

# An inspirational poll

In a three-part series, Gary Brothers examines the Alternative Dispute Resolution process, starting with an overview of what ADR is

I recently ran a poll on my LinkedIn page, inviting people to tell me how transparent they felt HMRC is during the Alternative Dispute Resolution (ADR) process.

The options and voting intentions were:

Always, couldn't be better	9%
Somewhat, but could be better	32%
Not at all, the process is opaque	45%
Not sure	14%

A scientific YouGov election night poll it was not, but it did give me the inspiration for this article.

I was surprised at the high percentage of people who couldn't say the process was clear and transparent and so thought I would share some of the experiences Independent Tax has garnered from going through ADR on many of our cases.

In a series of three, I am going to focus on what ADR is all about in this article, moving on to talk through some of our case studies in article two, before bringing everything together in a 'lessons learned' summary in the final part of the trilogy.

Hopefully I can help shed some transparency on the process, even if HMRC can't!

## When is ADR available?

ADR is available when progress has stalled during a compliance check or where there is a dispute.

The impasse might be because:

1. There is a dispute about the facts and there is a feeling HMRC has made the wrong assumptions. Like many peers and competitors – and no doubt readers – we find these circumstances particularly prevalent at the moment during R&D enquiry cases, where the HMRC officers are trained in process and procedure, rather than in the exercise of common sense.
2. Communication has broken down with HMRC. This can be because of a multitude of factors, including intransigent Inspectors or multiple changes of Inspectors and/or agent representatives. In a case we settled 12 months ago, we were the third agent to be approached by the client to assist with his long-running enquiry. Settlement negotiations had ground to a halt after seven years (yes, seven years!) before we were engaged to act. We proposed a different settlement methodology and achieved a great result through ADR for a very happy client in six months.
3. A Review Conclusion Letter has been received from HMRC and ADR is the next best option before Tribunal.

ADR is not available for issues such as complaints, late payment or late filing penalties, PAYE coding notices or High-Income Child Benefit Charges. The ADR route is also not an option for people or businesses under criminal investigation by HMRC.

## The best time to apply for ADR

An application can be made for ADR at any stage of a compliance check.

A compliance check can involve direct and indirect taxes, including:

- Income Tax, Corporation Tax, Inheritance Tax.
- VAT, Excise Duty, Customs Duty.

It may seem obvious, but there is little point applying for ADR at the very start of a check before HMRC has been supplied with information and drawn any conclusions. ADR might be an option if HMRC asks for something in the opening request for documents which is contentious and HMRC refuses to withdraw the

request. Waiting for an Information Notice and appealing that would probably be the most practical route in that scenario, rather than applying for ADR.

We think strategically about all of the enquiries we handle and do not have a fixed point in time on when to apply for ADR, it is a very strategic decision. We consider the specific circumstances of each case and consult with our client, before we make the decision to proceed.

However, as a general rule of thumb, we apply for ADR in the bulk of our cases when HMRC's mind is made up on a particular decision. This will often mean we have a View of the Matter letter or we have ground to a halt and such a letter is looking the likely next step, will have requested an internal review and have received a Review Conclusion Letter supporting the original view by the HMRC Decision Maker.

### How can ADR help?

Too often these days it is very difficult to get a Teams meeting with an HMRC officer, let alone a face-to-face discussion, so the end result is a seemingly endless round of emails and correspondence as HMRC try to run their enquiry purely from their desk.

For example, HMRC will always seek to understand an R&D claim by asking for reams of information to establish the baseline of the project, the advance, the uncertainties etc., but will rarely entertain an early meeting, or indeed any meeting, with the client to gain a greater insight into the R&D project(s). This is particularly frustrating when a letter arrives from HMRC asking for explanations in layman's terms, or in a manner which a 'non expert' would understand.

By their sheer nature, R&D claims are highly complex. We are handling R&D claims ranging from engineering to media software to solar energy harnessing innovations to cloud computing, all of which are intrinsically complicated to an unqualified professional in those fields, let alone a 'jobbing tax Inspector' who might have been trained on investigating cash trades but not R&D or engineering!

It is a requirement of the ADR process for a face-to-face Teams meeting to be held and can often be the first opportunity, after many months of an enquiry, to present the case in a manner which is easier for the HMRC officer to understand.

The same is true of more routine enquiries where explanations via correspondence have been exhausted and an impasse has been reached. Yes, sometimes a telephone call might help to progress matters, but in long running enquiries a fresh set of ears can help.

The ADR process is controlled by an HMRC Facilitator, who effectively acts as a go-between for the two sides.

On our side it will be our client and ourselves, but on the HMRC side it will no longer be just the HMRC Decision Maker present, but a colleague of a similar grade or the Line Manager. We have also attended meetings with members of HMRC's Policy Division present.

In an ADR meeting we attended with our client, the HMRC Decision Maker was sticking to his guns and defending the line he had been pursuing for months. However, his colleague who was in attendance understood exactly the point we were trying to make and persuaded his colleague to change his mind.

That would never have happened via the normal correspondence or telephone calls route because it is only ever the Decision Maker who is the recipient of the information being presented.

In our experience the HMRC Facilitators are objective and do their best to try to help both sides make progress. Progress might not necessarily involve a complete resolution to the dispute and an ultimate settlement, but it can lead to the conclusion of, say, three out of five issues, leaving just two to resolve. This can often be the case in cross-tax enquiries, where there are tax and VAT problems, as well as contested penalty decisions.

The final benefit of the ADR process to highlight is that all the discussions are conducted on a without prejudice basis, so if the dispute remains unresolved and proceeds towards Tribunal, any settlement proposals discussed during the ADR process are not binding.

### Preparing for an ADR meeting

The HMRC Facilitator will ask for Opening Statements from both sides, in advance of the Teams meeting taking place.

Usually this will have to be presented to the Facilitator seven to 14 days prior to the actual meeting. The Facilitator will then share the Statements between both sides at the same time, to prevent any party having advance sight of what the other side has included.

The Facilitator will typically ask for the Opening Statements to be restricted to two pages of content and no more.

We prepare our Opening Statements almost as if we are going to present the dispute to a Tribunal Judge.

We set out the dispute to begin with, in terms of which tax or accounting year(s) is involved, before laying out our position and then including any useful references to relevant legislation, tax cases or other helpful third-party information. We conclude our Statement with a summary and an invitation to HMRC to enter the ADR meeting with a positive approach to resolving the dispute.

We also prepare our clients thoroughly beforehand and ask them to remember which period is in dispute. It is only natural for clients to respond in the present tense, with what they are doing now, when things might be very different to how they were done in history.

Finally, we think of what our strategy will be on the day.

Invariably, as the representative of the Appellant we will go first and present our case to HMRC. That does not necessarily mean that we will present the whole case at the very start, but we will say enough to get the conversation moving and to provoke discussion.

Have I shone some light on the ADR process yet and encouraged you to try it? If so, let us move on to the application itself.

### **How is an ADR application made?**

An ADR application is made online, using this link: [Use alternative dispute resolution to settle a tax dispute - GOV.UK](#)

The online form will ask for basic details about the client, such as whether it is an individual or a company, the nature of direct or indirect tax, the amount in dispute and the reasons for the application.

The reasons do not need to be a statement of case, but rather a succinct summary of the dispute so that the ADR team can understand why the application has been made. The detailed reasons for the dispute come later and are incorporated in the Opening Statement.

HMRC aim to give a decision in writing within 30 days of receiving the application. However, what happens in practice is that the appointed Facilitator will usually ring you, the appointed representative, to discuss the application first. The Facilitator will ask what you hope to achieve from the ADR process and explain how the process will work in practice.

If the Facilitator is happy that the application is genuine and that ADR is appropriate, then the decision will be communicated in a letter (via email) shortly afterwards.

### **Summary**

The ADR process can definitely help with long-running disputes and highly contentious matters. It offers an opportunity to talk with HMRC officers face to face and to have an open discussion in real time, which is far more conducive than protracted correspondence.

It is so important to understand the process and to prepare thoroughly for the meeting, otherwise you may find the meeting is very short and could actually have made matters worse and set the dispute back, rather than the hoped for progress. We have seen that in a number of client instances that have been referred to ourselves to conduct the Tribunal litigation that is the only remaining route late in the day, and we often bemoan the missed opportunity, earlier, of a 'good' ADR.

Independent Tax has been through the ADR process on multiple occasions, for all types of disputes and has found it a useful route to settlement. We stand ready to help any practitioners who may lack the experience, or maybe the confidence to try ADR, to offer our expertise in this area.

My contact details are below and I would be delighted to hear from you.

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