

# UK Indirect Tax Conference 2014

## Alternative Dispute Resolution (ADR)



Glen Harling and John Neale (HMRC Dispute Resolution Unit)

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# ADR

## Mediation – what is it?

- ADR is any means of resolving a dispute without litigation
- Comes in a variety of forms – mediation / arbitration / non binding neutral determination
- “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 terms of resolution.”

# ADR

## Mediation / facilitation for tax disputes

- HMRC have two programmes – SMEi and Large and Complex cases
- Joint mediation with two ‘neutral’ mediators from HMRC and Deloitte (often referred to as facilitation)
- The tax mediation or facilitation process usually takes place over the course of one day and involves a series of joint and individual meetings between the parties and the mediator
- The mediator works with the parties to achieve settlement and does not impose a settlement or express views on the relevant merits of the arguments advanced
- The process can be used for any tax dispute regardless of the tax value or the number of issue
- Facilitation can be used at any stage – e.g. before a binding decision / enquiry closed or after appeal lodged
- Confidential and without prejudice process
- Application via HMRC’s Dispute Resolution Unit (“DRU”) headed by Val Hennelly / discussions with CRM – HMRC need to agree that mediation could work

# Cases where mediation might help

## Suitability

Suitable cases	Unsuitable cases
Parties unclear / unable to articulate points in dispute or lack of understanding of positions	Taxpayer does (or has) not work collaboratively with HMRC
No dispute over the technical analysis but parties need to agree methodology and quantify liability	Doubt over strength of evidence and HMRC want to test by cross examination at Tribunal
Dispute / uncertainty over the facts	More efficient to have an issue judicially clarified so precedent can be applied elsewhere
Issues / facts with no precedent value or wider impact	“Red Line” - resolution could only be achieved by departure from an established HMRC view / policy line / outside of LSS
Entrenched views / strained relationships or case has stalled	Marketed avoidance
Capable of settlement within the LSS	Tribunal hearing already fixed / stood over cases / issue(s) affecting multiple taxpayers
More than one right answer or where it appears to be all or nothing there may be alternative ways of looking at the facts	Case already being worked within another handling strategy – e.g. HRCP

- DRU “triage” process
- Governance & ADR Panel = Deputy Director LBS (Ian McNeill) / Solicitor General (Gill Aitken) / Director of Tax Professionalism and Assurance (Sue Walton) / Head of the DRU (Val Hennelly)
- Appropriate case selection key to retaining credibility with the DRU

# Tax mediation

## How a typical tax facilitation day unfolds

- Once HMRC have agreed that a mediation/facilitation day is suitable a facilitator will be allocated and date will be arranged
- Facilitator welcomes the parties into separate rooms where the facilitation agreement is signed
- Opening plenary session where the parties will outline their positions
- Following the plenary session typically the facilitator(s) will split the parties into separate rooms
- The facilitators move between the parties to gather or share information
- The facilitators will treat everything in confidence but will propose that certain information might be useful to disclose to the other party
- At certain points the parties or certain individuals might meet to discuss specific issues
- The parties hopefully reach settlement or find a positive way forward and any agreement is documented
- If the process fails then the parties can continue to litigate as appropriate

# The benefits

## Why mediate?

- Both parties retain ownership of the decision
- Identifies what is actually of importance to the parties which can be lost in years of correspondence
- Enables parties to begin / resume negotiations when the case has stalled or reached an impasse – fresh impetus
- Third party presence changes the dynamic and can shift focus from past to present or future
- Savings of time and costs generally vs litigation
- If litigation is unavoidable mediation can help the preparation and reduce costs associated with litigation – e.g. agreed facts
- Additional HMRC scrutiny of case – real focus on HMRC case team behaviour and approach
- Brings the right people to the table – influence of the DRU

# Latest statistics from HMRC

## ADR in large and complex

HMRC ADR stats:

- 89 applications / 30 rejections
- 7 unresolved
- 19 successes\partial successes
- 33 cases still underway.

HMRC – the future:

- Applications increasing
- HMRC ADR Evaluation Report
- Governance to remain – ADR Panel
- HMRC to build on success of secondment model and introduce internal secondments to the DRU
- Compliance manuals update
- Assistant Director Review in LBS

# Tax mediation

## Fees and the add value proposition

- Fees can be flexible and have typically ranged from £50k - £150k for an 'ADR project' – i.e. preparation and mediation day
- Deep knowledge of the tax mediation process
- 90% of Deloitte cases accepted into the process have been settled
- Deloitte has a team of CEDR trained tax mediators
- Strong relationship with HMRC mediators and the DRU
- Glen Harling 6 month secondment to HMRC's DRU
- Clients are keen to find ways to solve tax disputes outside of litigation where traditional negotiation fails
- A confidential, without prejudice and innovative way of solving tax disputes for our clients
- Working with existing client team is an important part of the process – preparation is critical to success

# The tax dispute climate and key changes

## Other forms of dispute resolution

**The recent environment has changed HMRC's approach to tax disputes:**

- Collaborative working initiatives
- Litigation and Settlement Strategy
- The Tax Assurance Commissioner – Edward Troup – Annual report and HMRC accountability
- The Dispute Resolution Board
- Contentious Issues Panel and Anti Avoidance Board

**Other forms of dispute resolution:**

- HRCP (High Risk Corporates Programme)
- MCRP (Managing Complex Risk Programme)
- Traditional negotiation / bilateral agreement
- Statutory Review
- Litigation



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