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Management of Taxes	Alternative Dispute Resolution	Meg Wilson

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Table of Contents

1. Overview	2
2. Is ADR worthwhile?.....	2
3. Cases suitable for ADR.....	3
4. Cases unsuitable for ADR.....	3
5. When to apply for ADR	4
6. Applying for ADR	4
7. Types of ADR.....	5
Facilitated discussion	5
Facilitative mediation.....	5
Evaluative mediation	5
Non-binding neutral evaluation	6
8. The ADR process.....	6
9. Reliance on ADR agreement	7
10. Tips on ADR.....	7
11. Further information	7

Alternative Dispute Resolution

1. Overview

Alternative dispute resolution (ADR) uses mediation to resolve tax disagreements between taxpayers and HMRC.

According to HMRC, the key requirement for ADR is a genuine desire and commitment by the parties to progress matters and limit costs.

ADR aims to provide a quick and fair way of resolving disputes. It does this by appointing an 'independent' HMRC facilitator, who has been trained in mediation and who has not been involved in the dispute, to work with both the taxpayer (and any adviser) and the HMRC caseworker, to try to reach an agreement.

If agreement is not possible, the ADR process should at least enable the parties to clarify the points that are (and are not) in dispute, to help the parties prepare for litigation.

The objective of ADR is to reduce the number of cases that reach statutory review and/or a tribunal, thereby cutting costs for taxpayers and HMRC.

One benefit for taxpayers and their advisers is that, through potentially quicker resolution, ADR can cut uncertainty and ease the strain on relationships that can result from HMRC compliance checks.

ADR is not a way of bypassing the HMRC caseworker, as the facilitator simply acts as a mediator. The decision on settling the case stays with the taxpayer and the HMRC caseworker. Nor is ADR a way of bypassing the law, as whether HMRC resolve a dispute through ADR or not it must accord with the terms of HMRC's *Litigation and Settlement Strategy (LSS)* which is the framework within which HMRC resolve tax disputes to secure the right tax under the law.

2. Is ADR worthwhile?

ADR could be useful where communications have broken down between the HMRC caseworker and the taxpayer.

ADR does not suit every taxpayer in dispute with HMRC. However, given the possibility of resolving matters for a fraction of the cost and time of taking a case to tribunal, for some, it is worth trying.

It is worth noting that in 2017-18 as reported in HMRC's *Annual Report and Accounts 2017-18*:

- 82% of cases accepted for ADR were fully or partially resolved;

- 98% of taxpayers and their representatives would recommend ADR; and
- 94% of taxpayers and their representatives were satisfied or very satisfied with the ADR process.

ADR does not affect the taxpayer's existing rights to have a statutory review or to appeal to the tribunal, but the taxpayer must stick to the usual time limits to keep these legal rights.

3. Cases suitable for ADR

ADR can be used when:

- communications have broken down between a taxpayer and HMRC;
- there are disputes about the facts;
- a dispute appears to be the result of a misunderstanding;
- the taxpayer wants to know why HMRC have not agreed evidence given to them, and why they want to use other evidence;
- the taxpayer is not clear what information HMRC have used, and the taxpayer thinks HMRC may have made wrong assumptions; and/or
- the taxpayer believes HMRC are requesting unnecessary information.

4. Cases unsuitable for ADR

ADR cannot be used for:

- complaints and disputes about HMRC delays in using information or giving misleading advice;
- debt recovery or payment issues;
- disputes about tax credits;
- disputes over default surcharges;
- automatic late payment or late filing penalties;
- PAYE coding notices;
- Extra-Statutory Concessions;
- cases being dealt with by HMRC's criminal investigators;
- pension liberation schemes;
- high income child benefit charges;
- national minimum wage;

- accelerated payments and follower notices; and
- cases categorised as ‘paper’ or ‘basic’ by the First-tier Tribunal (FTT).

5. When to apply for ADR

A taxpayer can apply for ADR at any stage of an enquiry, although HMRC should be aware of all the facts before an application for ADR.

If HMRC have made a decision about a tax issue, a taxpayer can apply for ADR if the decision has been appealed against and HMRC have:

- accepted the appeal, but have not offered a statutory review;
- offered a statutory review that has been accepted (the taxpayer must wait for the review to end, appeal to the tribunal and have the appeal accepted before applying); or
- offered a statutory review that has not been accepted (again the taxpayer must appeal to the tribunal first, and have the appeal accepted before applying).

However, the ADR panel will refuse an ADR application if an appeal has been lodged at the FTT and the ADR application is received either:

- after HMRC’s statement of case has been given; or
- less than 10 days before HMRC’s statement of case is due,

unless there are exceptional circumstances.

The *Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (SI 2009/273), r. 3 states that the FTT should facilitate ADR ‘where appropriate’. At the beginning of the hearing in *Steady* [2016] TC 05225, both parties submitted that the hearing should be stood over to enable the parties to pursue ADR, however the FTT refused the postponement application. The FTT decided that ADR did not offer material advantages to either party over a determination by the tribunal in a relatively informal hearing and it was therefore in the interests of fairness and justice to proceed with the hearing.

6. Applying for ADR

If a large business believes that a dispute may be eligible for ADR and it has an HMRC Customer Relationship Manager or a dedicated caseworker, the business should first contact them to discuss ADR.

For small and medium sized businesses or those with complicated personal tax affairs, they can use the online form to send their details to HMRC. An agent or tax adviser can do this on the business or person’s behalf.

When applying, if several issues are in dispute with different HMRC stakeholders, this should be made clear.

HMRC caseworkers consider and evaluate all requests for ADR. Where the caseworkers believe that a case is not suitable for ADR, the case is referred to a governance panel for a decision on whether ADR is suitable. HMRC should respond within 30 days.

For an example of a case where the FTT dismissed an application for HMRC to pay costs to the taxpayer on the basis that HMRC had failed to concede at an earlier stage and had refused requests for ADR, see *Gee [2015] TC 04387*. Given that the parties disputed the interpretation of the law and that HMRC's resistance to the appeal was based on a legal view that was not unreasonable, the FTT held that HMRC had not unreasonably refused ADR.

7. Types of ADR

Facilitated discussion

Facilitated discussion is a process in which an HMRC externally trained and accredited mediator facilitates bringing the parties together, but offers no opinion on the merits of the arguments being advanced. Sometimes this involves a trained mediator also being provided by the taxpayer's side to join with the HMRC mediator and facilitate together. The facilitator(s) may challenge each side as to how their dispute may play out in front of the tribunal. The HMRC facilitator may or may not be a specialist in the subject matter of the dispute, but has had no prior involvement in working on the case as part of the case team. If the taxpayer also provides a facilitator, it is expected that he similarly has not previously worked on the case. The main difference between facilitated discussion and facilitative mediation is that those brought in to help the disputing parties are not independent of the disputing parties but work neutrally.

Facilitative mediation

Facilitative mediation is a process in which an independent external mediator is jointly engaged by HMRC and the taxpayer to try to bring the parties together, but offers no opinion on the merits of the arguments being advanced. The mediator may challenge each side as to how their dispute may play out in front of the tribunal. A facilitative mediator may or may not be a specialist in the subject matter of the dispute but will have no connection with either party.

Evaluative mediation

Evaluative mediation is a process in which the mediator tries to bring the parties together in exactly the same way as in facilitative mediation, but also providing a view of the matter as a specialist in the subject matter of the dispute.

It is possible to have a combination of the two approaches in which facilitative mediation is attempted first, with evaluative mediation following if the initial approach is not successful. However, HMRC only see this approach as suitable in limited tax cases where the issue is not tax-related, but determination of the issue has tax consequences, if both parties are willing to consider the strength of their case in the light of the expert's view.

Non-binding neutral evaluation

Non-binding neutral evaluation uses a neutral third party who is an expert in a particular field to provide a non-binding opinion. This may be suitable in limited tax cases where the issue is not tax-related, but determination of the issue has tax consequences, if both parties are willing to consider the strength of their case in light of the expert's view.

8. The ADR process

If accepted for ADR, the taxpayer is asked by the facilitator to sign a Memorandum of Understanding indicating the taxpayer's understanding and agreement to ADR. Using ADR does not stop the taxpayer from subsequently asking for an HMRC review or following through the matter by appealing to a tribunal.

The facilitator then works with the HMRC caseworker and the taxpayer (and any adviser) to agree how to proceed. At its simplest, the process may involve one or more telephone calls.

If a meeting is appropriate, usually:

- the meeting is held at the adviser's offices – subject to having suitable facilities, such as enough meeting rooms, with enough space between them so that each of the parties can be allocated their own room in the knowledge that their discussions cannot be overheard;
- the meeting starts mid-morning with no fixed end time;
- the meeting lasts for between one-and-a-half and six hours;
- the meeting is attended by three or four HMRC staff, being the caseworker, their manager, the facilitator and possibly a co-facilitator; and
- hopefully, the meeting finishes with the dispute being resolved, in which case the facilitator summarises the agreed resolution. This is followed by the HMRC caseworker writing up the summary agreement and sending it to the taxpayer (and any adviser).

If agreement is not reached during the meeting, the facilitator tries to keep up the momentum on the case. It is not unusual with unresolved cases for an

agreement to be reached soon after the meeting. However, if resolution is not reached following the meeting, the facilitator advises on the options available.

The aim is for the process to be completed within 120 days.

If ADR does not resolve the dispute, the normal rights of review and appeal are available (subject to the usual time limits).

Discussions in mediation are confidential, but any new information or evidence disclosed by the taxpayer that has an effect on the tax position will be on record. In *Ritchie [2016] TC 05258*, the FTT refused an application by taxpayers to bar HMRC from taking further part in an appeal because HMRC had used without prejudice material obtained as part of the unsuccessful ADR process and had taken six months to agree to remedy this. However, the judge advised HMRC that if it did not already have them, HMRC needed to put in place procedures to ensure that follow up correspondence from an ADR meeting which still forms part of the ADR process is kept separate and is not included in the case file which is then passed to the litigation team.

9. Reliance on ADR agreement

In the FTT case of *Serpentine Trust Ltd [2018] TC 06719*, the trust used ADR to reach a written agreement with HMRC. HMRC later issued an assessment which the trust said did not adhere to the agreement. The FTT agreed with the trust over its interpretation of the ADR agreement, however the ADR agreement was contrary to the law and therefore the ADR agreement was ultra vires. As a result, HMRC were able to assess the trust as they had. The FTT concluded that the only way for the trust to challenge HMRC's change of position would be by judicial review on the ground of legitimate expectation.

10. Tips on ADR

- Consider applying for ADR as soon as there is an impasse with HMRC.
- Before applying, check whether the case meets the selection criteria.
- Remember the time-limits for statutory review and appealing to the tribunal.

11. Further information

HMRC's factsheet CC/FS21: *Alternative Dispute Resolution*

Guidance on gov.uk: *Use Alternative Dispute Resolution to settle a tax dispute*

HMRC Compliance Handbook page *CH280400*