What's the alternative

Management of taxes



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Bryan Mason explains what is so ‘alternative’ about alternative dispute resolution

Key Points

What is the issue?

Alternative dispute resolution (ADR) is a cost-effective, quick and efficient way to resolve tax disputes that would otherwise end up in litigation

What does it mean to me?

HMRC have a dedicated team of independent professional mediators who can broker discussions between clients and HMRC caseworkers to help both sides reach the right answer without recourse to a tribunal

What can I take away?

What the current process for applications is and the scope of ADR in HMRC. Assurance about the confidential, impartial and effective way to access this service

I am often asked: ‘What is so “alternative” about alternative dispute resolution (ADR)?’ The answer is simple. It is an alternative to lengthy, expensive and resource-intensive litigation for disputes that are at an impasse or are in danger of reaching one. Litigation entails both sides relinquishing control in decision making to a third party in the judiciary. In itself, this suggests that an ‘alternative’ route to settling disputes should perhaps be the orthodox way of working.

Of course, those of us in the mediation practitioner community do not pretend that ADR is a panacea for all tax disputes. Clearly, the need to have legal principles tested and precedent established will continue, although HMRC are increasingly handling disputes through ADR.

Yet there is every reason to consider using ADR more often: the easy application process, the impressive results since it was established and the scope for speeding up everything are convincing incentives.

I lead the team responsible for the operational aspects of ADR for everyone whose tax affairs are dealt with outside large business. In the large business model, applications are discussed first with the customer relationship manager (CRM), but for all other tax disputes there is a simple online application form to complete.

What is ADR?

ADR is a flexible mediation process to unite parties that have reached an impasse in an enquiry, or are in dispute over a view taken, or a decision made. ADR, as operated within HMRC, is in line with the litigation and settlement strategy and is also advocated by section 3 of the Tribunal Rules and Procedures. The Centre for Effective Disputes Resolution (CEDR) defines mediation as:

> ‘A flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.’

The principles of confidentiality, neutrality and leaving the parties in control of decisions are central to the way HMRC operates ADR, ensuring assistance provision in reaching a settlement.

Confidentiality

ADR has been described as creating a safe environment in which parties can have a difficult conversation. All discussions are conducted on a ‘without prejudice’ basis, allowing both sides to think broader and wider about the issues and giving them the ability to explore concerns, issues and solutions in a non-adversarial conversation with an independent facilitator. We conduct both private and joint meetings as part of these confidential discussions.

Neutrality

The function of the ADR operational team is to broker productive mediation meetings by using an independent and objective approach. We are concerned solely with finding a way to settlement by determining what matters to the parties and what they understand about the facts.

Even though facilitators are employed by HMRC, we take impartiality very seriously and the team are highly trained in mediation techniques. We own the ADR process that relies on our integrity as independent officers working separately from case team workers and HMRC appeals and review officers.

Parties in control

HMRC facilitators understand that their job is not to suggest a solution but to help parties find a way forward from impasse or reach an agreement in the disputed areas. We do this by allowing each side to explain their case, challenging each party and testing understanding of the facts, likewise the rules of evidence. Discussions take place in joint and private sessions, with the facilitator respecting the confidentiality of both sides. We are not targeted for amounts of tax arising and we are not put under any pressure to settle in favour of one side or another. Parties themselves have the ultimate control in deciding whether to settle.

What is the scope of ADR?

We take on cases across all tax types and lines of business outside large business. This includes disputes involving corporates, partnerships and individuals but can even extend into areas of customs duty and international trade as well as civil enquiries conducted by the Fraud Investigation Service (FIS). But we draw the line at criminal enquiries and particular aspects of civil evasion.

How do disputes get into the process?

Anyone with a tax dispute can apply for ADR by completing the application form on the gov.uk website. The team will assess applications to see whether the dispute would benefit from being in the process – most tend to. Types of dispute that benefit from our involvement are:

- communications breakdown;
- parties unable to articulate or understand what is in dispute;
- progressing exchange of facts impasse; and
- disagreement about quantifying liability methodology.

Experience has shown that ADR can be effective in more areas than previously thought, including disputes in which there are binary positions. ADR gives both parties the opportunity to state their case and identify any misunderstanding of the facts against established principles. This can often be lost in correspondence and the involvement of a facilitator can bring fresh perspective by changing the focus to find a solution.

However, ADR is not solely concerned with negotiating a settlement in terms of an amount. The process has also helped parties provide clarity on policy issues or legislation and has helped to prepare litigation when that has proven to be the only recourse in reaching a decision. ADR can result in new information being provided.

What do we achieve?

The team has achieved notable success. So far, the results for 2015/16 show that it:

- processed 90% of all applications within 30 days;
- closed 77% of facilitations within 120 days of acceptance; and
- fully or partly resolved 93% of all issues during facilitation.

Parties can be assured that we have a professional team committed to achieving a resolution.

What is the future for ADR?

The recent Consumer Protection Regulations, building on the European parliament ADR directive, specifically include using ADR vehicles to resolve consumer disputes. HMRC remain committed to using the ADR application for tax disputes and the success we have achieved so far shows that this will not diminish.

We have started accepting more complex cases and have dealt with bulk facilitations involving multiple parties in dispute. Work has begun developing different approaches for complex, standard and basic cases. ADR is innovative and HMRC are keen to try new ideas to maximise the benefits that ADR brings to all parties.

Conclusion

HMRC are committed to resolving disputes as quickly as possible. Pressure on the tribunals, perhaps leading to long delays before settlement, make it prudent to seek other ways to resolve disputes. Sometimes there is no alternative.

Further information

The benefits of using ADR have been covered in several previous articles; most recently by Dawn Register in 'Voluntary mediation', *Tax Adviser*, May 2014; Andrew Gotch and Hui Ling McCarthy in 'Breaking the deadlock', *Tax Adviser*, September

2012; and ‘Resolving tax disputes – is ADR the answer?’, *Tax Adviser*, May 2012.