Alternative Dispute Resolution for the Private Client Practitioner

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Talk for STEP City of London Branch
17 September 2012
Overview

• What is ADR and why is it relevant?
• An overview of HMRC’s pilots
• Suitable and unsuitable cases?
• Large and Complex pilot
• SME/Individual pilot
• Pilot feedback
• Myths
• Benefits
• How to engage/further information
What is ADR?

Third party brought in with the agreement of both parties:

- to determine the dispute (arbitration); or
- to facilitate bilateral agreement (as an expert or through mediation)
Mediation

- Most relevant form of ADR in tax disputes
- Centre for Effective Dispute 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.*"
Why are we interested?

Mediation is becoming increasingly prevalent in all areas of the law:

- 1998: Civil Procedure Rules
- 2001: UK government’s ADR Pledge
- 2008: EU Mediation Directive
- 2008: Upper Tribunal Rules
- **2009**: First-tier Tribunal Rules (Tax Chamber)
- 2011: MOJ Dispute Resolution Commitment
- 2012: Court of Appeal Mediation Scheme (CAMS)
What has HMRC been doing?

• Litigation and Settlement Strategy (LSS)

• 2011/12 – 2 pilots

(1) Large and Complex pilot – extended into 2012/13

(2) SME/Individual pilot – second phase from Jan to Nov 2012
Large and Complex pilot - overview

- Either before or after an appealable decision

- Use of an independent mediator or “facilitated negotiations”

- A formal mediation or facilitated negotiation over the course of a day
SME/Individual pilot - overview

- Pre- (and, since 13 Aug 2012, post-) appealable decision

- Internal HMRC facilitator

- Usually involves a number of telephone calls

- Might involve face-to-face meetings
Suitable cases for ADR

• Long-running dispute
• Both parties entrenched/communication broken down
• Progress stalled
• Fact-heavy/number of factors – further clarification possible
• May benefit from obtaining more suitable evidence
• Legitimate scope for a party to understand the other’s arguments better
• Number of issues – hard to identify
• Capable of settlement within the scope of the LSS
• “More than one right answer?” – e.g. valuation cases
• Structured discussion might uncover alternative approach(es)
**Unsuitable cases?**

- No such thing?

**HMRC’s view** – mediation likely to be unsuitable where:
  - Taxpayer won’t work collaboratively and/or is unwilling
  - Precedent value in litigation – wider public interest
  - Cases stood behind other appeals
  - Resolution can only be achieved by departure from HMRC policy/technical view/LSS
  - Lack of integrity on part of taxpayer suspected
  - Doubt over the strength of evidence – HMRC wish to test at trial
Large and Complex - How does it work?

- Make an application
- Dispute Resolution Unit (DRU) will decide whether case is suitable. If it is, then...

1. ADR process agreement
2. Pre-mediation structured discussions
3. Prepare for the mediation
4. Mediation – including resolving the dispute on the day of the mediation
(1) ADR Process Agreement

(a) Scope of the dispute
(b) ADR timetable
(c) Identify individuals on each side who will be responsible for progress
(d) Contact details
(e) Where will meetings be held
(f) Choice of mediator
(g) Confidentiality / without prejudice
(h) Aims and possible outcomes
(i) A presumption that mediation will follow if dispute not resolved through structured discussions
(2) Pre-mediation structured discussions

(a) Agreement and recording of disputed facts and law
(b) Both parties to summarise and meet to discuss their respective positions
(c) Possibility of further exchange of technical analysis and/or information in the light of (b)
(d) Parties prepare a joint document setting out key facts and/or legal issues
(3) Prepare for the mediation

If no settlement reached at pre-mediation stage:

(a) Choose a mediator
(b) Mediation agreement
(c) Choose a date
(d) Choose a venue
(e) Pre-mediation discussion with mediator
(f) Admin (checklists)
(4) Mediation – the day itself

Varies, but a “typical” mediation day might entail:
(a) Welcome from mediator in separate rooms
(b) Plenary opening statements from both sides
(c) Brief responses to opening statements
(d) Parties return to separate rooms
(e) Mediator holds separate sessions with each party
(f) Any movement or offers usually communicated by mediator
(g) Each party’s conversations with mediator are confidential; mediator will not convey discussions to the other side without express permission
(h) Parties may come together for another plenary session
(i) When agreement is reached, it is documented and signed by both parties on the day
Large and Complex Phase 1:
Pilot results so far

- 20 or so cases
- Some involved an independent mediator
- Others involved 2 facilitators – one from the taxpayer’s side, one from HMRC’s
- High proportion of cases settled – even some which had fixed hearing dates
- Cases which did not settle went on to appeal with fewer issues
SME/Individual – How does it work?

- Make an application
- SME ADR pilot team will decide whether case is suitable. If it is, then:
  (1) Notified of name and contact details of HMRC facilitator
  (2) Facilitator will contact you to develop a process
  (3) Complete a Memorandum of Understanding
  (4) Facilitation
SME/Individual–Facilitation

(a) Facilitator calls you to discuss case – in particular, the reasons for your client’s position
(b) Facilitator would then speak to HMRC caseworker to hear HMRC’s side
(c) Facilitator might ask each side to consider how they might put their case before the Tribunal
(d) Facilitator would then talk through the caseworker’s case with you – identifying particular HMRC concerns
(e) Repeat step (d) with HMRC caseworker
(f) Facilitator may come back with suggestions as to how the caseworker’s concerns might be addressed
(g) Exchanges of information may follow
(h) Further clarity in each party’s case and in the relevant facts and issues
(i) Potential for settlement?
SME Phase 1: Pilot results so far

- 149 cases offered ADR; 143 taxpayers accepted.
- 33 cases withdrawn (HMRC policy or taxpayer disengagement)
- 95 facilitations completed
- 60% of disputes wholly or partly resolved to mutual satisfaction of both sides
- Resolution took approximately 15% of the time that it would have taken to bring the case to trial
SME Phase 1 Pilot Feedback

• No complaints about the impartiality of internal HMRC facilitator

Unrepresented taxpayer:

“A very useful service and my advice to anyone who has a dispute is to use this free service as you would find it valuable to talk to someone who is both very knowledgeable and impartial to either party.”
SME Phase 1 Pilot Feedback

HMRC internal facilitator

“It was an enjoyable and rewarding role. It was good to be able to battle the perception that HMRC don’t want to help.”
Myths

• “HMRC won’t settle - it’s a waste of time”

(or, with the SME/Individual Pilot, “It’s no different to statutory review - it’s a waste of time”)

• “It’s too expensive”

• “It’s no different to going to Tribunal”

• “Why do we need someone else? I’m an excellent negotiator!”
Benefits

• Save money
• Save time
• Retain control of the decision
• Save pride, stress and relationships
• Even if the case does not settle, no such thing as wasted ADR:
  – Reduce issues
  – Clearer idea of other side’s case and strengths and weaknesses of your own
  – Build client relationships
  – Help clients to prepare for a hearing
How to engage

Large and complex
- Request for mediation to be made to the CRM/case-owner and copied to the Dispute Resolution Unit

SME/Individual
- Online application
Further information

SME pilot

“Alternative Dispute Resolution trial for Small and Medium Enterprise customers” - [http://www.hmrc.gov.uk/adr/index.htm](http://www.hmrc.gov.uk/adr/index.htm)

Large and complex pilot

“LSS commentary and ADR guidance finalised - large and complex ADR pilot extended” - [http://www.hmrc.gov.uk/practitioners/lss-intro.htm](http://www.hmrc.gov.uk/practitioners/lss-intro.htm)

Centre for Effective Dispute Resolution (CEDR) - [http://www.cedr.com/](http://www.cedr.com/)
(Mediator Skills Training (Tax Professionals))