is agreed by all parties that enough progress will be able to be made in their absence to make the meeting worthwhile.

One further practical point is that there has recently been a change to the format for concluding the ADR process. Previously, at the end of the meeting the parties drew up an agreement which all signed before the meeting closed. The new process is for the ADR mediator to draft a Record of Outcome document which is provided to both HMRC and the taxpayer for their agreement. In short, this document summarises

the agreements that were reached during the mediation process and quantifies any tax liability due / repayment owed to the taxpayer. Both parties must provide their written agreement of the Record of Outcome to the mediator.

Regardless of the current slight drop in success rates since pre-pandemic times, ADR is still a proven method for closing off long-running enquiries and I would expect it to only continue to be more popular as a means of settling disputes. We would certainly recommend that taxpayers and their advisors consider ADR as a way of settling those long running or messy enquiries – making sure the adaptations required for remote meetings are included within general ADR preparation.

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