



Taxing Matters

Alternative Dispute Resolution with Adam Craggs

Alice Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at www.rpc.co.uk/taxingmatters.

Today we will be talking about alternative dispute resolution with the man who quite literally wrote the book about litigating with HMRC, Adam Craggs.

Adam is a partner and the head of tax disputes at RPC. He's also my boss and has promised me that asking him hard questions won't get me fired. Probably. After 16 years at the solicitor's office at HMRC, where he advised on high profile matters, Adam came to his senses and now specialises in helping businesses and individuals out of the sticky situations they find themselves in with HMRC.

Adam, welcome to the podcast.

Adam Thank you very much Alice.

Alice So, what makes a case suitable or unsuitable for mediation or alternative dispute resolution?

Adam I think that's the \$60,000 question which everyone has to ask themselves when they do find themselves in dispute with the Revenue.

It's not suitable for all cases so if you have a very fact sensitive case where your alleging certain facts and HMRC dispute those facts and therefore there is likely to be witness evidence and that evidence will be challenged by cross examination, HMRC will want to ask the witnesses questions etc. That sort of case probably isn't well suited to ADR because the ADR process, as I've just mentioned, is very much collaborative and there isn't the opportunity to wheel out fierce lawyers to cross examine the other side's witnesses which is what you would have in an ordinary tax dispute at the tax tribunal. I think those cases probably aren't suited.

If the Revenue wanted a test case because there's a whole bunch of taxpayers who have got the same issue and therefore they want a public decision, then again HMRC would probably want that case to go to the Tax Tribunal to have it determined in the usual way because then the decision is published and everyone can see exactly what the arguments were and what the Tribunal has decided the law is.

Obviously with mediation it's very private and confidential and the decision and agreement that is hopefully reached at the end of that process remains confidential so again the Revenue wouldn't be able to publicise that, so they are probably the two main types of cases which wouldn't be suitable for ADR. But I think with the exception of those types of cases, I think pretty much every other case is well suited to ADR.

Alice So, when would you recommend to a taxpayer that you were advising to approach HMRC about this?

Adam There's no hard and fast rule to be honest. You can ask HMRC to participate in the ADR process, and I should add as well just for clarity, both sides do have to agree to ADR; so you can't force HMRC to be a participant in the ADR process if they are not willing to for any reason and likewise they can't force the taxpayer to. But in terms of timing you can invite HMRC to participate at any point in the process, quite literally, up to shortly before a case is due to be heard in the tax tribunal.

From a practical point of view, you wouldn't ordinarily suggest ADR when HMRC is still in the middle of their enquiries, because they are still fact gathering, they are still asking for documents and information from the taxpayer; they probably would feel understandably that they are not in a position to form a view on whether ADR should proceed. But I think, with the exception of that scenario, any time in the process really.

Once the arguments have been aired, so both sides know where each is coming from, and HMRC is satisfied that they have got sufficient information and documents, then you can certainly ask for the ADR process to be activated.

Alice So, you mentioned in there that HMRC have the discretion to say 'no' because it is, of course, a cooperative process and you talked about some situations where they might say no. What other factors would they take into account in making that decision? And do you have an opportunity to make representations on that decision?

Adam If I take those questions in reverse order, you certainly have the opportunity to make representations. There is a process which you go through; so there's a separate ADR unit within HMRC and obviously they will liaise with the Revenue officer who is dealing with your case and ask for his or her views on the matter. If, I've experienced it myself, where initially there has been some reluctance, you can certainly make representations and explain to HMRC why you think your client's case would be very well suited to ADR and, in practice one would normally have an informal conversation with the Revenue officer as well, because clearly, if he or she is adamant whether for good reason or otherwise that they won't agree to ADR then it will be very difficult, no matter how persuasive you are, to get them to change their mind. But if either they are positive and 100% behind it, or perhaps some reservations, but are happy in principle with exploring it further, then you can have that conversation with them and also with the ADR units to get the thing up and running.

In terms of your question about why HMRC might refuse, it could be for the reasons that I touched upon a minute or two ago, where they are not satisfied with the fact pattern and there is a dispute there and they want to test the evidence in the traditional way and ask your witnesses questions, or as I say they may want a public, published decision which other taxpayers can rely upon as a precedent, as it were.

The other area where they are very reluctant to go down the ADR route is if they feel a taxpayer has behaved dishonestly. Not necessarily in the strict criminal sense, but if a taxpayer has, for example, had a code of practice 9, which involves an allegation of fraud, an admission of fraud, then they would be very reluctant for any dispute involving that taxpayer to fall within the ADR procedure, and in practice, certainly in my experience, even if there is no dishonesty, but if a taxpayer has been involved in a transaction or an arrangement which HMRC considers to be tax avoidance, then they are very reluctant to agree for that sort of dispute to go down the ADR route.

So, I think, with the exception of those sorts of cases, HMRC are very happy to consider any sort of tax dispute for ADR.

Alice What's the benefit to a taxpayer of going down the ADR route?

Adam There are many in my view, you know I should add initially, before I became an accredited CEDR mediator on the course I mentioned at the beginning, I was quite cynical about the whole process.

I had been brought up in the traditional sense of being a hard-nosed litigator and I was very sceptical, and I am quite happy to admit that but I'm a massive convert because the advantages to the parties are as follows:

For the taxpayer it's quick and, sadly, if one is taking a tax dispute to the tax tribunal, even before Covid-19, you would be looking at a good twelve months before you had a hearing, and now it's probably 18 months to two years, if not longer. ADR, you can get that on and get it done very, very quickly indeed, so speed is great - especially for taxpayers who have been in dispute with the Revenue for a long time. And it's not uncommon for an enquiry to literally go on for years and years and the taxpayer, by the time the enquiry is finished, just wants to have the whole thing resolved.

So, ADR very quick and speedy.

It's relatively inexpensive as well which is an important factor for clients.

It's a fraction of the cost of preparing for a formal appeal at the Tax Tribunal and you don't normally have to involve Counsel as well, so you save on Counsel's fees because they don't normally have a part in the ADR process.

And more recently, I think one of the big pluses of ADR for clients, certainly high profile clients, is the fact that it is all confidential; so the ADR process which normally takes place over the course of one day, is private, so clearly members of the public and the press can't gain access to the mediation, unlike the Tribunal hearing where they are in public and anyone can walk in and listen and take notes and, if you're from the media, report on it and also with mediation there is no published decision so again once the dispute has been resolved, everything is totally confidential 100%.

HMRC will not publicise the result of the mediation process and the taxpayer shouldn't do so either.

Unlike at the Tax Tribunal where the decision will be published and will be reported widely in professional magazines and sometimes in the general media.

Alice	So, can the taxpayer make those findings or decisions public for their own reasons should they want to?
Adam	<p>If they did want to do that, then it would be a case of having a discussion with HMRC, and I can't imagine that they would have any objection to that, but the default position is that everything is confidential and should remain so.</p> <p>If a client said look, I would quite like to publicise the outcome, it would be a case of having a conversation with HMRC in advance and I wouldn't anticipate there would be any sort of reluctance on HMRC's part, but you would need to have that discussion.</p>
Alice	So, assuming that HMRC are on board and the taxpayer does want to go ahead how does the process actually work?
Adam	<p>There is a slight quirk with tax ADR.</p> <p>In a commercial environment, which many listeners will be familiar with, the mediator, and it's one of the sort of 'golden rules' when you become an accredited mediator, it should be completely impartial and independent of the parties, for obvious reasons because they're to hold the ring and to bring the parties together etc.</p> <p>With tax ADR, that is certainly an option, but it is extremely rare in my experience.</p> <p>The common scenario is you have two people who are called 'facilitators' and they are employees of HMRC, and I can hear the gasps from listeners thinking 'how on earth you can have an employee of HMRC as an impartial, independent mediator', but to be fair to HMRC, these people are carefully chosen, they are trained up, they're experts, that's all they do, and, in my experience, without exception they have always been impeccably fair and objective and have done a fantastic job. And I think it actually helps the taxpayer because you got someone who knows the Revenue mindset; how they work, and what's important to them, and what the redlines are for HMRC - which you wouldn't get with a non-HMRC mediator - and they are normally very experienced people as well, in my experience. And I think because they are, sort of, fellow employees of the Revenue officer, whose case it is, they have got a lot more credibility and respect and I think it's a positive.</p> <p>I was initially sceptical when the procedure was introduced many years ago, but now I'm absolutely fine with it and I think it actually helps.</p> <p>So you have, as I say, two HMRC facilitators, the venue; normally for our clients we would hold it at RPC's offices.</p> <p>It tends to take a day, so everyone will rock up in the morning at 9 o'clock, and you have the usual introductions etc. The parties will have normally prepared a paper for the Revenue's facilitators just setting out - it's not overly legalistic because mediation isn't really about legal arguments - but it's just setting out the background, the facts that are agreed and where each side is coming from, what the issues are, what the sticking points are, so that obviously helps the facilitators prepare in advance.</p>

As I say there will be the introductions at the beginning of the day, and then there's often a form of sort of 'shuttle diplomacy' so you'll have sessions where everyone's in the room, and there would be one point discussing where they want to get to, and then there will be one to one sessions where the facilitators will go and speak to the Revenue Officer on his or her own, and then the taxpayer or the taxpayer's team in order to try to narrow the issues and enable the parties to reach agreement and resolve their dispute.

The mediation normally takes a full day. I've had one or two where we've reached agreement before the end of the day but normally it does take the full day.

The psychology involved is such that by the time you get to late afternoon everyone is desperate to get out of the building and go home, and that concentrates minds and it's, you know, it's fascinating how people who might have had a very firm view that this was absolutely not negotiable, by the time you get to late afternoon, then there is movement on both sides. And I have never had a tax mediation where there hasn't been agreement which I think is quite phenomenal. I've had one where there wasn't agreement on the day, which is rare, because again one of the golden rules is you should either reach complete agreement, or you don't have agreement, you walk away.

On that occasion it was very, very complex, lots and lots of issues and there was one sticking point - so out of ten issues, we could reach agreement on nine, we couldn't on the tenth and we ran out of time; it was fairly late in the evening, but that was resolved in the following weeks. But it did take a few weeks, if not months, whereas, I'm sure if we had had another hour or so in the mediation, we could have reached agreement.

So it just goes to demonstrate how effective face-to-face meetings are in mediation.

Alice So, what happens if a mediation doesn't achieve an agreement?

Adam Well again, that's one of the pluses for the parties, because as far as I am concerned Alice, there isn't really any downside to mediation. Because if it does fail, and I've yet to have a failed mediation, but if it does, all that its cost the client is a day of their time and a little bit of professional fees for the day, but that is, in relative terms, it's a drop in the ocean.

And the advantages are you have a very good, clear idea of where HMRC are coming from and what really matters to them, not just what they've said in correspondence or their technical arguments. Sometimes you can't glean from written correspondence what really, really matters to them, whereas you do get that in mediation.

You also invariably get a feel for the areas where they could, perhaps, move, and those where there is absolutely no prospect whatsoever, from their perspective, of moving and that helps if the mediation doesn't work and you don't get a satisfactory result; you can always proceed to the tax tribunal in the traditional sense. There's no bar whatsoever in doing that.

As I say, I've never actually had to do that but I will say to clients 'look, lets give mediation a go'. In my experience, you are likely to get a decision that you can live with - you won't get 100%, it's not binary - but when you think about litigation risk, there is a big risk if you just go to the Tax Tribunal, no matter how secure and confident you are of your arguments. And if it all goes pear-shaped, we can go to the Tax Tribunal, and we will be in a better position to understand where HMRC are coming from. And as I say, you can always negotiate with HMRC throughout the whole process, so even after a failed mediation, and you are heading to the Tax Tribunal, you

	would still be able to have conversations, without prejudice conversations, with them so, as far as I'm concerned I think it's a bit of a no brainer and I would always advise a client to give some serious consideration to the possibility of ADR.
Alice	How do the Tax Tribunals feel about it?
Adam	<p>The Tax Tribunals are actually very supportive.</p> <p>Rule 3 of the Tribunal Rules actually specifies that the Tribunal does have to bring to the attention of the parties, the availability of ADR.</p> <p>Earlier this month Judge Sinfield, who's the president of the First Tier Tax Tribunal, issued a practice statement, which specifically relates to ADR, and this makes it quite clear that the Tribunal supports ADR and it also makes it clear that the Tribunal will be happy to stay any appeal that is at the Tribunal whilst the parties explore ADR and mediation.</p> <p>So you will certainly get a very sympathetic response from the Tribunal if HMRC and the taxpayer do decide to go down the ADR route.</p>
Alice	So, in the current environment, with coronavirus and lockdown, how has this changed either how you would want to tactically deploy this or how the process actually works?
Adam	<p>It may be a coincidence that that Judge Sinfield has issued that practice statement when he has, but I think because of the disruption that Covid-19 has caused, particularly in relation to the Tax Tribunals - and, yes, there have been some hearings that have proceeded by way of video and telephone and so on, but there has been an awful lot of disruption, and I think there will be something of a bottleneck in terms of determining tax appeals when we all come out of the lockdown - and I am hoping, and I expect, that HMRC and taxpayers will, perhaps, be more amenable and welcome ADR because, as I say, it's a forum where they can resolve their dispute very quickly and relatively inexpensively and not have to go to the Tax Tribunal. And I would have thought that the Tax Tribunal would be grateful if some of the huge case load, which they had before Covid-19, let alone the amount of cases that have built up in the interim, if some of those cases could be resolved by way of ADR, then I think it would help everyone taxpayers, HMRC and the Tax Tribunal itself.</p> <p>In terms of the process itself, I don't think there would be an awful lot of change, Alice, to be honest. I think it would be the same as it was before Covid-19; so if you've got a dispute with the Revenue, if their enquiry has finished then you could ask them to explore ADR and mediation, and if you're a little bit further down the road and they've already issued, for example, a discovery assessment and you've appealed that to the Tribunal, then now would be the time for the taxpayer and their advisers to give some very serious thought to ADR, and have a conversation with HMRC because if the case is suitable for ADR and mediation, then I would expect HMRC to embrace it and welcome that opportunity.</p>
Alice	Do you think there's a possibility of ADR being conducted virtually?
Adam	<p>Yes. I know certainly of cases within RPC in the commercial disputes team where they've conducted mediation virtually so it could happen with tax disputes in principle.</p> <p>I haven't conducted one yet, but I certainly wouldn't be averse to doing so.</p> <p>It's not ideal because as I've mentioned I think that the human interaction and being able to read body language and striking up a good rapport with the facilitators and with HMRC is very, very</p>

important to a successful outcome, and, yes you can still do all of those things via Zoom or Skype, but in my experience, certainly when I participated in virtual tribunal hearings, it's not quite the same as in person, and I think it would certainly not be my preference.

But if there was a need to conduct the mediation before we were all able to meet up again, then it certainly could be done, absolutely.

Alice Great. So, what would your advice be to businesses if they're starting to get into a sticky situation? Is this something that they should keep at the fore of their mind, or something to return to later?

Adam I think it's something to consider sooner rather than later.

As I say, I think the only time when it would be premature, would be when HMRC have just started the enquiry and they are starting to ask question of the documents, for obvious reasons - the facts aren't known to HMRC and they wouldn't be amenable to giving it serious consideration at that juncture.

But I think as soon as you get to that point where you feel 'look HMRC, you've got all of the documents you need, we've give you all of the information, we've answered all of your questions etc.' that's the time to sit down with them and say 'look let's have a chat and see if we can sort this out with the revenue facilitators and let's go down the mediation route' because there's not really much to be gained from postponing it if you are minded to explore that possibility; you're not going to strengthen your hand very much by holding off.

You know, there are some points which I call pinch points where HMRC, if they'd been reluctant initially to embrace mediation, then sometimes you get some leverage and they will warm to it.

So, for example, if you've actually gone down the formal litigation route and you have provided, possibly, a statement of case where you set out your arguments in huge detail or, certainly when you provide your witness statements, because then HMRC can see the strength, they can assess the strength of your case and what your witnesses will say. That's sometimes a very good time to say to HMRC 'look, let's consider ADR' and, until that practice statement which I mentioned a minute ago, was issued, the Revenue, and I think really without any basis, had adopted the view that, if they had prepared their statement of case at the Tax Tribunal, they wouldn't consider ADR. And I've had discussions with them, there is no legal or other basis really for that and what, I think, that was really down to was, if they'd gone to all of the effort and expense of preparing a statement of case, they were a bit miffed that you would then be talking about ADR and mediation, so they refused, and they have this in their guidance which is available. I don't know if they've updated it yet because the practice statement's only just come out, but the practice statement from the Tribunal makes it very, very clear that ADR can be considered at any point in the litigation process, so whether it's after you've exchanged witness statements, after you've exchanged statements of case, etc., etc., up to the steps of the court, you can consider ADR and mediation.

So, I'm confident that HMRC will change their publicly stated position in that regard now that the Tribunal has issued its practice statement.

Alice Great. So, if you are a taxpayer, from your experience in engaging with this ADR process, what works, what doesn't?

Adam	<p>I think cases where there is room for a little bit of give and take, so the Revenue have a document called Litigation and Settlement Strategy, which ties their hands to a certain extent, because unlike in a commercial dispute, they can't split the difference or horse trade, everything has to be principled and if they feel that they are correct in the law and the tax payer won't accept their position and they think they will win; a 51% chance of winning, then they should litigate and shouldn't compromise.</p> <p>And that document is applicable in the mediation/ADR context so it's not a case, and people shouldn't think 'oh well we will turn up to mediation and won't do old fashioned horse trading' which is what people tended to do in the past, before this document came into existence in 2007.</p> <p>that said, clearly if you have a number of issues, you may well, in a very principled way, be able to say well I'll concede issues 1-2 to HMRC and they may concede issue 3 in the taxpayer's favour. So, all the taxpayer's interested in is at the end of the day a deal which in monetary terms it can live with. For HMRC it has to be a principled settlement, and in that scenario, it would be.</p> <p>So I think the sort of cases where there's scope, where it's not black and white, it's not binary, there's some grey areas, and there's a number of issues on the table so you can give up some of the issues, even if you think you're correct and, you know, in return HMRC might be able to accommodate some of the issues in your favour. They are the sorts of cases that one should certainly consider for mediation.</p> <p>And also, I think cases where the facts aren't in dispute, so if the facts are pretty clear and everyone accepts that the facts are what one side say they are, so there is no dispute, then that kind of case would be ideal as well for mediation.</p>
Alice	<p>So, from a business perspective, you're walking into an ADR as a representative of that business, what kind of things should you be keeping in mind?</p>
Adam	<p>I think it's important that on the day you have the decision maker either present, or, certainly at the end of a telephone. As I say you generally do reach agreement and therefore there has to be somebody who can make the decisions there on the day. It's not good saying "oh, Joe Bloggs is off on holiday, and we'll have to wait two weeks until he comes back and then we can take instructions". So, you've got to have that sort of person there on hand.</p> <p>I think there has to be a mindset that you, probably as a taxpayer, will have to pay something; it's not going to be like a win at the Tax Tribunal where it's all or nothing. That's not how mediation works, so you will not leave that day with a settlement where you pay HMRC, nil, much as you might want that to be the outcome. And if you have sort of, very entrenched dogmatic approach then it may well be that the process is not for you and won't work. So I think you have to be pragmatic, sensible, diplomatic as well – it's no good going into a mediation if you absolutely hate the inspector and there is a lot of animosity there, because you have to sit around a table with him or her; and I have had a few like that and, actually, they warm to one another as the day progresses. But again, that's not ideal.</p> <p>It is very collaborative and you have to approach it with that sort of mindset.</p>

Alice

Well, thank you very much Adam for taking us through Alternative Dispute Resolution in the HMRC context and thank you to all of our listeners for joining us.

As ever, a full transcript of this episode together with our references can be found on our website www.rpc.co.uk/TaxingMatters.

If you have any questions for me or for Adam, or any topics you'd like us to cover in a future episode please do email us on taxingmatters@rpc.co.uk. We'd love to hear from you.

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Thank you all for listening and talk to you again in two weeks.



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