

## ADR: tips for success

In this final instalment of his trilogy on the Alternative Dispute Resolution process, Gary Brothers provides some practical tips on how to achieve a successful outcome

Here we are at the end of my series on HMRC's Alternative Dispute Resolution (ADR) process. What a relief, I hear you cry!

Thank you for taking the time to read my first two articles, in which I attempted to highlight when the circumstances may be suitable for the ADR process and my recollection of some of the good, bad and ugly scenarios we have encountered at Independent Tax.

I will now share some of the insight we have learned from our own experiences of taking cases through ADR and hope they prove useful to you with your own cases.

### Starting point

As with any direct or indirect tax dispute it is important to know your case and to have developed a strategy to try to reach a settlement with HMRC.

In a long-running enquiry it is easy to 'top sheet' and simply respond to the latest letter from HMRC, along the same existing lines of argument, which might simply be prolonging the enquiry without proactively trying to settle it.

It is easy to get sucked into responding to HMRC's questions without taking a step back and thinking what else can we provide from the client that might be persuasive? Or what other approach we could take that might help HMRC understand our client's position.

If you are considering applying for the ADR process on behalf of your client, then this is an ideal opportunity to take stock of the current state of the enquiry.

It is very rare than a 'one-size-fits-all' approach works well across the board, unless HMRC is running a campaign or project where the same generic tactics may succeed. Usually with complex disputes with HMRC though, it is crucial to examine the facts of each particular case and to have a clear plan of action.

For example, the enquiry in front of you may be suffering from interminable HMRC delays through frequent changes in the case officer, or maybe the officer is waiting for a decision from their colleagues in Policy Division.

The ADR route might not be the best option in those circumstances and the timing for ADR may be premature.

A better option might be to ask the Tribunal to direct HMRC to issue a Closure Notice, to try to force matters along. In our experience, HMRC invariably responds quickly to any such application, especially if there are delays or prevarication on their side. In those circumstances the ADR process might be better utilised after an appeal against the Closure Notice.

However, if the enquiry has exhausted all argument, the case has been through the review process and the reviewer from HMRC's Legal Team has supported the position of the Decision Maker, then ADR could well be the ideal option.

### Timing

The timing of the application for the ADR process is usually driven by the Tribunal.

It is important to keep the appealable decision alive, so the appeal needs to be made to the Tribunal in the first instance. The ADR team will usually wait for the Tribunal to accept and register the appeal formally, before an application will be considered.

Once the Tribunal has accepted the appeal, then the time is right to make the online application for the ADR process.

### The online application

The online process is simple and asks for straightforward facts about the dispute, such as HMRC's case reference details, the amount of tax/VAT at stake, but also why you think the ADR process is suitable.

Some practitioners seem to think they need to put their whole case to the ADR team in the limited space available. You don't!

The ADR team will want to understand why ADR might work, not the intricate details of the technical arguments. The response should be more along the lines of the case reaching a stalemate and you are unable to make further progress through correspondence and emails. Or that you feel a face-to-face discussion would be beneficial, or you believe HMRC has misunderstood the facts of the case and you would welcome the opportunity to provide clarity. Obviously, these are only examples. The application should reflect what the actual impasse is and how ADR might help resolve it.

It should be remembered that the application is going to be reviewed by the ADR team and the facilitators will be thinking about whether and how they can play a role in helping move the dispute towards a conclusion. The facilitators are not looking to read complex arguments. That is not their role. They are there to help facilitate discussion and negotiation.

### First contact with the facilitator

Once the application has been reviewed, one of the HMRC facilitators will get in contact and ask to discuss the reasons for applying for ADR in more detail. By this time, the facilitator is likely to have read some of the case history and will be more familiar with the background.

Again, the best approach here is to stress how the dispute may benefit from a face-to-face discussion, which might be the first chance of an actual in person discussion during a dispute. It is also the opportunity to discuss who might be present in any meeting and who you might like in attendance.

ADR meetings are never attended just by the case officer alone. Depending on the nature of the dispute, the case officer might be supported by one of their colleagues from the same team, their Compliance Manager, people from HMRC's Policy Division, or just a note-taker.

For example, if you have an enquiry that is a quantum-related dispute and your client is minded to make a settlement offer in the meeting in an effort to avoid the costs of going to Tribunal, it is worth asking for the Compliance Manager to be in attendance, because it will be that individual who signs off any agreement, not the case officer.

If the Compliance Manager is not in attendance, the case officer may well say they need to present the offer to their manager and seek their agreement. That can slow any momentum gained during the ADR meeting and, arguably, gives the case officer an opportunity to put the offer forward in a negative way to their manager, in the hope the offer is rejected.

It is always worth bearing in mind that a case officer who has been handling an enquiry for, say, two or three years is invariably reluctant to lose face by accepting what they consider to be a less than satisfactory amount after all their effort.

Having the Compliance Manager in the ADR meeting means that they hear the offer for themselves, without any negative spin from their colleague.

It is worth remembering that any such offer made during an ADR meeting is made on a without prejudice basis, so if rejected, it cannot be used against your client in a Tribunal hearing. Likewise, if HMRC makes an offer to settle that can't be used in a Tribunal hearing, either.

The dispute may be far more technically complicated than a quantum-related matter, in which case it makes sense to ask for a representative from Policy Division to be there, or someone with technical expertise of the matter in hand.

This is useful because, again, the case officer is very unlikely to give a final decision without seeking the view of someone with the technical nous to support it.

Just a word of warning though: you might not end up with who you ask for. Policy Division officers are very reticent to get on the front line of disputes and prefer to stay in the shadows, giving unseen advice and, often, wording for the case officer to use in responses.

Sometimes, as we have found out, HMRC have turned up mob-handed with four or five officers, all with an opinion and a perceived specialism to bring to the table.

The lesson to be learned here is to establish who exactly is going to attend the ADR meeting from HMRC and to consider who you might need to help you and your client in the meeting. Is there a specialist you can call on to assist? If you have a research and development (R&D) dispute about software, for example, can you call upon an IT specialist for help?

## The Opening Statement

Prior to any online ADR Teams meeting with HMRC, the facilitator will seek Opening Statements (OS) from both sides, typically seven to 10 days before the scheduled meeting date.

Your OS should not be War and Peace, but a resume of what has happened with the enquiry.

A typical OS should look something like this:

- An introduction explaining which accounting period or tax return is under enquiry and when the enquiry was launched.
- A summary of the decisions in dispute and the amounts of tax involved, such as a discovery assessment or Closure Notice.
- A round up of your client's view and an explanation of why they think they are correct in their position.
- Reference should be made to any tax legislation or tax cases which are relevant and you want HMRC to consider.
- A conclusion, including what your client hopes to achieve from the meeting.

An OS over two pages long is invariably missing the point.

The OS is all about making your position clear and a starting point for the discussions to follow. They should not be a blow-by-blow account of everything that has happened with the enquiry to date.

A final tip I would suggest, is not to put the whole case you wish to pursue in the OS. There are two main reasons for this:

1. If HMRC know the entirety of your argument from reading the OS, it makes it more difficult to negotiate on the day itself. The Statements will be shared by the facilitator before the meeting, so if every line of your argument is in it, HMRC will be prepared and ready to attack on the meeting day.
2. Sometimes it is a good tactic to introduce new evidence or supporting material during the ADR meeting because it then gives the case officer some scope to reach a settlement, without losing face.

These tactics need to be thoughtfully considered though.

HMRC will not take respond well if they feel they are being taken for a ride or are being played with.

However, if HMRC have propagated a technical position that you have then researched and found a supportive tax case which helps your client, then it is reasonable to introduce that case as 'new evidence' during the ADR meeting.

### The ADR meeting itself

Assuming the OS's have been shared and you are aware of who will be attending the ADR meeting from HMRC's and your own side, the next two factors to consider are:

1. Briefing and preparing the client.
2. Thinking about how best to present the case.

Preparing the client is very important because HMRC will be expecting to hear more from your client than from you, particularly if the dispute is centred on a means issue, where HMRC want to test your client's declared income against their perceived lifestyle expenditure, or where a technical issue such as goodwill is the main focus and they want to learn more about the business history and activity.

HMRC will not expect to hear from you how your client has spent or saved their money, or how they run their business. Only your client will know that, so they will need to be ready to answer those questions. The more convincing the answers, preferably supported by evidence, then the increased likelihood of a successful meeting. If your client repeatedly responds by saying they will need to go away and check their records then HMRC will not be impressed and your client may lose some credibility.

HMRC will have prepared for the ADR meeting and will have expected your client and yourself to have prepared too.

HMRC will, however, expect you to answer technical questions and that is where you can add value by being across the tax legislation and any relevant tax cases. You will also know and can remind HMRC, if appropriate, that Tribunal Judges rule on a balance of probabilities. If you feel that yardstick has been met in the answers and evidence provided, then remind HMRC of it.

Where you can also make a real difference and help your client is the manner in which you present your client's case during the ADR meeting.

If two years or more of correspondence and emails have not been persuasive, then what might be? How can you present the case differently to get your client's point across?

In my last article – The Good, the Bad and the Ugly – I talked about how we had won an R&D case by using visual aids to help the case officer understand what the advance was. In

other disputes, we have used diagrams and photographs. Could something visually help your client win? Could a PowerPoint presentation or a short video help during the meeting?

A visual prop may not always be suitable and the enquiry you are dealing with may be highly technical and rooted in tax law and precedent.

You will need to tread very carefully if you suggest the enquiry you are talking about might set a precedent. In those circumstances, the facilitator may well call an early end to the meeting if it is felt that agreeing to something under the auspices of ADR might prejudice HMRC with other similar cases.

However, it is perfectly reasonable to use existing case law to argue that a precedent has already been set. The presentation of those cases might best be done by lifting the pertinent passages from the relevant tax cases and summarising them on a separate sheet to talk through with HMRC, rather than expecting HMRC to look for the cases during the meeting.

### The Record of Outcome

The facilitator will seek to agree a Record of Outcome after the ADR meeting.

During one of our cases the HMRC officer really did not want to give ground, but his colleague who had also attended the meeting had already conceded during the discussions. The officer tried to include a clause in the Record of Outcome along the lines of “unless something else is found following the ADR meeting”. We refused to agree the Record of Outcome until that clause was removed.

### Summary

After all these paragraphs of advice I thought I would summarise the main points below for ease of reference:

1. Have a tactical strategy for dealing with the dispute, which you keep under regular review.
2. Let the client know what the strategy is so that they are on-board, as you will need their active participation in any ADR meeting. The client will be reassured that you have a plan.
3. Do not just get sucked into providing responses to HMRC's endless questions and 'top sheeting'. Sometimes it is information that HMRC is not asking for which can help your client's case.
4. Think about when to apply for ADR. Is there an alternative route to progress the dispute first, before ADR is applied for?
5. Keep the online application short and snappy. Explain why you feel ADR may help resolve the dispute. You might have three issues under challenge by HMRC, such as a Closure Notice, a discovery assessment for an older year and a penalty assessment. Even if the ADR process helps you settle two of those issues, you have still made progress.
6. Once appointed, ask the facilitator who is going to be present from HMRC at the ADR meeting. Do not be afraid to ask for someone from one of HMRC's specialist teams to be there, particularly if the dispute is very technical in nature. The specialist may not agree to be in physical attendance at the meeting, but may agree to be available on the end of the phone if required.
7. Consider whether you may need any specialist help in the meeting, depending on the nature of the dispute. Would an IT guru help with an R&D software dispute, or would someone from Independent Tax help? (!)

8. Give thought as to how you might present your client's case in the ADR meeting. Would a visual demonstration help – photographs, diagrams, sketches? Obviously, it depends on the nature of the dispute, but consider an alternative approach to simply just talking through the dispute correspondence to date.
9. Prepare an Opening Statement for the facilitator to share with HMRC. Make it concise and affirmative, stressing the positive elements of your client's position. HMRC will do just the same in their Statement.
10. HMRC will typically insist on a Teams meeting, but would your client benefit from you being there in person, with your client, to offer immediate practical support on the day? That is the approach we take and we find our clients appreciate it.
11. Prepare, prepare and prepare again for the meeting itself. This might be the last chance to reach a settlement with HMRC before heading off to Tribunal. Make a list of all the points you want to ensure are covered and discussed.
12. When asked to agree a Record of Outcome check the wording carefully before signing. Some case officers try to slip in an escape route to more questions.

I am always ready and willing to discuss any of the points I have raised in my articles, or about tricky tax disputes generally, on a strictly confidential basis. Please feel to contact me – my details are on page 2 of this issue.

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