

Alternative Dispute Resolution (ADR)

CIOT/ATT webinar 18 November 2019

Questions raised by listeners during the webinar and HMRC's responses

1. **If ADR is used but mediation ultimately proves unsuccessful and the matter proceeds to tribunal, does this ultimately mean the process takes longer?**

HMRC's response: ADR can be used both before and following an appealable decision. If pre-decision, then there is of course no Tribunal involvement and ADR can unlock any impasse. If post-decision, ADR resolves 88% of cases within 120 days of acceptance into the process. Even if ADR fails to resolve the dispute, then it can help clarify and narrow the issues moving forward to litigation.

2. **How can the mediators be impartial if they are employees of one of the parties to the dispute?**

HMRC's response: HMRC mediators are not involved in the case and do not form part of the decision making enquiry team. We are not there to judge or impose a decision but simply offer guidance to both parties to see if an agreement can be reached. The mediator would not engage with discussion about any other matters apart from the dispute in question or if material tax facts are disclosed during the mediation.

We actively seek feedback from customers after an ADR meeting and this along with the various articles that have appeared in the accountancy press over recent years have shown that impartiality of the mediators has never been called into question.

3. **Is an ADR agreement binding on both parties? What if one party wishes to resile from the agreement? Does HMRC have any comments regarding the case of 'The Serpentine Trust Ltd' [2018] where they sought to resile from an agreed contract made during the ADR process?**

HMRC's response: The ADR meeting detailed in Serpentine took place in 2013 when ADR was new in HMRC. In the following 6 years we have reviewed our processes and embedded ADR within HMRC. Although a FTT decision is persuasive, what Serpentine did show is that an ADR agreement is binding on the parties and should be adhered to.

4. **What is the success rate of the ADR process? How many reach resolution?**

HMRC's response: In 2018-19 we resolved 88% of cases which were accepted into ADR, viz:

| | |
|--------------------|-----|
| Full Resolution | 57% |
| Partial Resolution | 16% |
| Position Clarified | 15% |

5. **The last ADR I was involved in as an agent ended when, after several hours, HMRC informed us that they were following a policy decision and they couldn't change it, despite our evidence of case law, oral evidence etc. How does HMRC choose who attends ADR as I felt the ADR process was pointless if the representatives of HMRC at ADR cannot change a position or decision?**

HMRC's response: The HMRC mediator will speak to all parties, both within HMRC and in respect of the customer, to ensure the relevant stakeholders are available. However, it has to be remembered that acceptance into ADR will not necessarily guarantee a full resolution. Having considered further evidence/representations if HMRC still feel their position is correct and in line with HMRC's Litigation and Settlement Strategy then agreement isn't always possible. Likewise, the customer having listened to HMRC's position may not change their view of the dispute.

We would also consider whether it was appropriate for someone in Policy to attend. The mediator would explore this with all stakeholders and may be able to arrange either by phone or at the meeting itself. If there was further information i.e. case law and oral evidence that was provided at the meeting the resolution could be that this information including the verbal evidence could be documented and considered further following the meeting.

6. Are all mediators HMRC employees? Is it possible to use a third party mediator instead / as well?

HMRC's response: HMRC's published internet guidance states: "An HMRC mediator who has been trained in mediation skills and techniques will work with you and the HMRC officer dealing with your case".

There are occasions when we will undertake joint mediations with third party mediators, but the majority of cases are run by HMRC mediators as per our published guidelines.

7. When an appealable decision has been given by HMRC, can ADR take place before an appeal is lodged at the tax tribunal (for example, to save costs)?

HMRC's response: Basically, unless an appeal has been submitted then there is no "live" dispute to mediate. However, there are differences between direct and indirect cases:

Indirect Cases

Once an appealable decision has been made the customer has 30 days in which to request either an independent review from HMRC or lodge an appeal at the Tribunal. If an independent review is taking place then ADR would not be accepted. If the customer does not wish to request an independent review then they must lodge their appeal with the Tribunal before ADR can be considered.

Direct Cases

Once an appealable decision has been made, the appeal needs to be lodged with HMRC. Dialogue continues until HMRC issue the View of the Matter Letter. ADR can be considered during this stage. However, if the View of the Matter Letter has been issued then ADR will only be considered if this matter has been appealed to the Tribunal as with Indirect Cases.

ADR can also be considered before an appealable decision has been issued.

8. Can ADR be used to resolve technical issues?

HMRC's response: Yes.

- 9. What can you do if HMRC say that your case cannot be considered under ADR as the officers involved have said 'no'?**

HMRC's response: It is the mediator, not the compliance caseworker who holds the decision as to whether a case should be accepted for ADR. All ADR applications should be made via <https://www.gov.uk/guidance/tax-disputes-alternative-dispute-resolution-adr>. Please advise us if this situation ever arises.

- 10. Where there is a dispute about the facts, and this involves a 3rd party witness how does ADR work in this situation, ie does ADR ever involve 3-way mediation (for example HMRC, supplier and customer?)**

HMRC's response: Yes, we have resolved cases in ADR with third parties. However, permission to discuss their tax issues with other parties needs to be obtained from the customer in the first instance.

- 11. Can you give an example of the type of case which has gone to ADR and the value of the tax at stake?**

HMRC's response: The criteria for considering what type of case is suitable for ADR is detailed on the website. If the case is suitable, we will take it into ADR irrespective of the amount of tax at stake, although if the tax is less than £10,000 we will offer a telephone mediation rather than face to face if the customer is happy with this.