

Changes to Alternative Dispute Resolution (Lecture P1390 – 14.46 minutes)

HMRC's Alternative Dispute Resolution ("ADR") is a non-statutory process for resolving personal tax and business tax disputes between HMRC and a taxpayer. In a previous session, I covered the process, including how to apply for it, and what cases are suitable. Following recent changes to the process by HMRC, it is time for an update. This session provides an overview of the process and considers the recent changes.

Overview of Alternative Dispute Resolution

Under ADR, an online application is made, and a mediator (a trained HMRC officer not connected to the case) assists the taxpayer and the HMRC caseworker to resolve their dispute. Not all disputes are suitable for ADR, and HMRC provides details of cases that will not be accepted into ADR (see below). HMRC can reject applications that are not considered appropriate for ADR. As the process is not statutory, there isn't a right of appeal if HMRC rejects an application for ADR. Where there is uncertainty about whether a case should be included in ADR, there is an ADR Panel (made up of HMRC staff) which considers such cases.

HMRC's policy is that an application for ADR can be made at any stage of an enquiry, and an appealable decision is not needed, which is an advantage for the taxpayer.

Discussions under the ADR process are generally held on a "without prejudice" basis (but see below). HMRC state, at ADRG01800, that, in the context of ADR, "without prejudice" means that "the parties are able to propose and explore solutions to the dispute under consideration without having to worry that their discussions will in some way be regarded as an admission should the parties not reach an agreement".

HMRC manual

HMRC have produced a manual, Alternative Dispute Resolution Guidance ("ADRG"), which replaces previous information sheets. The manual, which was published in February 2023, covers the ADR process, from the beginning to the end. Sections include guidance on the use of external mediators (see below), the role of the mediator, and the types of cases that are, and aren't, suitable for ADR. Much of the guidance will be familiar to advisers who have used the ADR process, but there are some important changes. Advisers facing a dispute, even those with experience of ADR, should review the manual to consider the new information.

Using external mediators

HMRC's default position is that their own mediators are used for the ADR process. These are HMRC officers who are training in mediation skills and techniques and are independent of the case team. The mediator acts as a neutral third party without forming a view on who is right and wrong.

Not all taxpayers will want to use a HMRC mediator, particularly in those cases where there has been a breakdown in communication with the HMRC officer. HMRC give taxpayers the option to involve a "professionally accredited" mediator from outside HMRC. This is done at the taxpayer's expense. In addition, there are various conditions that apply to the use of an external mediator. The appointed external mediator must work with an assigned HMRC mediator, who has final control over the mediation process. The external mediator must accept and apply HMRC's terms and conditions of the ADR process, including the conditions set out in HMRC's manual.

Use of information

The general premise is, as noted above, that ADR discussions are held on a without prejudice basis. An exception to this is in relation to “tax facts”. HMRC define these as a fact “which has legal and technical implications for a taxpayer’s liability”. Examples of tax facts given in HMRC’s manual include the receipt of a payment, and the identity of a customer. A tax fact is distinguished from a situation where there is negotiation about what the facts might be. The mediator should make clear at the start of the mediation that any “tax fact” provided in the course of the ADR discussions is not covered by the “without prejudice” rule.

Advisers need to be mindful of the implications of making proposals which include the assertion, even implicitly, of a tax fact. At the end of the mediation, details of any tax facts that either party may wish to rely on in future proceedings, should be included in the Record of Outcome, if both parties agree. If there is no agreement, HMRC should set out details of the tax fact to the taxpayer in writing at the end of the mediation.

If the mediation is unsuccessful, and there is a dispute about the tax facts, HMRC may seek legal disclosure of the documentation. The taxpayer will have the same right, where appropriate.

The HMRC manual acknowledges that participants can take notes during the mediation if they wish. The mediator will encourage note-taking to be kept to a minimum during the joint sessions, so that the focus is on listening to the other side. HMRC will make a note of any “tax facts” supplied by the taxpayer.

It is likely that that mediator will also take notes. Any such notes are to be factual and should not include any personal opinions. The mediator’s notes are kept separately within HMRC, and are not available to the caseworker, or other HMRC personnel working on the case. Advisers should be aware that the mediator’s notes may be disclosable if the case proceeds to the tribunal.

Specified cases excluded from Alternative Dispute Resolution

There are specific areas of tax which HMRC currently excludes from ADR. The excluded areas include the following (the full list is given at ADRG02900):

- Cases that HMRC’s criminal investigators are dealing with;
- Complaints and disputes about HMRC delays in using information or giving misleading advice;
- Payment or debt recovery issues;
- Extra Statutory Concessions;
- Pension liberation schemes;
- Automatic late payment or late filing penalties;
- Accelerated payments and follower notices;
- Cases the First-tier Tax Tribunal have categorised as ‘paper’ or ‘basic’.

If your client has asked for a formal HMRC review of a decision, then ADR will not be offered at the same time. If a review decision has been made, and the client has formally appealed against it, and this appeal has been accepted, then the client can make an application for ADR.

Other points

In my previous session on the ADR, I referred to various timelines under the process. The new manual extends these, and states that HMRC's intention is that ADR cases are generally concluded within four months. This means that the case is either settled within that timeframe, or out of the ADR process. Advisers may take cases to ADR not expecting settlement, but wish to seek clarification of HMRC's position. In addition, the mediator is now required to ensure that the ADR process is not used to either delay HMRC's compliance activities, or the need for tribunal proceedings. If the mediator considers it appropriate, the mediation can be terminated.

At the end of the mediation, there will be a formal Record of Outcome, which both parties will be asked to approve. The document provides a record of what has been agreed, partial agreements, and points where agreement has not been reached. The document is usually prepared at the end of the mediation, but the HMRC manual allows extra time, where necessary, although the record should be finalised within a week of the mediation. There are certain cases where the mediation solution is deemed as provisional until approved by a "Dispute Resolution Board" or similar panel within HMRC.

Practical considerations

Advisers need to ensure that early representations are made to the mediator if they are seeking in-person meetings during the mediation. Given the limited resources available to HMRC, pressure will be on mediation officers to hold meetings by the default methods wherever possible. Advisers, and their clients, may need to be flexible on this aspect, particularly where the attendance of HMRC specialists at the mediation is desirable.

Advisers may be tempted to appoint a non-HMRC mediator. However, advisers need to be mindful of the restrictions that apply, as well as the responsibility of the client to meet the costs involved. Advisers also need to be mindful of the circumstances in which information provided during the mediation will not be treated as confidential.

It is important to ensure that the appropriate HMRC officers are present for the mediation. The mediator should ensure that a decision-maker is there for HMRC (usually the caseworker's manager), but the adviser should consider whether there is a need for a technical specialist from HMRC to also be present.

Despite the changes that have been introduced by HMRC, ADR can still bring time and cost savings over formal litigation. However, it is important for the adviser to consider each case on its merits.

In my previous session on ADR, I expressed the opinion that ADR should be a consideration for advisers when their clients have a dispute with HMRC (in conjunction with statutory review, where available). That remains my view, but extra caution is needed. Advisers may want to seek specialist advice before embarking on the ADR route. They can help assess the merits of using ADR in the client's circumstances. In addition, advisers may find that a specialist consultant is able to engage with HMRC and reach an acceptable outcome for the client, thereby avoiding the need to pursue an ADR application.

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