Alternative dispute resolution: a change for the better?

Management of taxes



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As the tribunal case backlog continues to grow, could alternative dispute resolution alleviate the process?

What is immediately obvious from the tax dispute resolution statistics recently published both by HMRC's Annual Report and Accounts for 2022 to 2023 (see tinyurl.com/mxfa4b85) and the Ministry of Justice in its quarterly report for 2023 (see tinyurl.com/5eub4psw) is that HMRC's conventional approach to dispute resolution is, to put it mildly, 'not operating as best it could'. More worryingly, the direction of travel, evident from the growing tribunal case backlog, indicates that things are getting worse rather than better.

We know that in some areas both the taxpayer and HMRC are experiencing acute challenges in establishing an appropriately balanced approach to dispute resolution. In the context of R&D disputes, the CIOT on 3 July 2023 took the fairly unprecedented step of writing an open letter to HMRC regarding enquiry conduct in

this area.

In the context of this landscape, it is clear that considering alternative dispute resolution (ADR) as merely an ‘alternative’ part of the process is not enough. ADR could and should be a key part of the solution for preventing the breakdown of the whole dispute resolution process ecosystem. Given the statistics, it is evident that using the Tax Tribunal as a backstop is not a viable option for either HMRC or the taxpayer, so we have no choice but to use ADR more to help alleviate this unsustainable position.

The ADR statistics also tell an interesting story. The consistently high resolution rate, averaging 85% over the past five years, indicates that when ADR is used it is an extremely powerful and effective tool.

The relatively low uptake of ADR tells another story. We see that in overall terms, the ADR numbers (a little more than 1,000 applications per annum) are not consistent with the high number of ongoing tax interventions. I believe both HMRC and professional tax advisors have a part to play in unblocking this status quo.

Increasing engagement with ADR

As advisors, how do we interpret the relatively low engagement with ADR? BDO’s own research among mid-sized businesses shows that awareness is high with 92% saying they have heard of ADR. Yet with over 60% saying they had been stuck in a dispute with HMRC lasting longer than a year, it’s clear that only a tiny fraction are considering it for their dispute.

Anecdotally, I see that many disputes proceed unthinkingly along the traditional route – of protracted correspondence with occasional meetings – for far longer than they ought to. In practice, taxpayers and their advisors often keep ADR in reserve in their ‘back pocket’ until all else has failed.

It seems evident therefore, that the education priority for ADR specialists must move on from ensuring that there is a general awareness of the availability of ADR. Instead, the focus must be on the more subtle articulation to taxpayers of how they, supported by specialists, must engage with ADR as soon as it is clear that a difference of opinion is emerging. ADR is not just relevant when the taxpayer is knocking at the tribunal door, but must be ‘upstreamed’ as much as possible.

Another statistic that needs unpicking is that HMRC rejects over half the applications for ADR. About half of these rejections are because the applications are ‘out of scope’ – which means they are likely to be a dispute about one of the fairly limited areas which are excluded from ADR and are outlined in HMRC’s ADR Guidance.

It is the other half of the rejection rate – i.e. those cases rejected by the Governance Panel – that requires more explanation. In these instances, it is likely that the panel rejects the applications on the grounds that ADR will not add value. We need an understanding of why this is. And more critically, HMRC needs to focus on what can be done about this in a wider policy context.

ADR was introduced over a decade ago in recognition of the problem articulated above. In that period, the need for effective dispute resolution support has grown hugely but the take up of ADR has remained broadly static. ADR is constantly evolving in response to taxpayer and HMRC feedback and in my opinion needs to be recognised as the ‘go to’ rather than ‘alternative’ tool to accelerate dispute resolution in most cases, allowing the courts to focus their limited resources on those minority of cases that really do need judicial determination.

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