The future role of Alternative Dispute Resolution in civil justice

Management of taxes

01 February 2018

The CIOT has responded to the Civil Justice Council's (CJC) interim report on the future role of Alternative Dispute Resolution (ADR) in civil justice, focusing specifically on how ADR is used in resolving tax disputes by agreement between HMRC and taxpayers. We also sent a copy of our response to HMRC.

ADR was introduced as part of HMRC's 'business as usual' in autumn 2013. Since then, the use of ADR as a tool for resolving tax disputes between taxpayers and HMRC has gradually become more prevalent. On the whole, it has been successful and the experiences of those who have used it (on both sides) are positive. In our view, carried out properly, ADR has a valuable role to play in dispute resolution involving tax matters.

We consider that the main reason for the success of ADR in tax disputes has been a willingness on both sides to make the process work. However, there is still a lack of awareness of ADR amongst taxpayers, their advisers and HMRC.

ADR can help where a dispute has become 'bogged down'. This can occur where the facts have not been completely established, information is incomplete, the facts have been misunderstood or misinterpreted and/or there is technical disagreement. Most cases would otherwise be headed towards the Tax Tribunal. Unsurprisingly, experience has shown that the best results are obtained where both sides enter into the ADR process in a spirit of open-mindedness and compromise, and when there is a genuine commitment to resolving a case and/or narrowing the issues in dispute.

In the majority of cases, the mediator is an HMRC employee who has been specially trained by the Centre for Effective Dispute Resolution (CEDR), works in a dedicated ADR team and has had no previous involvement with the case and no previous contact with the case worker. Feedback from our members indicates that in the vast

majority of cases the performance of HMRC's mediators is very good indeed, and in general the HMRC caseworker has a good understanding of the case and of the technical aspects involved.

Whilst the view of the tax profession towards ADR remains generally positive, we note that certain common themes have emerged in cases where taxpayers and their advisers have been dissatisfied with the behaviour of the HMRC 'side' (that is, excluding the HMRC mediator) and therefore have felt that the process was unsatisfactory.

These include:

1. It becoming clear on the day of the ADR itself that the relevant HMRC decision-maker/policy specialist is not present and/or cannot be reached so that HMRC are not in a position to settle.
2. Intransigence on the part of the HMRC case worker.
3. Lack of preparation on the part of the HMRC case worker.
4. HMRC's governance position not having been made clear to the taxpayer or their advisers in advance so that it becomes apparent only on the day of the ADR itself that there is an additional step that needs to be taken on HMRC's side before a settlement can be concluded.
5. Lack of communication in advance on the part of HMRC about their 'red lines'.

When ADR results in a settlement of the dispute, this has been shown by data collected by HMRC to save time and costs for both sides. Conversely, there can be significant cost consequences for both sides if ADR is not successful in resolving a tax dispute, and the case proceeds to the Tax Tribunal. This is particularly frustrating for the taxpayer if the reason for the failure to reach agreement on the day is due to HMRC's behaviour.

We have previously recommended, and continue to recommend, to HMRC that they publicise, promote and explain ADR better both externally and within HMRC, and that they give consideration to widening the scope of ADR. We have also suggested that they review cases where ADR has not been successful in resolving tax disputes in order to identify common causes of failure and put in place processes to address them, as necessary.

Our response also quoted the feedback on ADR we received from CIOT members when we conducted our survey into HMRC's Powers in 2015, and recent HMRC

statistics.

The full text of the CIOT’s response can be found on the CIOT website.