



# Taxing Matters

Navigating the complexities of the tax world

RPC

## Season 3 Episode 3 – ADR in Tax Disputes with HMRC's ADR Lead, Fiona McRobert

**Alexis:** Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alexis Armitage and I am a Senior Associate in RPC's Tax Disputes team. I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some extra bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at [www.rpclegal.com/taxingmatters](http://www.rpclegal.com/taxingmatters).

**Alexis:** I am delighted to be joined today by Fiona McRobert, who heads up the ADR team at HMRC. Fiona joined (the then) Inland Revenue in 2000 and worked in compliance prior to taking up a post as a technical advisor. Having represented the department as a mediator within the dispute resolution team, dealing mainly with complex cases, she now leads the ADR team at HMRC. Welcome, Fiona, and thank you so much for joining me today.

**Fiona:** Hi Alexis and many thanks for having me onboard. Lovely to speak to you.

**Alexis:** Brilliant – so without further ado, let's jump into ADR. So Fiona, how does the ADR process work and what is the typical timeline for resolving disputes through ADR?

**Fiona:** Mainly, we get applications which come into the team via our online portal which is on gov.uk, direct referral from HMRC colleagues or by telephone for those maybe less digitally able customers. I should add that for the direct referral from HMRC colleagues cases they will only come into the ADR process if the customer wants them to, so both parties have to agree on that. And it typically takes up to 120 days to progress the dispute within the process.

**Alexis:** So how do you decide that a case is suitable for ADR? What sort of factors are considered?

**Fiona:** So we have a triage team which is overseen by trained managers and they will consider applications and determine initial next actions. So for example, if an appeal to the tribunal has been made, they're going to check with Clearinghouse to see if the tribunal has acknowledged and categorized the appeal. There may be some cases which are out of scope for ADR, but they will if possible, redirect the query to another part of HMRC and they will obviously then reject it from the ADR process, but hopefully it can be progressed elsewhere. But all other applications will have next actions considered and then they're allocated to a mediator to fully triage, and that's dependent on complexity. And any cases where the mediator, the HMRC case team, solicitors office, policy or the customer of concerns over acceptance they'd be referred to our standard or complex panels for governance.

**Alexis:** So are there any cases, sort of categories of case where HMRC would not consider ADR as a matter of policy or for other reasons?

**Fiona:** We're always looking at when ADR can best add value for the customer because obviously, from the customer's point of view, we want to manage expectations and we only want to bring them into ADR if it's going to be of benefit. And in addition to that, HMRC has a finite amount of resources and we all want to make the best use of these.

While I'm fully aware that in many cases ADR is very beneficial, it's not suitable in all cases. So in brief, it'll only be used where there's a potential benefit from the start. It will only be used if the customer wants it. It may not be appropriate if there's a need for a test case or if it's a litigation follower case. It may not be useful if the evidence provided requires some form of verification at cross-examination.

And there's certain areas of tax which are not currently covered, but this is under review to consider a principles-based approach. But for example, criminal cases will always remain out of scope - that wouldn't be appropriate to bring into ADR. It also it's not offered at the same time as a statutory review, so we can either follow a statutory review or we can be instead of, but not at the same time. And that's because we're dependent on the outcome of statutory review. It's very important we manage expectations for both parties. We're very clear to anybody entering ADR that any settlement agreement must

be within the parameters of the litigation and settlement strategy. There's no scope for doing a deal and all cases must be able to pass relevant governance procedures.

I think that covers everything. Yeah, and as I said, there may be cases where it is more appropriate to go to litigation. For example, there is a point of law that needs determined. Things like that, we might not be adding the benefits, so therefore it would not be appropriate to come into the ADR process.

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- Alexis:** Of course, and if HMRCs say no to a taxpayers request to engage in ADR, is there an opportunity to make representations on that decision?
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- Fiona:** All representations will be made in advance of a decision being made. So there is no right of appeal against us rejecting a case for ADR.
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- Alexis:** And so is there a perfect time for ADR to be considered on a case? Can it realistically be considered at any time or is it better to be at the start?
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- Fiona:** I think ADR can be considered at any point during the enquiry process, but I would say it is most beneficial when all the information or evidence has been exchanged and considered, and parties are coming to the point of reaching a decision or are discussing a potential decision which can be made. Now, of course, there may be cases when the parties are unclear on what information or evidence is needed or what is available. Those cases, of course, we could help at an earlier stage. But that's, as I say, any point during the enquiry process, but hopefully most, if not all, of the evidence and information has been exchanged.
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- Alexis:** So how does the ADR process differ from formal litigation or an internal HMRC review, just for anyone out there who doesn't know the difference?
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- Fiona:** Of course, yes. And we all use terms like ADR all the time, as if everybody should know. And hopefully most people won't have to enter into that discussion, so they won't. But ADR, alternative dispute resolution, basically the parties have ultimate control over any decision reached within the ADR process and whether they wish to agree terms to progress or finalise their enquiry, depending on what the outcome of that process is.
- Within formal litigation, as you're more than well aware, any decision will be made by a judge after hearing representations from the parties. And they obviously are the final arbiter in those cases. An internal HMRC review is a statutory process. It's undertaken by an independent review officer, and they impartially review the appealable tax decision, which was made by the original decision maker. They can uphold the decision, they can vary the decision, or they can cancel it.
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- Alexis:** And so what are the potential outcomes of ADR and how binding are any agreements reached between the parties?
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- Fiona:** So it may be we can fully resolve a case and what we can do depends a little bit at the timing of which the case enters ADR. So we may be able to fully resolve a case, no further actions required by either party. Alternatively, we could assist in resolving some points which are in dispute and maybe some other points remain. So that would be a partial resolution and that will obviously reduce the issues moving forward. Or it could be that we could assist the parties in understanding each other's position. We may be facilitating an exchange of documents or information to help move things forward, help the parties to agree next actions and agree timelines. So those would be the key things that we can do. Maybe it is, hopefully, getting that collaborative approach working again and getting the parties discussing the case and how best to move it forward is also something that's really important within the ADR process. If an appeal is determined during the process, then that will be binding. Otherwise, the outcome's not necessarily binding on the parties, but obviously they have both invested in it and they have both made the decision on how to progress. So it is in their interests to progress on that basis.
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- Alexis:** And so what if an ADR process with HMRC is unsuccessful, what then?
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- Fiona:** Well, you would return to the point in the enquiry process that the case was at prior to entering the ADR process, and then you would just continue within the enquiry framework. Or if you were in the appeal framework, you would continue on to tribunal as if ADR had not happened.
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- Alexis:** And so can a taxpayer withdraw from the ADR process at any time if they feel that it's no longer beneficial?
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- Fiona:** Absolutely, it's a flexible process. The customer has ultimate control over the decision on whether to continue with the process, whether to settle following discussions, and when they wish to keep engaging with the process. So absolutely, it is their ultimate decision.

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**Alexis:** And can material that was discussed or revealed during an ADR process be used by either side during subsequent litigation, assuming of course the ADR was unsuccessful?

**Fiona:** Obviously we're hoping it is going to be successful and it is going to move forward, but we do also, we are also aware that some cases will move to litigation no matter even if we have clarified things within the ADR process rather than fully resolved them.

So in 2023 we published our clarified terms and conditions and that clarification noted that should a fact be stated during the course of mediation, that fact will be on the record but hypothetical discussions continue to take place within a mediation in the traditional way. So if I could explain that just a little further, a tax fact is any statement or document/evidence, which has a legal or technical implication on a customer's tax liability. And those are not capable of being without prejudice. So examples of tax facts are things like the receipt of a payment, the making of a supply, the identity of a customer or perhaps the place of supply.

So again, just there's a lot of terms used in ADR and I think just to clarify a couple of them, the ADR process in HMRC is confidential and that nothing said in ADR discussions can be shared by HMRC with anyone else unless that disclosure is made for the purposes of the function of the revenue and customs. And that's in line with the statutory restrictions about what information HMRC can disclose about taxpayers and their financial affairs. But without prejudice applies to ADR and that ADR is an opportunity for parties to propose and explore possible solutions to the dispute without having to worry their discussions will in some way be regarded as having conceded a particular point of liability should they not reach an agreement. But crucially, it's not possible for a tax fact to be without prejudice.

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**Alexis:** So we've just sort of covered briefly there sort of a whistle stop tour, I suppose, of ADR and how it works in terms of the process, just moving on to the sort of the role of the mediator in the process. What are the specific roles and responsibilities of the mediator?

**Fiona:** So the mediator is responsible for the process. They organise bringing the parties together. They ensure the parties understand what is involved in the process, and they bring, hopefully, are able to bring all the relevant stakeholders together and organise the correct type of, I'll say meeting, should that be a meeting, an exchange of emails, maybe telephone calls. It just depends what is appropriate to each individual case. So it's up to the mediator to organise all of that. But the parties have responsibility for the issue in dispute. So that's the bit that's under their ultimate control.

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**Alexis:** In terms of approximate percentage terms, how many ADRs involve an external mediator in addition to HMRC's mediator?

**Fiona:** A small percentage of cases include an external co-mediator. And that would normally be requested by the customer if that's what they want. And we find that works well, I've worked with a lot of very good external co-mediators. It is something that the customer must fund the cost of themselves. So, to clarify that a little further, the HMRC mediators are impartial, externally accredited mediators, and the service is offered free to all customers. Using that internal mediator will save customers the cost and effort of sourcing their own mediator. It's also intended to offer an efficient service. If customers do wish to use their own external mediator, on the understanding they need to source and fund that themselves, we ask those external mediators to work alongside an HMRC mediator and agree to the general terms and conditions of the HMRC ADR process, which means that we can ensure consistency and fairness of outcome for all our customers. I know one of the main reasons we like to include an HMRC mediator in those processes is that they are familiar with how HMRC works, they're familiar with the parameters within which HMRC are able to resolve cases, but they also have access to all the relevant stakeholders. They know who to get in touch with. We find it makes for a much more efficient, effective service for the customers as much as anything else so that they are not left in any way disadvantaged.

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**Alexis:** So how many mediators are there in HMRC's ADR team, roughly?

**Fiona:** In the core team, there's about 35 mediators, small but perfectly formed team.

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**Alexis:** So in terms of the pros and cons of ADR, what are the benefits to a taxpayer of going down the ADR route with HMRC do you think?

**Fiona:** To me the benefits are it's an opportunity to discuss any issues that you're having in an ongoing enquiry intervention with an impartial third party facilitating those discussions. So it enables both parties to ensure they have a full understanding of the facts and evidence relevant to a particular dispute. Then they can understand the application of any relevant legislation. It allows the parties to explore opportunities for settlement and to be in control of the outcome of those discussions. And sometimes when an enquiry has been going on for a period of time, parties can become a little bit entrenched, and it can be difficult to see a way forward. So that third party can just help unlock that little bit of deadlock and help them find a good way forward.

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- Alexis:** And so what do you think some of the downsides to a taxpayer of going down the ADR route might be? If you think there are any, obviously I appreciate it's a difficult question.
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- Fiona:** Well, I think it's really important to be realistic about outcomes. So as I said earlier on, we only want to bring cases in where we can add value. So both parties need to come to the table with a resolution mindset and be fully prepared to discuss all aspects of any dispute. I think everybody needs to understand that HMRC have particular parameters under which they operate, namely the litigation and settlement strategy. And they're unable to depart from this. And that can sometimes leave customers feeling frustrated if they have an expectation of being able to do a deal or negotiate a settlement on a commercial deal basis. HMRC have those parameters and they have to stick to those for transparency, and to make sure there's a fair outcome for all customers, or fairness and consistency for all customers.
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- Alexis:** So just having a look at some of the ADR success rates, what are they and how is success defined for that purpose?
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- Fiona:** So over the last number of years our results have reasonably consistent or very consistent I should say. We have what I would term a positive impact on over 80% of the cases which come through the ADR process and what do I mean by positive impact? It's really due to the variety of tax heads and types of cases and the timing of cases that come into the process we work to advance or progress cases forward.
- So it may be we can fully resolve a case, no further actions required by either party. It may be we can assist in resolving some points in dispute, some remain, or it may be we can assist the parties in understanding each other's position, facilitating exchanges of information and documentation, agreeing next actions, understanding, for example, what information is actually available and what information can be exchanged to maybe evidence a particular point.
- So that's why I say I think those are progressing cases forward probably. Everybody always wants to fully resolve a case, but it does depend on the point of the enquiry process your case is in.
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- Alexis:** Brilliant. obviously during the pandemic, a lot of the ADRs had to go virtual. And actually a lot of it has gone virtual. In terms of percentage terms, how many of your ADRs are virtual versus in person now? Is it quite an even split or?
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- Fiona:** The majority of cases that enter the ADR process are carried out on a virtual basis. There's a number of reasons for that. One, there is a finite resource and we're trying to make sure we can accommodate as many customers as possible. To, geographical locations of customers, HMRC case teams, maybe advisors for customers and so on means that actually a virtual meeting can be much more beneficial for people. We have a lot of customers who are actually maybe more comfortable speaking virtually. It fits better in with either their own wellbeing side of things or their whatever else they need to do in a particular day. So virtual can work very, very well. However, we are aware that some customers would prefer face to face and in those cases that is available for customers. So it's a matter of requesting it and it's up to the mediator to decide what is best in each individual case for all the parties concerned and what can be accommodated.
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- Alexis:** And have you noticed a change in your success rates because it's gone overwhelmingly virtual rather than in person or not?
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- Fiona:** No, our success rate has remained consistent the whole way through, which is really pleasing.
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- Alexis:** As you said, it's probably quite useful to people all over the country for ADR to be available to people virtually. So I imagine it actually is more inclusive than it was before.
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- Fiona:** We're trying to be very inclusive for everybody. And of course, not all our customers are always in this country and maybe there's time differences, there's all sorts of other things. So it's to try and accommodate and as you say, be inclusive to as many different people as we possibly can.
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- Alexis:** Of course, and I imagine in terms of resources as well that you might actually be able to do more ADRs because you won't have to travel and you won't have to, you know, you won't have to coordinate diaries in quite the same way because it's not in person, I can imagine. And actually different time zones, I imagine, actually you might be able to do more ADRs maybe.
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- Fiona:** Absolutely, and it also means we can be very flexible about the approach we offer. So for example, if there are a number of points for discussion, it may be that a customer says, well, actually, I would like this advisor with me to discuss this point, but another advisor for a different point, you know, maybe there's very tax technical points or something, we can have different meetings set up. So you could have a number of shorter meetings, for example, which actually for some customers works very well. Or we may have customers who have particular extra support needs and a full day of a meeting would just be quite difficult to accommodate. So we can have a number of shorter meetings. Again, very dependent on the issues under dispute and on the customer who is coming to us. But it does give a great degree of flexibility for everybody.

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- Alexis:** Of course yeah, and would you mind for people that haven't been through a virtual ADR experience would you mind just quickly talking us through exactly what that would look like in terms of actual practicalities, how does that work?
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- Fiona:** Certainly. Well, we offer what I think that the technical term is a "shuttle mediation model". So we try to have one main room where all parties, the mediator, customer party and the HMRC party can all come in to. So online, we set that up as one room. And then we have a separate online meeting or room for the customer with their advisors which the mediator can go into, but that is private to them. HMRC team can't go in there, so they can have private discussions in there as is desired. And we also have a third room, which is set up for the HMRC team. So they can have private discussions and the mediator can go in there. It means the mediator can pass from, let's say, the customer team to the HMRC team and then bring everybody back together for discussions as appropriate. And again, that's very dependent on what is useful or what is going to work on the day. And it'll be any variety of those three rooms. It'll always be those three rooms, but it'll be whether they're together or separate will just depend on the discussions taking place at a particular time.
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- Alexis:** Perfect. So you're really trying to create the in-person vibe, but just virtually. So it really is trying to mirror that exact experience just virtually.
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- Fiona:** Absolutely
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- Alexis:** Then just because I know there'll be lots of people out there thinking this, just to confirm HMRC obviously wouldn't record any of this virtual mediation. Can I just check?
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- Fiona:** Absolutely not, no, we would not record any of that. Obviously people are free to take some, you know, I say handwritten notes, that sort of thing, but we wouldn't be recording anything and we would obviously ask any customers not to be recording anything either. It is supposed to be a safe space for people to have a conversation on how to discuss matters moving forward and towards settlement.
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- Alexis:** So what are your top tips for any taxpayers or advisors out there who may be considering or preparing for an ADR with HMRC?
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- Fiona:** Top tips, I think probably things to become aware of. Mostly, if there's a change to the HMRC position, it's due to further evidence or information coming to light, which enables the HMRC team to reconsider their position and ensure that the factual position is being properly considered in line with the relevant legislation, the policy position, and those sort of things. For the customer, it's often that they gain a full understanding of HMRC's position direct from HMRC. So to elaborate a little further on that, I think it gives both parties the opportunity to ensure that they've either presented all their evidence and it has been fully understood, or that if there is further evidence required, it can be asked for and explained what might be available. And if, for example, a piece of evidence is not available, there might be an alternative. So it gives everybody that opportunity to explore what's available and make a very informed decision and understand how they're moving forward. All of those things tend to come out in the ADR environment because the third party basically takes the heat out of any conversations or interactions between the two parties, which I think inevitably over perhaps a period of years can become a little bit fraught. So I would say to all parties to come to the table with an open mind, come with all your cards on the table and come with realistic expectations, but most of all come with a resolution focused mindset.
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- Alexis:** Brilliant. Thank you so much Fiona, for today's podcast. I'm afraid that's all we've got time for today.
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- Fiona:** Thank you very much Alexis for having me and taking time to talk to me it's been a pleasure.

**Alexis**

As ever, a big thank you goes to RPC's in-house team for the production, music and sound editing of this episode.

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