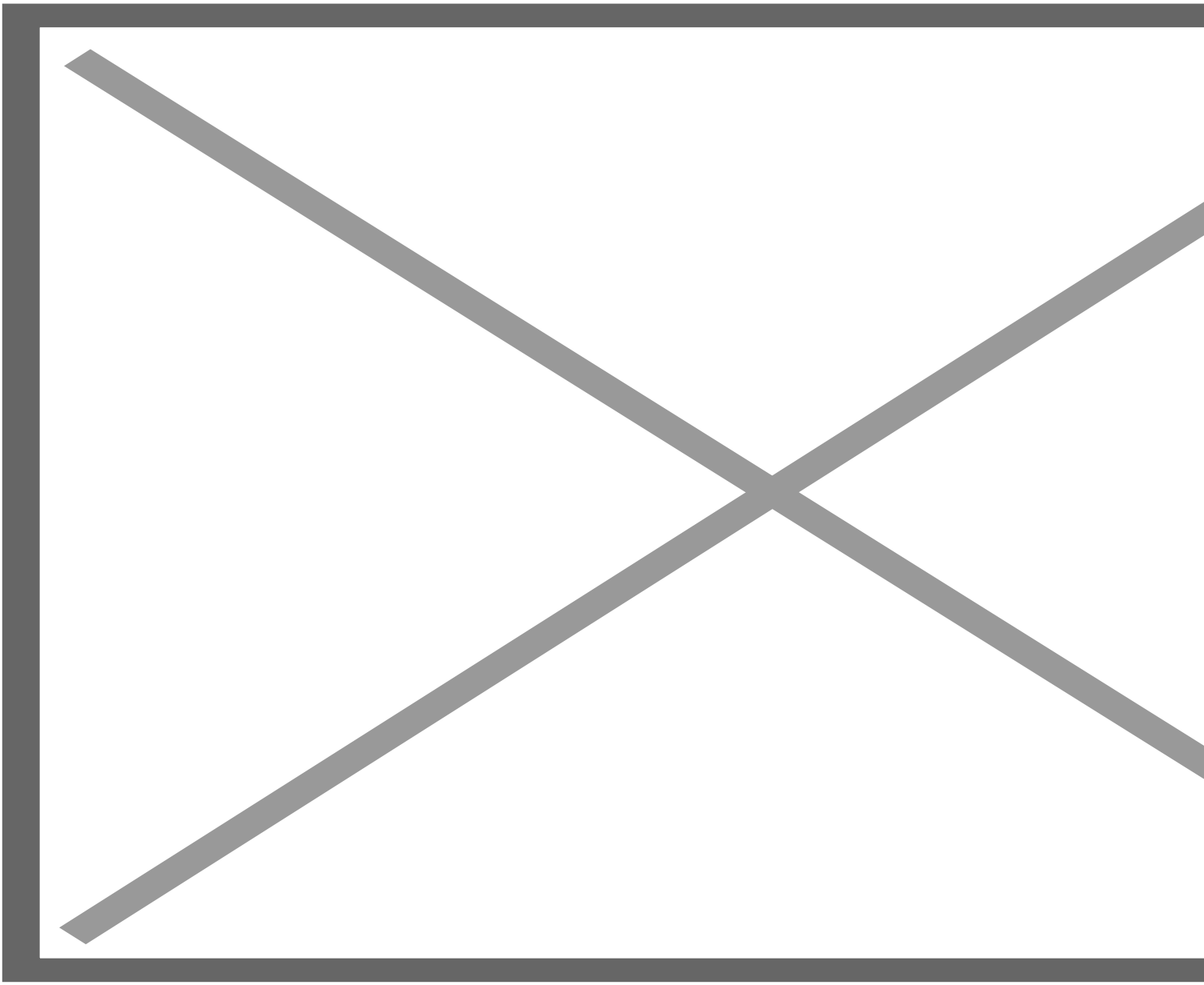
A new dawn

Management of taxes



01 June 2018

Helen McGhee considers the reasons to encourage your clients to consider alternative dispute resolution

Key Points

What is the issue?

At the end of 2017 the Civil Justice Council (CJC) published an interim report on the future role of Alternative Dispute Resolution (ADR) in relation to civil disputes. The CIOT responded to this report from a tax perspective and this article considers the work that the CJC are doing and the work that tax practitioners can do to further promote the use of ADR where appropriate.

What does this mean for me?

Resolving tax disputes can be time consuming and expensive. Encouraging clients to consider ADR could work in their best interests as well as easing the substantial pressure on the tribunal system.

What can I take away?

Where tax payable is in dispute, tax practitioners could be more proactive and assertive in discussions with HMRC regarding pursuing ADR. To empower tax professionals to do this, this article seeks to address the perceived lack of understanding and confidence in ADR as a process and to some extent extol its virtues.

The ADR deficit

It is well known that the Tribunal system is under increasing pressure and often overwhelmed with cases that need not have ever seen the light of day in an adversarial setting. Take as an example the recent flurry of cases regarding a penalty for a failure to submit a NRCGT return (from *Patsy-Anne Saunders v HMRC* TC 6173 to *Jackson v HMRC* TC 6329).

Alternative dispute resolution (ADR) in the tax arena is still in its infancy. In 2017/18 there were only 612 ADR applications made. Evidently there is a chasm – there is a place for ADR in relation to tax disputes but why is the ADR message not getting though? The ADR deficit is not unique to tax but exists in the broader civil disputes context. The CJC are of the view that this gap is in some part due to a nervousness of advisers to advocate the usefulness of ADR stemming from a lack of knowledge of the process and confidence that any decision has real teeth. It is important to remember that as the parties own the decision, any conclusion following ADR will have whatever weight the parties themselves choose to attach to it. The CJC also consider that to some extent the lack of real uptake is due to public perception and historic inertia. This could certainly be said to be relevant to the large number of unrepresented tax payers. Many people still do not really know much about ADR and thus are not accessing this very valuable tool.

It should be noted that of course, the use of ADR in resolving tax disputes specifically is somewhat unique in that one party to every dispute is a public body with an obligation to first and foremost collect revenue but also a party that has inherent restrictions on its discretion to enter into negotiated settlements. In light of this, in the context of tax disputes the onus therefore is arguably more on HMRC to publicise, promote and explain ADR to its customers. But where a taxpayer has an adviser then there is certainly a role for professionals to play.

Process is everything

The purpose of this article is not to repeat what has already been said about what ADR is and how it works. Instead the purpose is to promote real thought and ask important questions about its role but in so doing it is helpful to have somewhat of an overview of ADR.

There are various forms of ADR but the most relevant one in the context of tax disputes is mediation. HMRC have said that they see little scope for the use of arbitration or adjudication. Where this article refers to ADR it is

being used as shorthand to mean mediation.

The Centre for Effective Dispute Resolution (CEDR) defines mediation as:

‘A flexible process conducted confidentially in which a neutral person actively assists the 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.’

Under Rule 3 of the Tribunal Rules there is a requirement for both the First Tier and the Upper Tier to bring the option of ADR to the parties’ attention. This is a clear statutory recognition of the vital role of ADR (albeit for now there are no costs sanctions for a failure to consider ADR). Indeed HMRC have stated in the context of the Litigation and Settlement Strategy (LSS) that ADR ‘can help support the resolution of disputes’ and through various pilot schemes and statements of policy HMRC are seemingly keen on ADR but this is just not evident from the statistics at present. The role of the adviser is therefore important in supporting HMRC on the ADR journey.

When is ADR appropriate?

Of course, ADR in the context of tax disputes may not always be appropriate and this is certainly a key reason for it not flourishing as it could do as a means of resolving disputes.

Nonetheless there is an obvious and huge space for it. Often the parties to a dispute, particularly if it is long running, may get bogged down in the facts, which possibly have never been completely and properly established, information might be incomplete or facts have been misunderstood or misinterpreted. Wrong assumptions or inferences may have been made. HMRC may not accept certain pieces of evidence advanced by the taxpayer to support their position. HMRC may request more information and the taxpayer is unclear as to why. In these instances ADR can help the parties to focus and narrow the issues.

Where parties have reached an impasse and often where communication between the taxpayer and HMRC has almost completely broken down, ADR may assist in re-establishing a dialogue. It may look as though the position is very much all or nothing until an impartial third party is able to propose an alternative.

HMRC have made it clear that there are some circumstances when they do not regard ADR as suitable. HMRC do not consider ADR to be effective regarding disputes about requests for time to pay or similar issues; fixed penalties on the grounds of reasonable excuse; tax credits; PAYE coding; HMRC delays in using information; cases that HMRC’s criminal investigators are dealing with; and default surcharges. Additionally, there are clearly scenarios where the parties fundamentally disagree on the interpretation of a particular legislative provision or there is a wider policy position at stake. There is no way of really testing the evidence of the other side at mediation. There will always be a role for the courts but there needs to be careful consideration as to whether from a costs, expedience, control, confidentiality standpoint ADR might be a better option.

As mentioned previously due to the unique context of ADR with HMRC as a party, there are certainly barriers impeding the use of ADR specific to tax. HMRC are often constrained by red tape and the relevant decision maker/ policy specialist cannot be present on the day of a mediation. HMRC need to adequately communicate any policy boundaries or constraints beyond which they simply cannot operate prior to any attempt at mediation otherwise the entire process is frustrated. HMRC behaviour will have a huge influence on the success of ADR in the tax arena. There has to be a genuine commitment to resolving a dispute and any perceived HMRC aggression in relation to their tax collection powers has no place in the ADR context.

HMRC are certainly committed to training some excellent mediators. The taxpayer ought not to be reluctant to pursue mediation simply because the mediator is often an HMRC person – all mediators are CEDR trained and excellent independent professional facilitators and the advantage of having HMRC persons available as mediators means that there is no charge to the taxpayer in engaging them.

At what stage is ADR appropriate?

The CJC have spent considerable time debating some kind of automatic referral or compulsion towards attempting to settle a dispute via ADR first and foremost. The CIOT are opposed to compulsory ADR as it could simply waste time and costs and frustrate a dispute even further. There is also a strong access to justice concern in making ADR mandatory. However lessons can be learnt from abroad and some tempered form of automatic referral does seem to work well in civil disputes in Italy, Greece and France. Indeed in a family law context a Mediation Information and Assessment Meeting often precedes any proceedings and whilst one cannot force people to mediate there can be no real argument against sitting down at the very outset of any dispute with an independent third party with no cost consequences and to ease the pressure on the tribunal system. This would need to be resourced though. Similarly in the family law context the use of Early Neutral Evaluation meetings and Financial Dispute Resolution hearings are a forum where parties can discuss early issues in a without prejudice environment, bearing their own costs as a means to narrow issues and potentially be able to take a preliminary view as to merits. This may well be helpful in relation to any tax dispute.

ADR can also run concurrent to proceedings. Simply by allocating a mediator to a case early on they can constantly reassess, appraise, explain challenges etc. in a way that the parties are not capable of doing. The role of the mediator is often to encourage the parties to think in a different mind-set, to approach the dispute differently. Where cases have been going on for years with no sign of resolution the answer has to be to try something different. Einstein once said ‘The definition of insanity is doing the same thing over and over again and expecting different results.’

It’s a new dawn

There will always be cases where ADR is not appropriate, most obviously where a question of law needs to be tested, where HMRC have no scope for policy reasons or where the parties are just not minded to settle under any circumstances. However as a means of dispute resolution in an atmosphere of increasing disagreement in relation to tax there needs to be more tangible commitment from both advisers and HMRC to utilising this very useful tool.