

RESOLVING TAX DISPUTES

PRACTICAL GUIDANCE FOR HMRC STAFF ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN LARGE OR COMPLEX CASES

Feedback on this guidance and its use should be addressed to:

HMRC Dispute Resolution Unit

Dispute.resolution@hmrc.gsi.gov.uk

RESOLVING TAX DISPUTES

GUIDANCE FOR HMRC STAFF ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN LARGE OR COMPLEX CASES

Contents

Section	Title	Page
1.	What is ADR?	3
2.	Why is ADR relevant to my work?	3
3.	How does ADR fit with the LSS?	5
4.	Benefits of using ADR	6
5.	In what sort of cases might ADR be appropriate?	7
6.	In what sort of cases is ADR unlikely to be suitable?	11
7.	Who within HMRC decides whether or not ADR is appropriate in a particular case?	12
8.	Summary of a typical ADR timetable and process a) for facilitated discussion b) practical issues for a facilitated discussion c) for mediation d) practical issues for a mediation	14
9.	Who from HMRC should be involved in the ADR process?	22
10.	What typically happens on the meeting day?	23
11.	Resolving the dispute within an ADR process	24
12.	Where to go for further information	26
Annex 1	Template for notifying the DRU of a potential ADR case	27
Annex 2	Model Facilitation Agreement	28
Annex 3	HMRC checklist for ADR	31
Annex 4	Template ADR process agreement	34
Annex 5	Facilitated discussion protocol	40
Annex 6	Further examples	44

1. What is Alternative Dispute Resolution ('ADR')?

ADR grew up as an 'alternative' to having to resolve contentious disputes at Court. The essence of ADR is that another party is brought in, with the agreement of both parties, either to determine the dispute (arbitration) or to facilitate bilateral agreement (either as an expert through non-binding neutral evaluation, or through mediation). The benefits of such an approach have been shown to be that it is both cheaper and quicker than going to Court.

The vast majority of tax disputes are settled by out of court agreement following discussions between HMRC and the taxpayer. Relatively few disputes are referred to the Court for resolution.

Various forms of ADR are used in commercial disputes and by a number of overseas tax authorities. In HMRC, and in this guidance, when we talk about ADR we are generally talking about mediation or 'facilitated discussion', both of which are forms of 'Collaborative Dispute Resolution' (CDR) rather than arbitration, which we see as part of the Court process.

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

"Mediation is 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."

ADR is specifically referred to in the First Tier Tribunal Rules (SI 2009/273). These rules provide that the Tribunal should, in appropriate cases, make the parties aware of the availability of ADR and facilitate its use as necessary (see [here](#)). The Civil Procedure Rules (Practice Direction – Pre-Action Conduct) also encourages parties to exchange information about the issue in dispute and consider using ADR in order to try to resolve the dispute without the need for formal legal proceedings (see [here](#)).

On behalf of Government as a whole, the Ministry of Justice and Attorney General launched the [Dispute Resolution Commitment](#) and associated [guidance](#) in May 2011. The new commitment renews and strengthens the Government's 2001 ADR pledge. HMRC's approach to cost effective resolution of tax disputes, including the use of ADR where appropriate, is fully consistent with the Government-wide Dispute Resolution Commitment.

ADR is a toolkit available to HMRC and its customers which may be of benefit in certain cases, subject to the criteria and additional governance requirements described below.

2. Why is ADR relevant to my work?

In appropriate cases, HMRC considers that ADR can be used as a cost effective, consensual and speedy means of supporting the resolution of tax disputes (whether the dispute is ultimately resolved by agreement between the parties or by litigation).

Since 2011, HMRC has been using two ADR pilots to explore in more detail the criteria for when ADR might be appropriate for resolving tax disputes. One involves large businesses or taxpayers with complex tax affairs – in which the relevant disputes are subject to an ADR process which uses CEDR accredited HMRC staff to facilitate discussion and/or the involvement of third-party accredited mediator. The other pilot covers disputes involving mainly Small and Medium-Sized Enterprises and individual taxpayers (SMEi) – using an in-house HMRC-trained facilitator to help the parties agree resolution. This pilot has no access to third-party mediators.

There is scope for applications to the SMEi pilot to enter the large & complex pilot if it is thought the disputes are of sufficient complexity or size. The taxpayer or agent may make representations for a SMEi case to be considered for movement to the large & complex pilot if they feel strongly that they would like to engage a third-party mediator. Acceptance is not guaranteed and has to be approved by both the SMEi governance panel and the large & complex ADR governance Panel.

This guidance applies to the use of ADR in large or complex cases only and reflects the interim findings of the large and complex ADR pilot. Guidance on the use of ADR in smaller and less-complex cases can be found [here](#).

ADR can be particularly useful in long-running disputes where positions on both sides have become entrenched, or progress for whatever reason has stalled. For example, ADR could:

- narrow down the areas of disagreement in one or more component parts of a dispute by clarifying technical issues;
- identify points of difference whilst maintaining or creating good working relationships between the parties;
- unlock provision of further information or assist parties to agree key facts;
- clarify the key questions which need to be answered in order to resolve the dispute (i.e. agreeing a decision tree); or
- even if settlement is not reached, the process usually results in narrowing the particular points in dispute in preparation for litigation.

As a Government Department, HMRC is accountable to Parliament for the decisions it makes. The [Litigation and Settlement Strategy](#) (LSS) sets out HMRC's overall approach to resolving tax disputes through civil procedures, subject to the over-riding authority of the Commissioners of HMRC as defined in legislation and set out in the [Code of Governance](#). HMRC is committed to using a collaborative dispute resolution approach wherever possible in order to resolve disputes as efficiently as practicable. In the vast majority of cases, this will involve disputes being settled through bilateral discussion/agreement between the parties or litigation, without recourse to ADR.

Types of ADR in which HMRC may engage:

- (i) 'Facilitated discussion' is a process in which an HMRC externally trained and accredited mediator facilitates bringing the parties together but offers no opinion on the merits of the arguments being advanced. Sometimes this involves a trained mediator also being provided by the customer's side to join with the HMRC mediator and facilitate together. The facilitator(s) may challenge each side as to how their dispute may play out in front of the Tribunal. The HMRC facilitator may or may not be a specialist in the subject matter of the dispute but will not have had any prior involvement in working on the case as part of the case team. If the customer also provides a facilitator it is expected that they will similarly not have previously worked on the case. The main difference between facilitated discussion and facilitative mediation is that the people brought in to help the disputing parties are not independent of the disputing parties, but will work neutrally.
- (ii) 'Facilitative mediation' is a process in which an independent external mediator is jointly engaged by HMRC and the customer to try to bring the parties together but offers no opinion on the merits of the arguments being advanced. The mediator may challenge each side as to how their dispute may play out in front of the Tribunal. A facilitative mediator may or may not be a specialist in the subject matter of the dispute but will have no connection with either party.
- (iii) 'Evaluative mediation' is a process in which the mediator will try to bring the parties together in exactly the same way as in facilitative mediation, but also providing his/her view of the matter as a specialist in the subject matter of the dispute.

It is possible to have a combination of the two approaches in which facilitative mediation is attempted first, with evaluative mediation following if the initial approach is not successful. However, HMRC would only see this approach as suitable in limited tax cases where the issue isn't tax related but determination of the issue has tax consequences, if both parties are willing to consider the strength of their case in the light of the expert's view.

- (iv) 'Non-binding Neutral Evaluation' uses a neutral third party who is an expert in a particular field to provide a non-binding opinion. This may be suitable in limited tax cases where the issue isn't tax related but determination of the issue has tax consequences, if both parties are willing to consider the strength of their case in light of the expert's view.

For HMRC (and the customer) there are additional costs associated with everything but the first option.

3. How does ADR fit with the LSS?

ADR, unlike arbitration, leaves decision-making in the hands of the parties. Any decision by HMRC to settle a case during such a process will still be governed by the terms of the LSS and associated governance and any settlement or agreement reached as a result of ADR will be subject to exactly the same process as any other case. In rare cases, agreements may need to

be provisional subject to governance processes and this will be explained as part of the ADR.

One of the fundamental principles of the LSS is that settlement of the 'right tax' due is to be sought. Another is that disputes should be resolved in the most efficient and cost-effective method possible. ADR is supportive of LSS principles as a cost effective way of trying to reach agreement by providing a process which allows for a better shared understanding of each other's arguments or contentions regarding what is the 'right tax'. This enables HMRC and the customer to make a more informed decision.

The LSS presupposes that disputes will be resolved collaboratively (as opposed to adversarially) wherever possible, as the most effective and efficient means (for both sides of the dispute) to arrive at the 'right' result in a tax dispute. ADR also presupposes such a collaborative approach, therefore Collaborative Dispute Resolution (CDR) should be the norm and ADR a toolkit to be used sparingly within this normal way of working.

For further commentary regarding the LSS and HMRC's collaborative approach to tax dispute resolution please see [here](#).

4. Benefits of using ADR

The vast majority of tax disputes are settled by bilateral agreement between HMRC and the customer. However two-way collaboration sometimes breaks down, and in these circumstances ADR can support the reaching of agreement between the parties. Potential benefits of this approach include the following:

- both parties retain ownership of the decision and can withdraw from the process at any time;
- it can enable parties to begin or resume negotiations when direct negotiations have stalled or are at an impasse;
- including another party automatically changes the dynamics of a dispute and brings a fresh perspective;
- an ADR trained person can change the focus from the past to the present or future;
- a new focus on the timetable can inject urgency into decision making;
- even if there is no settlement, ADR can enable a better understanding of why litigation is the appropriate way to resolve the dispute and help both parties better prepare for litigation;
- the discipline of approaching a dispute by first clarifying the framework by which the dispute may be resolved can lead to the development of principles capable of being applied in other cases;
- the hands-on experience of collaborative dispute resolution techniques in the context of ADR is likely to benefit the parties in terms of how they are

likely to approach their future interactions and ways of working; in this way the process is likely to help to maintain (or build) the relationship between the parties;

- because both parties own the decision, any settlement will be seen by both sides as an outcome preferable to litigation. Both sides 'win'. In disputes settled by litigation at most one side 'wins' and often both sides feel they 'lost'.
- there is little 'downside' to the process as all work and preparation involved is likely to be of direct relevance to and use in litigation in the event of ADR not resolving the issue.

5. In what sort of cases might ADR be appropriate?

ADR should generally be considered in all cases that are headed for litigation or are otherwise protracted.

More specifically, ADR may be appropriate where any or all of the following points apply:

- the parties are seeking to work collaboratively but:
 - it is proving difficult to pin down the essential point(s) of disagreement,
 - HMRC and the customer appear to be at cross purposes, or
 - there is uncertainty about the other party's position, underlying rationale or process for resolving disputes;
- collaborative working relationships appear to have broken down and ADR may help to restore them;
- the point at issue appears to be 'all or nothing' but there is a possibility that structured discussions might uncover (an) alternative approach(es) which would enable HMRC to resolve the dispute in accordance with the terms of the LSS;
- the point at issue appears to be 'all or nothing' but there may be some misunderstanding or disagreement over how the facts ought to be weighted in coming to a decision;
- the dispute may be able to be resolved by having a wide ranging discussion of the issues on a non-prejudicial basis (although this would not entail setting off issues against others in a 'package deal');
- a narrowing or clarification of the facts or issues in the dispute is necessary. This may be particularly useful in fact-heavy disputes such as transfer pricing;
- agreement is needed on what facts are relevant and should be disclosed to progress resolution of a dispute;

- out of court settlement is likely to be preferable to determination by the Tribunal/ Courts, for example, because:
 - it is likely to result in a quicker and more cost effective resolution of the dispute or part of the dispute;
 - evidentiary difficulties for one or both parties increase the risks of proceeding to Tribunal; or
 - complex or unique facts mean that a potentially costly and time-consuming judicial determination would be of little or limited precedent value.

Cases can still be considered for ADR even if the parties initially feel that the dispute turns exclusively on points of law. ADR can uncover a wider range of possible solutions than those generated by a traditional negotiation process, or assist in understanding what 'weight' should be given to conflicting facts, generating an LSS compliant result without the need to go to Tribunal.

ADR can help to resolve one or more issues in dispute with the same customer. This could include situations where issues are intertwined or one issue impacts on another. It may also include situations where there are a number of entirely separate issues – in such cases considering a number of disputes simultaneously may help to unlock the resolution process. Where there is more than one dispute between a customer and HMRC, the LSS provides that each dispute must be considered and resolved on its own merits, not as part of any overall "package deal". As a matter of process, however, it may be that a number of unrelated disputes will be resolved at the same time (each on their own merits), for example as part of a process of bringing a customer's tax affairs up to date.

ADR can also be used to try to resolve certain aspects within a dispute, such as factual arguments over what information is relevant, or narrowing either points for litigation or subsets of points of law or fact under dispute, for instance issues of valuation.

When attempting to resolve a dispute through the ADR process, it is desirable to strive to resolve all aspects of the dispute, including any interest, penalty and/ or payment issues.

Even in an 'all or nothing' case which HMRC is prepared to litigate because it has high expectations of success, the ADR process might offer both parties some potential value added compared with litigation. This is the idea of using negotiation to enlarge the pie rather than simply carving it up. The sort of things which could be important to a customer, over and above their position on the point of substance, could include:

- the need to be listened to and have their position or point of view taken seriously;
- opportunity to engage with HMRC specialist(s) as well as a CRM or other case owner;
- possible recognition of their motivation in relation to the transaction in question;
- certainty as a result of retaining control over the detailed outcome;

- impact on how they are perceived by HMRC in future.

This might mean that even where we see the particular point in dispute as 'all or nothing' in terms of negotiating positions, the dispute as a whole could be susceptible to a range of outcomes in terms of the underlying needs and interests of the parties.

A practical example of a large/complex case which might be suitable for mediation:

UK Group A has been providing services to Group B for a number of years through a Group A subsidiary company based in Singapore. Group A considers that the service is provided by the Singapore subsidiary and so does not attract output VAT. HMRC considers that the service is provided to a UK company (Group B) and that therefore none of the supply is outside the UK. At the same time, HMRC has raised queries about the transfer pricing mechanisms used between the UK and Singapore companies.

The relationship between HMRC and Group A is good but the parties have now reached an impasse in the dispute on the point of law regarding place of supply for VAT purposes. The related transfer pricing enquiry is dragging because of the difficulty in verifying the complex facts involved – the relevant information and personnel are in Singapore. There is also disagreement as to which arm's length method of computing profits is most suitable.

Group A is represented by XYZ LLP, who represent a number of businesses with similar VAT arrangements. However, the facts in this case are sufficiently distinguishable to mean that litigation would probably not have significant precedent value.

In this case, ADR could be useful in untangling the facts surrounding the transfer pricing, or could be useful in helping the parties come to agreement regarding what information is relevant, what documentation is available and how best it can be provided. It could also assist the parties in agreeing a transfer pricing methodology.

ADR might help the parties agree on the point of law regarding place of supply for VAT purposes. But even if the parties eventually could not agree on the substantive issue, ADR could be useful in identifying the underlying needs and interests of both parties, to enable a framework for a solution to be put in place. It could also be useful in setting a roadmap as to how the disputes with XYZ LLP's other clients could be resolved.

ADR might enable the parties to agree on the two separate issues by considering them side by side, with agreement on the merits of each issue.

At what stage in a dispute should ADR be considered?

The stage at which a particular tax dispute may be suitable for mediation will vary from case to case.

However, as a general rule, ADR should only be considered when both sides have attempted to explore fully the facts and their respective technical arguments. As such, ADR should not be seen as (or sought to be used as) a substitute for collaborative working/ discussions as part of the usual enquiry process.

ADR can help to focus areas of disagreement in long-running, complex disputes. Where disputes turn on points of law, case-teams should seek legal advice before considering ADR. Case-teams are encouraged to critically evaluate advice received from Counsel with the help of HMRC Solicitor's Office.

In cases where it is proving exceptionally difficult to reach agreement on the relevant facts, or where there is a breakdown in collaboration over what factual disclosure is needed to elicit the relevant facts, there may possibly be a role for ADR in helping to unblock this aspect.

ADR can be considered either before or after the issuing of a formal decision by HMRC.

Interaction between ADR and the appeal / litigation process

If HMRC and a customer agree to use ADR in a case after a formal decision has been made by HMRC, it is important that the customer also separately considers (and actions) any appeal of the HMRC decision within the relevant time limit. Failure to follow the legal process can mean that an alternative answer reached as part of the ADR process cannot be legally implemented.

Once an appeal to the Tribunal has been made, it is up to the parties to discuss and agree how to manage the ADR process and work in relation to any potential future litigation. Depending on the particular case and, for example, how much work has already been undertaken in relation to potential future litigation, the parties may wish to:

- temporarily 'park' work relating to the litigation process in order to allow the parties to commit fully all time/ resource to the ADR process. However, it is important to guard against ADR unnecessarily delaying the litigation process;
- work the ADR process and litigation as a "twin track" approach. This approach is likely to be more relevant to indirect tax cases and could impact the ability of one or both parties to commit to the ADR timetable. However, such an approach might be appropriate where, for example, the parties have already undertaken a significant amount of work in preparing for litigation and a date has already been set for the case to be heard by the Tribunal (or Court). In such circumstances, assuming the ADR process can be completed prior to the date of the hearing, the parties may wish leave the date of the hearing in the diary in order to provide some momentum/ impetus to the ADR process and to allow the litigation process to be used as a "back stop" if the parties are not able to resolve fully the dispute through the ADR process;

- where an appeal has been notified to the Tribunal, liaise with the DRU and Appeals and Review caseworker or Solicitor as to the appropriate actions to inform the Tribunal Service that ADR has been engaged.

6. In what sort of cases is ADR unlikely to be suitable?

ADR should only be considered in cases where the process is likely to add value. Therefore, in general, ADR is unlikely to be appropriate if the benefits of using it in the particular case (and how it might help the parties resolve a dispute) cannot be clearly identified, articulated and agreed between the parties.

More specifically, ADR is unlikely to be appropriate where any of the following points apply:

- the customer does not work with HMRC in a collaborative manner or on the specific dispute has indicated that they do not wish to try ADR;
- it would be more efficient to have an issue judicially clarified so that the precedent gained can be applied to other cases;
- resolution can only be achieved by departure from an established 'HMRC view' on a technical issue, and no exceptional facts or circumstances exist to justify a departure from the law or practice;
- there is reason to suspect lack of integrity on the part of the customer, whether or not criminal proceedings are envisaged;
- there is doubt over the veracity or strength of evidence provided and HMRC wish to test it by cross-examination in a public tribunal;
- an appeal has been listed for hearing at the Tribunal and entering into an ADR process would result in that hearing being postponed.

ADR should not be entered into within an existing dispute resolution process unless there is a possibility of adding to or creating efficiencies. For example, cases in HRCP are already utilising mediation techniques in certain areas and increasingly a collaborative approach is being adopted across risk working/ compliance checks more generally. Equally, an issue within HRCP governance could potentially 'fast-track' to an ADR session if much of the preparatory work has already been done.

A practical example of a case where mediation is unlikely to be suitable:

A member of K Group claims Corporation Tax relief for goodwill under the corporate intangible fixed asset regime in respect of its acquisition of a business that was carried out by another member of K group before commencement of the regime (1 April 2002).

In making this claim, K Group and its advisers are challenging HMRC's interpretation of the law, which is set out clearly in guidance. There is no disagreement regarding the facts of the dispute, which turns exclusively on the interpretation of the relevant legislation.

HMRC is aware that there are a large number of businesses who could make similar claims, were K Group to be successful in its claim.

ADR in this circumstance is unlikely to be suitable because of the policy implications. Unless the customer is prepared to concede the point, it is likely to be preferable in these circumstances to obtain a judicial precedent which would clarify the situation for similar arrangements in other businesses.

7. Who within HMRC decides whether or not ADR is appropriate in a particular case?

Either party to a dispute can suggest ADR may be an appropriate method of resolving the dispute.

Customer proposes ADR

Where the customer wishes to propose ADR, they should inform the CRM or case-owner and notify the Dispute Resolution Unit (DRU). The CRM/case-owner should discuss with the customer what may be the potential benefits of using ADR as well as with all internal HMRC stakeholders involved in the issue. The DRU will liaise with the CRM or case-owner to help them understand what is being proposed and assist in articulating the potential benefits or downsides of an ADR approach. Where the CRM or case-owner and the DRU agree that ADR would be appropriate, they will authorise the agreement of the customer's suggestion and make appropriate arrangements to take the process forwards and inform the ADR Panel that the decision to accept the customer's proposal for ADR has been agreed.

Where it is considered either by the CRM/case-owner or by the DRU that ADR is not appropriate, the DRU will arrange for the request to be presented to the ADR Panel for them to make a formal decision on behalf of HMRC. The ADR Panel consists of the Head of the Dispute Resolution Unit, the Director Tax Professionalism and Assurance, the Director LBS and the General Counsel and Solicitor. This decision will be communicated to the CRM / case-owner and to the customer.

HMRC wish to offer ADR to customer

Where an HMRC CRM or case-owner or member of their team considers ADR may be appropriate, they should obtain consensus from the case team, and all other internal stakeholders and inform the DRU **before** approaching the customer. The DRU will want to understand what the potential benefits of such a process may be. If the DRU concur with the suggestion, they will arrange for a formal decision to be made by the ADR Panel after which the CRM or case-owner as appropriate is authorised to suggest ADR to the customer, who can accept or decline the offer. If the customer requires more information about the process before making a decision, they should be referred to the DRU. In some cases, if agreed with the case team, it may be more appropriate for the DRU or an HMRC facilitator to make the approach to the customer, for example, where it would be beneficial to emphasise the impartial nature of the ADR process.

Should the DRU not agree that ADR is appropriate, they will not authorise the CRM or case-owner to make the suggestion and will refer the request to the ADR Panel for a formal decision.

Governance and assistance

Unjustified refusal to engage in ADR has been seen by the Court as a reason to award costs against the refusing party. For this reason, it is important that the appropriate governance is in place so that HMRC can record and demonstrate the decision-making process in cases where an external ADR request has been refused.

Other governance processes and procedures (e.g. HRCP, Counter Avoidance Group, Contentious Issues Panels, MCRP, etc) should be followed as usual.

In the interests of consistency and best practice, the DRU should be informed of any case where ADR has been requested or is being actively considered. A template which should be completed and submitted to the DRU is attached at [Annex 1](#).

The DRU is available to provide advice and support in all cases and help talk through the potential advantages / disadvantages of ADR in a particular case. This might, in particular, be helpful where not all HMRC stakeholders agree as to whether or not the use of ADR is appropriate in a given case.

There may be occasions where a request for ADR is made to HMRC by a party other than the customer's usual tax agent. It is therefore important to ensure that you have the appropriate confirmations that the customer has authorised the particular party to act, before you discuss any aspects of the customer's case further with that party.

ADR is not a route to bypass any of the existing governance arrangements such as AAB, CIP, TDRB, etc. All normal governance applies to any agreement reached within ADR.

Summary of decision making process

On receipt of a request for ADR:

1. Depending on who receives the request for ADR in the particular case, notify the CRM/case owner and DRU of the request as soon as is practicable
2. Clarify why the customer/agent considers ADR may be appropriate and specifically what potential benefit(s) they believe it can bring to the particular dispute
3. Seek advice/ input from DRU and arrange internal discussion with all HMRC stakeholders with an interest in the case to agree a consensus as to whether ADR may be useful
4. If the consensus is that ADR would be useful and the DRU agree, the DRU will authorise and assist with making any ADR arrangements necessary
5. Where consensus within the HMRC team cannot be reached or the DRU believes that ADR is not appropriate, the DRU will arrange for the request to be considered by the ADR Panel to make a decision on behalf of HMRC
6. Where ADR is refused by HMRC, the DRU will write to the affected customer/representative within 5 days of the decision

In cases where HMRC consider that ADR might be appropriate (and there has been no specific request from the customer/ agent), steps 3 – 5 apply with the exception that the ADR Panel **must** make a decision to offer ADR **before** an approach is made to the customer to offer it.

8. Summary of a typical ADR timetable and process

a) for a facilitated discussion

Length of the process

Facilitated discussion is expected to bring efficiency to the process of agreeing a customer's liability. The process is expected to be relatively short and not interfere with other dispute resolution processes, especially Tribunal hearings.

The aim is to attempt to reach resolution of the dispute at a single meeting.

Consequently, it is expected that where HMRC and the customer agree to enter into a facilitated discussion process, that process should be concluded within a three month window from the agreement and HMRC's ADR Panel may impose such requirements on the process as a condition of entering into facilitated discussion. Where, exceptionally, this is not possible, agreement should be sought from the DRU to extend the process.

The DRU will appoint a trained facilitator to facilitate on HMRC's behalf and advise the facilitator of the customer and HMRC contact names. The customer may decide to appoint a similarly trained facilitator.

Preparation for the facilitated discussion

Both parties should (assisted by the facilitator(s) as necessary):

- agree whether the facilitated discussion is to be managed solely by the HMRC facilitator or whether the customer will supply a mediation trained facilitator to act with the HMRC facilitator;
- agree and document the particular point(s) of fact or law which are in dispute and/or the particular question(s) which need to be answered in order to resolve the dispute;
- agree a date for the facilitated discussion and also where it will be held. Usually it would be convenient for the meeting to be held at either the customer's premises or those of their agent;
- summarise (ideally in no more than 2 pages of A4) their respective positions in relation to the particular point(s) in dispute or question(s) which need to be answered (identified above) and these should be exchanged (ideally through the facilitator(s)) in good time for the meeting;
- agree how to proceed with the questions and what order they will be taken in. Facts also need to be agreed and where there are factual disputes, arrangements need to be considered as to how to address them (potentially through further evidence or discussion) as appropriate;
- where the facilitated discussion fails to resolve the issue(s), give consideration as to whether the issue(s) are likely to be resolved through a further meeting and, if so, agreement to the preparations for that meeting, who will attend and the date of such a meeting. If further meetings are considered unlikely to resolve the issue, give consideration as to what new agreements (if any) as to the respective positions and agreed facts of the parties, to inform any Tribunal hearing;
- where the facilitated discussion(s) resolves the issue, draft a written agreement of the agreed resolution and sign it as part of the meeting.

b) practical issues for a facilitated discussion

Facilitation agreement

The parties may choose to sign up to a facilitation agreement which covers the basics of the facilitated discussion and the responsibilities of the parties. It also expressly acknowledges that the facilitator(s) is(are) not independent but will work 'neutrally'. A model agreement can be found [here](#).

Agreeing a date for the facilitated discussion

Agreeing a date can, potentially, be quite complicated because of the number of people involved. The date should be one on which the facilitator(s), the

customer's representatives (and "decision makers") and HMRC's team are all available, and should be far enough in advance to allow for the preparation and exchange of position papers prior to the meeting.

If relationships between the two sides are cordial, it may be that the CRM / case-worker and customer representative can agree the date between themselves. If relationships are not so cordial, it is usual for the HMRC facilitator to make the arrangements (with the customer facilitator if one has been appointed) to help establish their neutrality.

Availability of HMRC team members (and customer's team)

Whilst facilitated discussions are typically scheduled for a full working day they can – and very often do – overrun and can sometime finish very late in the evening. This generally reflects experience of the effectiveness of continuing a session until agreement is reached, rather than reconvening the facilitated discussion on a future occasion.

If a dispute has not been resolved by the end of the scheduled time, it is up to the parties whether or not to continue discussions. A decision as to whether or not the facilitated discussion should continue is likely to be influenced by the likelihood of a resolution being reached.

However, in order to ensure that the benefit of any progress is not lost, it is important to ensure that representatives of both HMRC and the customer (in particular the respective decision makers) are, if necessary, able to stay beyond the scheduled time for the facilitated discussion. This should be discussed in advance with the customer as it is likely to influence the choice of date of the facilitated discussion and will enable individuals to make necessary arrangements (e.g. child care or booking hotels). Consideration should be given in advance to practical matters such as transport, accommodation requirements in case mediation does overrun and provisional booking may need to be made in advance.

Choosing a venue

The best model for a facilitated discussion follows that of mediation and requires three separate rooms for a whole day. This (and security concerns) means that it is unlikely that HMRC would be able to provide the necessary accommodation (although thought should always be given as to whether HMRC could offer to host the facilitated discussion).

Alternatively, it may be appropriate to hold the facilitated discussion at the customer's premises, especially if there may be the need to refer to documentation which the customer has in their possession, as it should be more easily available.

A third option is to hold the facilitated discussion at the agent's premises as they will have access to some documents and the ability to generate agreement documents, if needed.

Alternatively, it may be possible to hold the facilitated discussion using two rooms, with one party staying permanently in the general room and the other party shuttling between the two, but this is not ideal.

Finally, it may be necessary to hold the facilitated discussion at a neutral venue. If this is the case, the costs should usually be split 50:50 with the customer and contact with the DRU needs to be made **before** any arrangements are made so that payment can be authorised.

Pre-facilitation discussions

If the customer has appointed their own facilitator each side may have discussion with their own facilitator about how the meeting may proceed. It would be inappropriate to discuss with the facilitator what the merits of the arguments are as this would compromise their neutrality.

If the customer hasn't appointed their own facilitator, the HMRC facilitator should be even-handed in their approach to both sides, bearing in mind that they are a representative of HMRC in the mind of the customer.

Administrative points

The facilitated discussion may last a whole working day, and may carry on into the evening. The parties will need to consider and agree catering requirements. Each party may wish to arrange their own catering options and to bear the costs separately, although this may be dictated by the choice of venue.

The parties should also discuss the availability of internet access, printers, paper, projectors, computers, cables, fax machines and other equipment as required.

If spreadsheets are needed, they should be exchanged before the day as it may be difficult to import documents between laptops, for example if ports have been disabled for data security reasons.

HMRC checklist

A checklist of other practical matters to be considered by the HMRC team prior to the facilitation is set out [here](#).

This includes guidance in relation to identifying HMRC's 'red', 'amber' and 'green lines' prior to the mediation (i.e. what, if any, parameters there might be for agreeing particular matters).

It is an important part of HMRC's assurance process that some decisions are subject to a separate governance process in addition to the case team. These are set out in the [Code of Governance](#). HMRC teams need to identify such cases where any proposed agreement can only be provisional and make this clear to the customer and their team. They will also need to ensure that they have prepared the appropriate paperwork and timetabling for any governance process so that this step can be expedited.

c) for mediation

Length of the process

A mediation process is expected to bring efficiency to the process of agreeing a customer's liability. The process is expected to be relatively short and not interfere with other dispute resolution processes, especially Tribunal hearings.

The aim is to attempt to reach resolution of the dispute possibly over a series of meetings.

Consequently, it is expected that where HMRC and the customer agree to enter into a mediation process, that process should be concluded within a six month window from the agreement and HMRC's ADR Panel may impose such requirements on the process as a condition of entering into mediation. Where, exceptionally, this is not possible, agreement should be sought from the DRU to extend the process.

The DRU will appoint a trained facilitator to facilitate on HMRC's behalf and advise the facilitator of the customer and HMRC contact names.

Because of the added complexity surrounding mediation, it may be sensible to enter into an ADR process agreement to regulate the process, a template for which can be found [here](#).

Preparation for the mediation

Both parties should:

- agree whether the mediation should be preceded by structured discussion and, if so, how that discussion should be managed (possibly by the HMRC facilitator or jointly with a similarly trained facilitator appointed by the customer);
- agree and document the particular point(s) of fact or law which are in dispute and/or the particular question(s) which need to be answered in order to resolve the dispute;
- if having a structured discussion:
 - agree a date for the structured discussion and also where it will be held. Usually it would be convenient for the meeting to be held at either the customer's premises or those of their agent;
 - summarise (ideally in no more than 2 pages of A4) their respective positions in relation to the particular point(s) in dispute or question(s) which need to be answered (identified above) and these should be exchanged (ideally through the facilitator(s)) in good time for the meeting;
 - agree how to proceed with the questions and what order they will be taken in. Facts also need to be agreed and where there are factual disputes, arrangements need to be considered as to how

to address them (potentially through further evidence or discussion) as appropriate;

- agree and appoint a mediator (see *Practical Issues* below);
- agree a date for the mediation;
- follow the requests of the mediator as to any pre-mediation communications or position papers;
- where the mediation fails to resolve the issue(s), give consideration as to whether the issue(s) are likely to be resolved through a further meeting and, if so, agreement as to whether the meeting will be mediated, who will attend and the date of such a meeting. If further meetings are considered unlikely to resolve the issue, give consideration as to what new agreements (if any) as to the respective positions and agreed facts of the parties, to inform any Tribunal hearing;
- where the mediation(s) resolves the issue, draft a written agreement of the agreed resolution and sign it a

d) practical issues for a mediation

Choosing a mediator

The parties should discuss whether facilitative mediation, evaluative mediation or non-binding expert determination is most suitable for the particular case, and whether there are any particular individuals who might be appropriate to mediate the issue. The DRU is available to advise on what might be the most appropriate form of mediation and also help suggest a suitable mediator.

The HMRC team cannot agree a mediator without DRU approval. Once a suitable mediator has been suggested, the HMRC facilitator should contact the DRU, who will advise them on the information required before HMRC can engage the mediator. This is to ensure that there is no conflict of interest between the mediator and HMRC.

Usually this will consist of the mediator's:

- full name;
- private and business addresses;
- unique taxpayer reference (UTR);
- VAT registration number;
- CV or similar (or link to website where this can be obtained).

The DRU will liaise internally to ensure that HMRC are content to contract with the proposed mediator and that there are no conflicts of interest present in the engagement. **This may take up to two weeks.** The facilitator should

advise the customer of these requirements in advance where it is proposed that a mediator be appointed. Once the DRU have completed their checks and given approval, the HMRC facilitator should sign any contracts with the mediator on HMRC's behalf.

Mediation agreement

Once the parties have agreed on who should be appointed, in order to appoint a particular individual, a separate 'formal mediation agreement' will need to be entered into by both parties and the appointed mediator.

Typically the mediator will be able to provide the parties with a standard template formal mediation agreement, however, it is recommended that the terms of this agreement are discussed with and reviewed by the DRU. The facilitator is responsible for signing the formal mediation agreement on behalf of HMRC (this is for logistical purposes and allows the DRU to track who is authorised for which mediation).

Examples of model formal mediation agreements can be obtained from the CEDR website [here](#).

Choosing a date for the mediation

Once the parties are agreed on who should be appointed they will need to agree a date for the mediation. The date should be one on which the mediator, the customer's representatives (and "decision makers") and HMRC's team are all available, and should be far enough in advance to allow all agreed pre-mediation steps to be completed.

Mediations can be arranged and held at fairly short notice (subject, of course, to the availability of the mediator and the representatives of the respective parties). However, if the parties want a particular individual it is often possible to "hold" an agreed date in the diary.

Parties may wish to consider agreeing a date at the outset of the ADR process, prior to the pre-mediation steps. This can help to ensure that the parties keep to the agreed timetable of the ADR process and can also help to maintain momentum in the process. However, the parties should bear in mind that it is possible that they may resolve the dispute prior to the formal mediation, therefore if a date is reserved in advance the parties need to consider / understand any potential cost implications of subsequently cancelling the mediator; which is likely to depend on each mediator's specific terms.

Availability of HMRC team members (and customer's team)

Whilst mediations are typically scheduled for a full working day they can – and very often do – overrun and can sometime finish very late in the evening. This generally reflects mediators' experience of the effectiveness of continuing a session until agreement is reached, rather than reconvening the mediation on a future occasion.

If a dispute has not been resolved by the end of the scheduled time, it is up to the parties whether or not to continue discussions. A decision as to whether

or not the mediation should continue is likely to be influenced by the likelihood of a resolution being reached.

However, in order to ensure that the benefit of any progress is not lost, it is important to ensure that representatives of both HMRC and the customer (in particular the respective decision makers) are, if necessary, able to stay beyond the scheduled time for the mediation. This should be discussed in advance with the customer as it is likely to influence the choice of date of the mediation and will enable individuals to make necessary arrangements (e.g. child care). Consideration should be given in advance to practical matters such as transport, accommodation requirements in case a mediation does overrun and provisional booking may need to be made in advance.

Choosing a venue

Careful thought should be given to where the mediation is held – typically at least three separate rooms will be required which, preferably, should not be next to one another. In some cases it may be necessary to hire a neutral venue, however, the parties should try to minimise costs wherever possible and consider the availability of meeting rooms in their own offices or perhaps of the customer's agent. The parties will need to consider any impact of the mediation overrunning (e.g. costs, does the building shut at a certain time, etc.).

The choice of venue should be discussed and agreed by both parties with the mediator, who is responsible for the conduct of the mediation.

Pre-mediation discussion with mediator

Before the actual mediation, the mediator may suggest a pre-mediation meeting (or conference call) with both parties present. The purpose of this meeting is for both parties to meet the mediator and, typically, to provide an opportunity for the mediator to give an outline of how the mediation day will be structured, discuss any of practical issues and also allow either party to ask any questions.

As set out in the template ADR process agreement, unless expressly agreed with the other party, neither party should seek to contact or discuss any aspect of the case or point(s) in dispute with the appointed mediator prior to the mediation, outside of any pre-agreed meetings/ conference calls with the mediator.

Administrative points

The mediation is likely to last a whole working day, and may carry on into the evening. The parties will need to consider and agree catering requirements. Each party may wish to arrange their own catering options and to bear the costs separately or ask the mediator to arrange these.

The parties should also discuss and agree the availability of internet access, printers, paper, projectors, computers, cables, fax machines and other equipment as required.

If spreadsheets are needed, they should be exchanged before the day as it may be difficult to import documents between laptops, for example if ports have been disabled for data security reasons.

HMRC checklist

A checklist of other practical matters to be considered by the HMRC team prior to the mediation is set out [here](#).

This includes guidance in relation to identifying HMRC's 'red', 'amber' and 'green lines' prior to the mediation (i.e. what, if any, parameters there might be for agreeing particular matters).[

It is an important part of HMRC's assurance process that some decisions are subject to a separate governance process in addition to the case team. These are set out in the [Code of Governance](#). HMRC teams need to identify such cases where any proposed agreement can only be provisional and make this clear to the customer and their team. They will also need to ensure that they have prepared the appropriate paperwork and timetabling for any governance process so that this step can be expedited.

9. Who from HMRC should be involved in the ADR process?

The HMRC "cast list" and stakeholders will need to be considered and agreed on a case by case basis. However, the following sets out the likely HMRC stakeholders who might be involved in the ADR process, together with their particular role in the process:

- *CRM (or case owner, if no CRM)*

Role: Principal point of contact for customer regarding ADR process and to lead all stages in process. Alternatively, it may be appropriate for the HMRC facilitator to be the lead contact for the process. The CRM / case-owner must attend all calls / meetings with customer and must attend the meeting day.

- *Product/ process group specialist (where relevant)*

Role: Member of the core team to support case owner where a point of tax law is in dispute. They are likely to attend some meetings, as well as the meeting day.

- *AAG specialist (where relevant)*

Role: Member of the core team to support case owner. They are likely to attend some meetings, as well as the meeting day.

- *DRU appointed facilitator*

Role: Provide support to CRM and HMRC team throughout ADR process, as required. Where appropriate, during HMRC preparation and in the stages / meetings prior to the meeting day, could act as a "quasi-

facilitator” in order to question, challenge assumptions etc. They should always attend the meeting day.

The DRU will also ensure that appropriate regular progress reports are provided to the ADR Panel, and that progress reports are in any event provided to the ADR Panel in the event that agreed timetables in a case approved for ADR slip by more than a month.

- *Solicitor’s Office representative*

Role: Review ADR process agreement, mediation agreement or facilitation agreement and provide any other support as required. May attend mediation (otherwise to be “on call” on day of mediation in order to advise regarding documenting any agreement between the parties).

- *Decision maker (where case is subject to possible escalation for a decision)*

-

Role: Wherever possible the decision maker(s) from both sides should attend the meeting day. In any event, the HMRC decision maker should agree parameters for possible settlement with HMRC team prior to mediation and should be “on call” on day of mediation in case a potential settlement outside of pre-agreed parameters is put forward by the other party. This approach should also be agreed with the customer side.

Where a decision needs to be ratified by a governance body or the Commissioners, the HMRC facilitator should liaise with the DRU before the meeting day to ensure that a decision by the governance body or Commissioners can be expedited. The facilitator should ensure that this requirement is explained to and agreed by the customer before arranging the meeting day.

The fact that this agreement has been reached should be reflected in any signed mediation or facilitation agreement and communicated to the mediator as necessary.

- *Others?*

In each case, the relevant HMRC team should consider the nature of the issue (is it a tax technical or commercial argument) and the nature of the composition of the team who will be representing the business at any meetings / mediation etc. (e.g. senior management, advisors, Counsel etc.). Understanding this will indicate the thrust and nature of the taxpayer’s approach to mediation and will help you to decide whether or not it is appropriate for any other HMRC attendees to also attend (e.g. Sector Lead).

10. What typically happens on the meeting day?

As facilitated discussions and mediations generally follow the same basic outline, to keep this section simple, we will use the word ‘mediator’ to include ‘facilitator(s) as well.

The format of the day will generally be set out for the parties by the mediator during the any pre-meeting or conference call.

However, in outline, a 'typical meeting day' would generally involve the following steps:

- welcome from the mediator in separate rooms;
- plenary opening statements from both sides – length agreed in advance (typically maximum of 10-20 minutes);
- brief responses to opening statements;
- parties return to separate rooms and mediator holds separate sessions with both parties, alternating between the two. The mediator's role is to challenge assumptions and strengths / weaknesses of positions held by both parties, help to clarify the parties' interests and needs underlying their negotiating positions, and provide a channel of communication. Whilst often the two parties may not speak directly to each other between the end of the opening session and the next plenary session, this is in the control of the mediator who may consider it beneficial to get parts of the teams together to discuss particular issues. It is generally open to either party to suggest a plenary or partial meeting but up to the mediator to arrange one if they think it will advance resolution;
- any movement or offers to the other party is usually made by the mediator;
- each party's conversations with the mediator are confidential and the mediator does not relay any information to the other party without express permission;
- the parties come together in plenary when both sides are ready to talk face to face – this is usually at the stage when agreement in principle is reached/ imminent;
- when an agreement has been reached, it is documented (in outline) and signed by the parties immediately.

11. Resolving the dispute within an ADR process

Documenting the agreement

It is likely that, for the majority of tax disputes going through an ADR process, the intention of both parties will be to try to resolve the dispute if possible.

Where HMRC and the customer are able to reach an agreement or a proposed agreement through ADR which will be subject to governance, it is important that the agreement is documented and signed by both parties on the same day and noted as being subject to HMRC internal governance. At this time, it is possible that the parties may not be able to agree the detailed calculations of liability that flow from the terms agreed, but this should not prevent the parties from documenting the key points or principles agreed.

The document might include reference to terms and conditions outlined in the ADR process agreement and / or formal mediation agreement (see section [8](#) above).

Where litigation proceedings have already begun, a settlement agreement may be made by consent order (also known as a ‘Tomlin order’) under Rule 34 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009—see [here](#).

This allows the settlement to take effect immediately, without the 30-day ‘cooling-off’ period provided for in S54 TMA 1970/ S85 VATA 1994. It may be advisable to initially document heads of agreement on the day, with consent order to follow so that the terms can be reviewed / agreed by Solicitor’s Office.

As an alternative, and in cases where litigation proceedings have not begun, the settlement will need to be formalised in the same way as for any out of court settlement of the tax matters in dispute (e.g. contract settlement or S54 TMA 1970 agreement for direct tax disputes, or S85 VATA 1994 agreement for VAT disputes). Here too, it may be advisable to initially document heads of agreement on the day, with the formal settlement process to follow once reviewed / agreed by Solicitor’s Office again, subject to any HMRC internal governance requirements.

CEDR’s model Settlement Agreement and Tomlin Order is available [here](#).

What happens if only partial agreement is reached?

Generally, discussions and any negotiations in an ADR process are on a ‘without prejudice’ basis and therefore any partial agreement on any matter of substance will not be recorded.

However, it may be the case that during ADR, progress is made in narrowing particular points of disagreement or in clarifying facts and the parties may agree that it is useful to document these points (e.g. for use in subsequent litigation).

What happens if no agreement is reached?

This should be pre-agreed between the parties and is likely to be set out in either the ADR process agreement or the formal mediation agreement.

As with any tax dispute, if HMRC and the customer are not able to resolve the dispute through bilateral discussion then – unless either party concedes the issue – it is likely that the dispute will ultimately need to be resolved by litigation.

Confidentiality of proceedings

The status of information provided in the course of the ADR process / mediation, including documents drafted in preparation for and during the mediation session should be pre-agreed between HMRC and the customer. Standard confidentiality clauses can be found in the ADR process agreement and are likely to be used in the majority of cases.

However, where a dispute is not fully resolved through mediation, it is possible that certain information / documentation prepared during the course of a mediation process could be beneficial in subsequent litigation (e.g. where parties narrow down points in dispute). In such circumstances, it is envisaged that the parties are likely to agree that particular information / documents could be disclosed and used in the litigation.

In common with all casework, mediation proceedings and documents should be kept on a 'need to know' basis within HMRC. Where the ADR process is being conducted through an HMRC facilitator, they will be acting as a neutral broker between the two parties but will remain an HMRC employee with the obligations which that employment brings.

Feedback

Following the conclusion of a facilitated discussion or mediation process, the DRU will contact both parties to obtain confidential feedback on the ADR process and on the facilitator or mediator involved, to improve the process for the future. Details of the case will not be asked for.

12. Where to go for further information

The Dispute Resolution Unit is available to give further advice and information on ADR within HMRC.

The DRU's role in relation to ADR includes the following:

- provide support to case owners and CRMs, drawing on lessons learned and feedback from pilot cases;
- act as a repository for management information relevant to mediation for metrics purposes;
- act as a central point of contact for internal / external queries regarding mediation;
- act as guardians for best practice, training and guidance for mediation;
- collate internal and external feedback from mediation participants in order to inform development of the ADR programme and to provide metrics information;
- maintain a list of relevant directorate contacts;
- Co-ordinate network of HMRC's trained mediators and manage resources to provide facilitators for accepted cases.

Template for notifying the DRU of a potential ADR case

Notification of potential ADR

Once completed to be sent to: [INSERT EMAIL / CONTACT DETAILS], DRU

[Customer Name]

CRM/ case worker:	
Directorate:	
ADR requested by customer/ proposed by HMRC	
Case Details:	
- <i>Point at issue</i>	
- <i>Tax at risk</i>	
- <i>Type of tax / duty</i>	
- <i>Tax specialist contact details</i>	
- <i>Other HMRC stakeholders</i>	
- <i>Agent</i>	
- <i>Date issue/risk taken up</i>	
- <i>Stage reached</i>	
Potential ADR case because:	
- <i>Dispute over facts</i>	
- <i>Likely to be cost efficient</i>	
- <i>Impasse in negotiation</i>	
- <i>Preparation for litigation</i>	
- <i>Involves multiple parties</i>	
- <i>Litigation unwelcome / sensitive</i>	
- <i>Other (provide detail)</i>	
Brief narrative (explaining role ADR likely to play):	
CRM/ case worker agreement to ADR?	
HMRC stakeholders agreement to ADR?	
Other governance procedures in place?	
Assistance required from DRU:	
DRU Notes	

Facilitation Agreement

THIS AGREEMENT dated **IS MADE BETWEEN**

Party A

..... of

Party B

..... of HMRC
(together referred to as **“the Parties”**)

The HMRC Facilitator

.....
(a term which includes any agreed **Assistant Facilitator**)

in relation to a facilitation to be held

on

at
(“the Facilitation”)

concerning a dispute between the Parties in relation to

.....
.....
.....
.....

(“the Dispute”)

IT IS AGREED by those signing this Agreement THAT:

The Facilitation

1 The Parties agree to attempt in good faith to settle the Dispute at the Facilitation. All signing this Agreement agree that the Facilitation will be conducted in accordance with its terms.

Authority and status

2 The person signing this Agreement on behalf of each Party warrants having authority to bind that Party and all other persons present on that Party's behalf at the Facilitation to observe the terms of this Agreement, and also having authority to bind that Party to the terms of any settlement or to having notified the facilitator and other party that they do not have such authority and have explained the arrangements to obtain such authority as detailed below.

3 The HMRC Facilitator is not an independent contractor and whilst their role is to be even-handed and objective in their approach to both parties, they will be operating within the Civil Service code.

Confidentiality and without prejudice status

4 Every person involved in the Facilitation:

4.1 acknowledges that all such information passing between the Parties and the HMRC Facilitator, however communicated, is agreed to be without prejudice to any Party's legal position

4.2 acknowledges that the HMRC Facilitator is acting in a neutral role and will not during the process of the day, or in relation to any proceedings, disclose to either party any discussions or information without their permission, subject to any legal overriding obligations or conflicts of interest.

5 No verbatim recording or transcript of the Facilitation will be made in any form.

Settlement formalities

6 Terms of settlement reached at the Facilitation will usually be set out in writing and signed by or on behalf of each of the Parties.

Legal status and effect of the Facilitation

7 Any contemplated or existing litigation or arbitration in relation to the Dispute may be started or continued despite the Facilitation, unless the Parties agree or a Court orders otherwise.

8 This Agreement is governed by the law of England and Wales and the courts of England and Wales shall have exclusive jurisdiction to decide any matters arising out of or in connection with this Agreement and the Facilitation.

9 The referral of the dispute to the Facilitation does not affect any rights that exist under Article 6 of the European Convention of Human Rights, and if the Dispute does not settle through the Facilitation, the Parties' right to a fair trial remains unaffected.

Changes to this Agreement

10 All agreed changes to this Agreement and/or the Model Procedure are set out as follows:

Signed

Party A _____

Party B _____

HMRC Facilitator _____

HMRC checklist for mediation

This checklist is intended as a suggestion of items that the case-team may wish to consider in preparation for the mediation. It draws on the checklist produced by the ICAEW, together with specific feedback from the ADR pilot.

Bring a laptop or at least a calculator.

HMRC case

- 1.1 List evidence – witnesses, documents, reports, statements, etc.
- 1.2 List financial liability for each point in dispute (including interest, penalties, etc).
- 1.3 List strengths and weaknesses for each point in dispute
- 1.4 Clarify what, if any, parameters for negotiation are there on the issue in dispute (i.e. HMRC's 'red', 'amber' and 'green lines'):
 - Red: no movement possible
 - Amber: can be pushed a little
 - Green: reasonably flexible
- 1.5 Calculating potential settlement range:
 - What would HMRC ideally like?
 - What would HMRC accept?
 - What is HMRC's bottom line?
 - At what point would HMRC walk away?
 - How did HMRC value the case? (including consideration of non-financial aspects)
 - What is the best alternative to no agreement (BATNA)?
 - What is the worst outcome to no agreement (WOTNA)?
 - How much will it cost to go to trial?
 - How long will it take?
 - What are the % chances of winning in court?
 - What does the other party consider its % chance?
 - What questions or line of argument do you want the mediator to put to the other party?
- 1.6 Identify HMRC's core interests and needs with relation to the other party, assessing alternative ways in which they can be met. This could include commitments in relation to aspects other than the particular issue / dispute in mediation.

Customer's case

- 2.1 List their evidence
- 2.2 What are their likely arguments regarding liability on each point in dispute?

- 2.3 List the strengths and weaknesses of their case
- 2.4 Consider (or guess) the basis of their demands
- 2.5 Consider (or guess) the basis of their offer
- 2.6 How else may they have valued their demand (including non-financial aspects)?
- 2.7 How else may they have valued their offer (including non-financial aspects)?
- 2.8 Try to identify the customer's core interests and needs, and assess whether they can be met within the bounds of LSS.

Considering all dimensions of the dispute

- 3.1 Something may have financial cost for one party which does not impact the other party in the same way – i.e. an offer by HMRC to undertake complex calculations may not incur extra financial cost for HMRC, but may save the customer incurring hours of adviser fees. Conversely, a customer may have access to sophisticated document management systems which could save HMRC resource time.
- 3.2 Burden of proof can be a significant factor, especially in fact-based disputes. How important is it to each party?
- 3.3 What else can be brought to the negotiating table? This does not mean contemplating 'package deals', but considering what other issues / disputes could be considered simultaneously, and what other aspects of the relationship between HMRC and the customer could be usefully discussed. Some things may be worth more to the customer than expected, for example receiving certainty on a transaction before a key accounting date.

Things that the mediator will need to know

- 4.1 A clear, concise background to the case, with all points in dispute highlighted.
- 4.2 Are there any unique features of the case which the mediator should be aware of?
- 4.3 What was the outcome of previous negotiations?
- 4.4 Have any without prejudice offers been made? What was the basis for refusal / acceptance?
- 4.5 Are there any issues HMRC considers to be 'red herrings' which the mediator should be aware of?
- 4.6 Would a chronology of events help the mediator?
- 4.7 If legal proceedings have already commenced, does the mediator need to see relevant documents?

- 4.8 What stage of disclosure has been reached? In mediation there are no formal rules of disclosure – it is important that the mediation process does not get bogged down with unnecessary documentation.
- 4.9 What are the particular points of fact or law which the parties agree / disagree? It is likely to be helpful to provide the mediator with some or all of the documents prepared by the parties during the pre-mediation steps – what is to be provided should be agreed between the parties.

Mediation case-team – roles and responsibilities

- 5.1 Identify all the individuals who will need to be at the mediation session, remembering that it may go on long beyond the end of a normal working day.
- 5.2 Identify any individuals who will need to be available 'on-call'.
- 5.3 Agree a clear decision-making process which enables a decision to be taken on the day.
- 5.4 Allocate roles and responsibilities to members of the mediation case team: for example, monitoring the other party's non-verbal communication; deciding who makes the opening statement at the first joint session; who is responsible for drafting responses, etc. A brief role-play rehearsal of difficult discussions likely to come up is well worth considering.

Witnesses of fact and expert evidence

- 6.1 Expert witnesses are not usually called during mediation sessions. However, this is a matter which should be agreed by the parties prior to the mediation.

Template ADR process agreement

WITHOUT PREJUDICE

DRAFT FOR DISCUSSION PURPOSES

[INSERT CUSTOMER NAME]

SUGGESTED ADR PROCESS FOR RESOLVING [INSERT DISPUTE]

1. Introduction

On *[insert date]*, *[insert names of HMRC representatives]* of HM Revenue & Customs (HMRC) met with *[insert customer representatives]* of *[insert customer]* to discuss the possibility of resolving their current *[insert tax type]* dispute through the use of Alternative Dispute Resolution (“ADR”). The dispute concerns *[insert brief summary, including overview of issue and period(s) impacted]*. Both parties are keen to resolve the dispute without litigation if possible and have agreed to enter into the process in good faith and use their best endeavours to resolve the dispute through ADR, including facilitated discussions between the parties and if necessary, a mediation process.

This note sets out *[HMRC’s / customer’s / a]* proposal for how the process might work, together with an indicative timetable and dates which the parties will endeavour to meet. It is agreed between the parties that the ADR process is on a without prejudice basis.

2. Administrative Points

The following administrative points need to be agreed.

- (i) Who should be instructed as mediator?

In terms of appointing a mediator, the following are possible options:

- The parties can appoint a mediator recommended by a Civil Mediation Council accredited mediation provider organisation (see list [here](#))
- The parties can approach Counsel’s chambers who also offer mediation services, and choose from their panel of mediators (e.g. an accredited mediator like *[insert possibilities]*) or choose to appoint a non-accredited mediator (e.g. a recognised expert with experience in the relevant sector).

[Insert any other possibilities, including if wished the preferences of either party, and relevant considerations in choosing a mediator]

(ii) Who should be involved from the parties?

[*Customer*] will be represented by the following people who will jointly lead the discussions on behalf of [*customer*]:

- [*Insert names of customer representatives, including agent*]

HMRC will be represented by the following people who will jointly lead the discussions on behalf of HMRC:

- [*Insert names of likely HMRC representatives*]

[Optional: It is possible that other HMRC specialists may become involved in the process or at particular meetings, as and where necessary.]

(iii) Who should bear the cost of mediation and what are the costs?

It is suggested that both parties will bear the third party costs of mediation (that is the costs referred to in this subsection of these proposals) equally and each bear their own internal costs. Mediators charge out at an hourly rate, normally ranging from £200 to £500 per hour depending on their experience and the circumstances of the case. It is also possible to agree a daily rate which is usually 13 times the hourly rate, consisting of 8 hours mediation and 5 hours preparation.

[*Insert fees for specific mediator to be appointed or mediators to be put forward as suggestions, if known*]

Estimated total fees for a mediator for 1 day including full preparation (i.e. to cover Steps 4 & 5 below) could be up to £10,000.

Additional expenses may include:

- Venue fees and associated costs, assuming the parties agree to hold the mediation at neutral venue and not at one of their offices; and
- Further mediator costs in relation to drafting the settlement agreement.

(iv) When and where should the mediation take place?

[*Insert estimated date of mediation and location possibilities*]

3. Suggested process for a facilitated discussion process and mediation

The following details the steps the parties have agreed to follow. If at any stage either party decides that the dispute can only be resolved by litigation, they can notify this to the other party and the ADR process will be discontinued.

Preliminary step: [*Insert details of any preliminary steps required prior to commencing the ADR process.*]

[Insert detail of how preliminary step is to be carried out, including timescales and dates].

Step 1: Parties to identify which facts and issues are in dispute and which are not

[Insert detail of how this is to be carried out, including timescales and dates. This could entail a series of structured discussions around all potential outcomes of the mediation.]

Step 2: If there was no resolution after Step 1, the parties to prepare position papers based on the key facts and issues identified still to be in dispute.

[Insert description of papers to be provided and dates for exchange, along with method of exchange, i.e. electronically or by same day courier.]

Step 3: Presentation of parties' positions

[Insert agreed timescale]

[Optional: The meeting will take place on DDMMYY. The parties will take turns, with (customer) going first to present their viewpoint. The presentations can take any format and involve any media, but each party may only present for a maximum period of 2 hours. Following both presentations, the parties will go to separate rooms and take a break of 1 hour to reflect and to identify an outcome which is agreeable to them and possibly, agreeable to the other party 'offer'. After the break, the parties will meet and discuss their respective offers. It is hoped that the parties will agree to a mutually acceptable offer and, by doing so, will have resolved the dispute.]

- If the parties are unable to reach agreement then the need for mediation will be considered. The intention is that a mediator will be appointed to facilitate negotiation of an agreement.
- If the parties are still not able to resolve this dispute, the parties are to agree to appoint a mediator.
- If it is agreed that a mediator should be appointed then that should happen by *[insert time and date]*.
- The dates and detailed timetable in relation to Steps 4 – 6 will (if needed) be discussed and agreed by the parties in due course. In particular, it is likely that any timetable will be subject to the availability of the particular mediator which the parties agree to appoint. However, the parties will be mindful of the desire to maintain momentum with the process and will endeavour to ensure that Steps 4 – 6 are completed as quickly as possible.

Step 4: Appointment of a mediator

[Anticipated date]

- On [date TBC], [*Insert name, i.e. agent*] on behalf of [customer] and HMRC will:
 - formally appoint the mediator agreed by the parties; and
 - send copies of all documents prepared by the parties for Steps 1 to 3, and any further submissions the parties wish to make, to the mediator, and copy these documents to the other party.
- Unless expressly agreed with the other party, neither party will seek to contact or discuss any aspect of the case or point(s) in dispute with the appointed mediator prior to the mediation, outside of any pre-agreed meetings / conference calls with the mediator (as set out in this document).
- Between [dates TBC], the mediator is expected to review the documents sent by [...].
- On [date TBC], the parties and the mediator will talk via a conference call. The purpose of this call is to give the mediator an opportunity to seek clarifications and clarification of any issues (if required) and to ask questions in order to gain a better understanding of this dispute. During the call, the parties and the mediator will agree on mutually convenient day(s) to meet for the formal mediation process. [*Alternatively, this could take place at a face to face meeting*].
- By 5 pm of [date TBC], the mediator must have familiarised himself/herself with the facts and the issues in dispute. By 5pm on the same day, the parties and the mediator must have also agreed the amount of time required to complete the mediation process.

Step 5: Mediation Process

Week commencing [...]

- On the agreed day(s), the parties and the mediator will meet at the chosen venue.
- The process will begin with a short plenary session in which each party will make a brief presentation in relation to what they would like to achieve in the mediation and provide a brief summary of their position following the facilitated discussions.
- Both the parties and the mediator will be allocated their own separate rooms. During the course of the day(s), the mediator will move between the two rooms to hear and discuss the views of both the parties.
- The object of these discussions is that the mediator will facilitate agreement of the parties to a solution to their dispute, which could include one of the range of outcomes identified in Step 1.

Timings:

- [*Optional: The parties are to meet, at least once, between [dates TBC]*]

- The mediation process to commence at 9am on the chosen day(s) and to conclude by 5pm, unless both parties agree that they wish to continue for a longer time.

Step 6: Settlement Agreement or document summarising key points of agreement / difference

Week commencing [...]

- Following the mediation process:
 - If a basis for settlement has been agreed between the parties, [*Party A*] to draft a written settlement agreement formalising the outcome agreed upon. [*Party A*] to send [*Party B*] the draft agreement electronically by 9am on [date TBC]. [*Party B*] to review and the parties to sign the same on or before 13 January 2011.
 - If a basis for settlement has not been agreed between the parties, [*Party A*] will draft a document which summarises the key points which have been agreed as well as the principal points of difference (either factual or technical) between the parties.
- In either case, [*Party A*] will send [*Party B*] the draft settlement agreement or draft summary of key points of agreement / difference electronically by 9am on [date TBC]. [*Party B*] will review and provide any comments / suggested amendments to [*Party A*] on or before [time on][date TBC].

Timings:

- The parties will draft, review, amend and sign the settlement agreement over the course of [date TBC] and no later than 5pm of on that day or agree the summary of key points of agreement / difference by [time on date TBC].

4. Ultimate Outcome

The parties will have resolved the scope of their dispute. In the alternative, they have narrowed the scope of the dispute and, through review and discussion of the facts and arguments, advanced the preparations for litigation. The parties will have reached an understanding of each party's litigation aspirations.

5. Rules of conduct

Confidentiality

The ADR process proceeds entirely on a 'without prejudice basis'. Anything said and all documents produced during the ADR process are confidential and without prejudice to the parties and shall not be disclosed to any third party, other than the parties' professional advisors (including statutory auditors), unless the express consent of each of the parties is obtained and subject to the obligations placed on the parties by the operation of English law.

Record of action points

At the beginning of any meeting, (either via telephone conference call or face-to-face) the parties will agree a note taker in order to record the action points emerging from the discussions. The notes taken will not be formally settled by the parties but may assist in the event of any misunderstandings that may have occurred during the course of these discussions.

Compliance with ADR best practice

By entering into this process, the parties have demonstrated a reasonable attempt to resolve the dispute by ADR, as encouraged under the Tax Tribunal Procedure Rules and more generally, the Civil Procedure Rules.

Facilitated discussion process

Background

'Facilitation services' have grown up from the pre-mediation structured discussions phase as described in paragraph 9 of the guidance. Many cases which were timetabled for mediation settled before the mediation day and it was decided to offer facilitated discussions as an alternative to mediation which customers could request or HMRC offer. Where facilitated discussion is accepted, it is not expected that mediation will follow, although a request for mediation can be made as part of the facilitated discussion, which request will have to be considered by the Dispute Resolution Unit and ADR Panel as necessary.

Objective

The objective is to bring to a resolution as efficiently as possible the dispute between HMRC and the customer. We would suggest that, where possible, the objective be to resolve the dispute at a single meeting.

However, the dispute may still be in the 'fact-finding' stage and, if this is the case, the objective will be to facilitate HMRC and the customer agreeing what facts are necessary, how they will be produced and when as efficiently as possible, possibly then leading on to a future resolution meeting.

Our experience is that, where most of the facts are known, there is little reason for facilitation to continue much past three months and, unless significant progress has been made, reference back to the Dispute Resolution Unit should be made where discussions continue past this point.

Your role as HMRC facilitator

You will be acting as a neutral facilitator in a tax dispute. Whilst this will usually be with a similarly trained facilitator [from the agent] acting for the customer, this may not always be the case and you may be acting with someone filling the customer side role who is untrained or you may be acting on your own.

In any event, you will need to ensure that the customer understands that you cannot be independent but that you will act as neutrally as you are able to do.

Other than that, you should act within the facilitated discussions as you have been trained to do through the external accreditation course and observe all protocols which a mediator would observe.

It may be that a revision of the mediation handbook you received before the course may be useful before commencing the facilitated discussions.

Methods we have successfully tried

The three methods we have tried to date are:

Joint facilitation – the two facilitators always act together, whether meeting both sides at the same time or meeting each side separately. You can explain that this method of working with the customer’s agent will assist both facilitators in being neutral and should explain that anything that is said to you or the customer facilitator in a meeting is treated as confidential and doesn’t go outside the facilitation without agreement (unless your wider legal obligation is to report it).

This is the method of which we have most experience and would recommend, especially if this is your first attempt acting as a facilitator.

Separate facilitation – the two facilitators act separately, each with their own ‘side’ with the facilitators meeting and exchanging views and positions to be communicated. This may reduce the ‘threat’ of discussing sensitive issues but may increase time overhead as the facilitators have to ensure they have communicated the views correctly between themselves.

Sole facilitation – occasionally, the customer may request the services of an HMRC facilitator without wishing to supply one themselves. This should generally not be a problem but emphasis will need to be placed on the fact that you are not independent but that you will act as neutrally as possible. Also more issues of trust may arise and have to be dealt with by you as facilitator.

Other options – another format for the meeting may be suggested. You will need to consider whether this could assist in resolving the issue or fact-finding and, if necessary, discuss with other facilitators or the Dispute Resolution Unit.

Things you should do before the meeting

Whilst it is not necessary for you to meet the HMRC team, it is good practice to ensure that they have met or talked to each other and have decided between them their roles and responsibilities within the team. If this cannot be achieved before the day of the meeting, you should set aside time for the team to make these decisions before the meeting starts and explain to them beforehand, that they will need to do this.

You will need to explain to the HMRC team your challenge roll. If there are only one or two members of the HMRC team, you should explain to them that part of the day will probably be spent with them on their own and that they may need to bring something with which they can occupy themselves during this time. Our suggestion is that at least two people from HMRC are present other than yourself as this enables the decision maker to discuss things with someone.

Understand, at least in outline, what the dispute is about and what stage has it reached (still fact finding, decision point, post decision point, appeal etc).

Determine what is expected from this meeting (links to previous point). Also, whether this is more of a ‘discussion’ type meeting or a ‘resolution’ meeting with the intention of attempting to resolve the dispute. You should be particularly careful to ensure that the objectives for the meeting are not inappropriately expanded e.g. where the meeting is essentially a fact finding

one, moving into resolution phase without ensuring that HMRC governance requirements are met or that appropriate parties are available.

Who is likely to be present from the customer side.

Who is needed and will be present from the HMRC side.

If working with a facilitator from the customer side, contact them to agree roles and how the meeting will be handled by the facilitators e.g.

- one 'relatively normal' meeting with facilitation which may be more use when there are still facts to be obtained;
- mediation style with joint opening and then splitting out into 'camps' with facilitator leading exploration. With this you may also need to agree whether both facilitators will move between the parties or one facilitator work with each party and then the facilitators meet;
- if multiple issues, what order they will be taken in and whether all issues will be looked at during the meeting
- Agree where the meeting will take place. Most meetings to date have been held either on the customer's premises (useful where there may be facts to learn when the customer may be able to provide evidence) or in the agent's premises (where they are likely to have more available room for separate meetings than HMRC would). If the meeting is held on HMRC premises, you will need to organise security and consider how best to deal with refreshments. The DRU currently have a budget for this and you should discuss things with the DRU **before** making any arrangements
- Agenda (agreed or suggested) and expected duration of meeting, including a suggested structure, where there are multiple issues.
- Authority levels of participants so there is a shared understanding.
- Explanation to each side (verbal or written) of your (and your opposite number's) role and how you will run the meeting so that each side understands what to expect.

In a 'resolution' type meeting, it may be useful to get both sides to prepare and share a short 'position paper' of no more than 2 A4 sides, where they put their position and their main arguments but without going into detail. This can help with the initial meeting before the sides split into their respective camps.

During the meeting

Act within the agreed agenda and according to mediation protocols exploring and challenging as required with both sides.

Maintain confidentiality and do not seek to present solutions to the issue, unless you have an evaluative role.

After the meeting

Ensure any follow-up action is taken by the HMRC team.

Help to arrange any further meetings agreed.

Discuss with any opposite number what went well and what didn't, to improve performance.

Provide feedback to the DRU, including as appropriate, outcome of meeting.

Personal Tax ADR case study

1. A long running domicile enquiry, opened in September 2006 with tax at stake in years 2004/05, 05/05 and 06/07, had been thought suitable for litigation.

Would domicile usually be considered an issue suitable for mediation?

2. It was agreed that generally, there is limited scope for mediation in cases where the individual is either UK domiciled or not. The usual debate is around when the individual's domicile status changed, if ever. The matter is also something that HMRC cannot "rule" on as it is a general law concept under the jurisdiction of the UK courts. Any agreement made would only be binding on HMRC for tax purposes. It would not be legally binding in a UK court considering other domicile matters.
3. Having agreed that mediation was unlikely to be appropriate in this case the caseworker and the taxpayer's agent spoke at some length about ADR and, in particular, the option of expert determination. The process would include preparation of a stated case, discussions around the case and agreement by a third party expert (likely to be a QC). It was thought that it would bring the case to conclusion and a rough timetable was agreed in an aim to resolve matters. The agent agreed to discuss the procedure with both the taxpayer and the barrister and indicate whether they would like to pursue this option.

What benefit might there be in discussing how ADR might benefit the case?

4. A meeting was arranged between the barrister and the HMRC case team. During the meeting, the barrister put forward a novel suggestion on the taxpayer's domicile status and not one that had been discussed previously during the enquiry at any stage. The taxpayer and her husband had spent two years in Switzerland when her husband took on the post at a Swiss school. It was contended that the move from Scotland was intended to be permanent in which case the taxpayer's domicile of choice in Scotland had been lost and her domicile of origin in South Africa would revive.
5. HMRC had little information about why the taxpayer and her husband moved to Switzerland. The move followed the death of their son so it was understandably a very upsetting period and not one that the taxpayer wished HMRC to investigate. HMRC had previously been satisfied that it did not affect the domicile enquiry significantly so had agreed not to pursue this line of enquiry. However, HMRC agreed to consider the point further.
6. The barrister also proposed, at the meeting, a way of resolving the enquiry that a discount of 35% was given to the customer for paying the tax believed by HMRC to be due.

What would HMRC need to consider in deciding whether or not to accept the proposal?

7. HMRC rejected this proposal as it was not in line with the LSS.
8. Tax at stake for the three years was about £780K (including interest to 31/12/11). However, there will be a substantial charge (up to 50% of the tax

due) if the tax was paid out of unremitted overseas income. The taxpayer confirmed she did not have “clean” capital out of which to pay the tax so the remittance tax basis rules will further tax any settlement payment.

9. Other areas explored at the meeting included the option for HMRC to close the three open enquiry years by assessing the tax due but to leave the three following years undisturbed. No enquiries had been opened for 2007/08 and 2008/09. The enquiry for 2009/10 had not been opened at that time but could be opened provided this was done so by 25 January 2012. The barrister agreed to discuss this proposal with his client.
10. The barrister also indicated at this meeting that his client would want some “comfort” from HMRC. If she paid the tax that HMRC thought was due, she would not be accepting that she was domiciled in Scotland. She would continue to assess as a non domiciled taxpayer going forwards. HMRC indicated that no guarantees could be given that there would not be another enquiry post 2009/10. It was, however, noted that were the taxpayer to leave the UK for South Africa in the near future, that would have an impact on HMRC’s case and, as such, it would be less likely that an enquiry would be pursued. Similarly, the longer she remains in the UK, the stronger HMRC’s case becomes as the intention to return to South Africa becomes less likely to translate in to the action required to divest the domicile of choice HMRC contend she has acquired.
11. The agents discussed the proposals further with the caseworker and HMRC put the proposals forward in a letter on a “without prejudice” basis.
12. Various other telephone calls took place including a call between HMRC and the agents to discuss (1) the degree of comfort that HMRC could give to the taxpayer on her domicile status going forwards and (2) the remittance basis charges on any tax paid. During the telephone call, it was clear that she would not agree that she was domiciled in Scotland; HMRC could not accept that she was domiciled outside the UK. Both parties could accept a compromise via a contract settlement in which the tax was paid for three years on a without prejudice basis without either side agreeing to accept the other’s views on domicile. However, there could be little or no compromise on the remittance basis charges, following advice from the Senior Technical Adviser in that area, whose view was supported by Solicitor’s Office.
13. The agents consulted with their client. Whilst she was keen to come to an agreement, she would not be able to pay the income without a further tax charge becoming due. She was not willing to proceed on this basis. The agents floated a further possible solution ie: that HMRC suitably reduce the contracted liability to take into account the further tax due when the payment is made. HMRC agreed that this would be considered.

Could this further proposal be LSS compliant?

14. Further internal discussions followed with senior management which conclude that the agent’s proposal was not acceptable as it would not be within the Litigation & Settlement Strategy.
15. If the proposals were accepted it would mean: (1) there was no decision on the domicile status and, going forwards, with the taxpayer self-assessing as non domiciled (2). Tax at stake is unquantified but will be similar to the

previous three years ie: an average of at least £200K plus the potential loss of tax on CG/IHT planning of up to £10m (3) There would be a loss of tax on payment made to satisfy the settlement of approximately 50% ie: £350K.

16. The discussions exhausted the possibility of reaching resolution by agreement. A 2009/10 enquiry has been opened HMRC will be recommending a statutory review. If the decision is upheld, the taxpayer will have 30 days to appeal or to accept the conclusion that she is domiciled in Scotland.

ADR multiple issues case study

1. A Local Compliance Large & Complex Business Unit Head (BUH) was contacted by an agent for a customer who had lost trust in the relationship with their Customer Relationship Manager (CRM). The customer had a number of disputed issues across several heads of tax, spanning several years, and had escalated their case to the BUH looking for a better way to progress their issues.
2. The BUH was aware from another case and wider publicity of the possibility of ADR for resolving certain disputes. He therefore arranged to meet members of the Dispute Resolution Unit (DRU) to explain the background and position of the case so the possibility of ADR could be considered. Details of the issues were discussed and which aspects of the case could be suitable for ADR. Based on this discussion the DRU were able to present the case as suitable for ADR to the ADR Panel (excluding a potential evasion issue) and recommend a suitable CEDR trained mediator to facilitate progression of the issue within an ADR process.
3. Following further discussion with the customer and their agents a mediation day was arranged at the customer's business premises to seek to resolve a number of issues agreed to be in an ADR process. The HMRC team that attended the mediation day included the CRM, the wider case team plus the HMRC mediation facilitator. All open issues were settled on the mediation day with HMRC securing approximately £1.3m out of the £1.8m tax at risk.
4. Despite starting from a position of a lack of trust in HMRC and ultimately conceding the majority of the tax at risk, feedback from the customer was very positive and included the following comments:

"We would make the following general observations:

- a) The work undertaken in advance of the meeting with our client succeeded in generating a feeling of trust and openness.*
- b) The fresh approach allowed different views to be taken, not only of issues that were going to be negotiated, but also a more constructive view of the Revenue arguments and personnel involved.*
- c) The goal of achieving a settlement was grasped by both parties as apposed to simply sticking to ones guns and retrenching which had been the norm in previous discussions.*
- d) Writing a brief one page summary of the facts and issues in each of the five core negotiating subjects helped to simplify each subject and draw up helpful side arguments.*

Turning now to the actual mediation day, the early and professional start set the scene for a very hardworking day. Matters were fair and well handled by yourself [the HMRC mediation facilitator] we continued to have confidence in the process which was undertaking discussions of fairly complicated topics.

We thought it was a good idea to have the two facilitators. This allowed a free and open discussion which would not have been possible if the Revenue representative/mediator had been the only facilitator present.

Our overall view is that a negotiation which had become very contentious and acrimonious was converted into one where movement and flexibility was obtained from both sides. The measure of success of this process is that we believe both parties left the table feeling that they had conceded too much ground however were prepared to state that the end result was equitable. We do not believe this would have been achieved without entering into the dispute resolution process”.

5. In summary a negative position was turned into a very positive outcome by using an ADR process as an effective and cost-efficient process to collect a substantial amount of tax whilst rebuilding a relationship with a customer. The entire ADR process lasted approximately two months. Some of the disputes had been running for several years.