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# Access to Justice through Mediation in Tax Disputes: A Case Study of Pakistan

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*Pakistan suffers from an extreme backlog of civil dispute cases, which impedes the delivery of justice to citizens threatening the overall social, political and economic system in Pakistan. Mediation is an alternative dispute resolution process and serves in achieving justice in relation to resolution of tax disputes. The foremost object of mediation is to improve the trust relation between tax administrative authorities and concerned taxpayers by providing an informal procedure for resolution of tax disputes. The administration of Pakistan's taxing statutes even though introduces ADR system; however, ADR Committees confront challenges to effectively and efficiently resolve tax disputes under the constraints of limited resources. Moreover, many countries have developed Mediation legal practices with regard to tax disputes. Such legal practices should be incorporated in Pakistan's taxing statutes because this process is compatible with the working environment of Pakistan adjudicative system for the reason that Pakistan from years has been well familiar with this process through different mediums. This article focuses on the depletes in the system of addressing tax dispute and in conclusion provides for recommendations that has been construed upon the developing mechanism of mediation concerning tax disputes in other States.*

**Key Words:** ADR, access to justice, mediation, tax, ADR committees

## **Introduction**

The concept of alternative dispute resolution has been defined by Black's Law Dictionary as "Any procedure for settling the dispute by means other than litigation, as by arbitration or mediation." Mediation is "a method of non-binding dispute resolution involving a neutral third-party who tries to help the disputing parties reach a mutually agreeable solution." Alternative dispute resolution, an alternative mean of an amicable settlement, in response to traditional court litigations has gained a worldwide acceptance. Such resolution is not recognized as a modernization of conventional litigation process but is deemed as a supplement which could be traced back to centuries. ADR has the potential to provide access to individualized justice for citizens by holding free deliberations and confabulations. Mediation is one of the successful methods of ADR, which is a non-binding dispute resolution involving a neutral third party assisting the disputants to agree on a mutual agreeable solution. The entire edifice of mediation rests on self-determination, impartiality and confidentiality encompassing various benefits as recognized by voluminous literature. Access to justice, in its sense of effective resolution of disputes, is an essential aspect of ensuring the realization of the fundamental rights recognized and protected by the Constitution. Such could be endorsed through empowering citizens to discover acceptable resolution to their problem which incorporates the opportunity of court-based proceedings but as a fragment of a broader menu of selections.

Pakistan is a Democratic Republic, the constitutional goal of which is to set up an egalitarian society and to secure political, economic and social justice of its citizens. Pakistan justice system suffers from growing menace on hands of litigants by roping in innocent citizen with the use of litigation as a weapon used for personal vendetta. The formation of a new forum for the purpose of determination of dispute with a simple, easy, and opportunity of full participation in the dispensation of justice is a constitutional mandate. The prevailing flood gates of litigation with procedural complication create hindrance for speedy and effective redressal of legal proliferation. Such situation makes it imperative to restore mediation.

## **Mediation and Access to Justice**

An essential characteristic of mediation is that it provides the parties with the right to self-determination and autonomy. This right adds onto the

element of access to justice. This particular feature of mediation distinguishes it from adversarial litigation, hence making it one of the modes of ADR. Mediation has been, for long, considered to be a means for the provision of an easier access to justice taking into account the fact that it is contrary to the adversarial litigation processes normally carried out in courtrooms around the world. The exclusion of lengthier procedures fixed by the courtrooms makes it easier for the public to access justice which is comparatively difficult to access otherwise. Consequently, mediation lessens the burden on these courtrooms.

### **Reception of ADR for Resolving Tax Disputes**

ADR procedures have been initiated in Pakistan only recently for resolving tax-associated disputes.<sup>1</sup> Resolving such disputes is one of the primary functions of revenue bodies. As tax disputes develop in regularity and intricacy, revenue bodies encounter trials too meritoriously and efficiently determine tax disputes under the restraints of limited resource. In order to address these broader challenges, to meet the demands of the modern tax administration environment and, to perform more efficient mediation presents itself as a preferable strategy for resolving several common types of tax disputes. When used in appropriate circumstances, mediation not only delivers on its promise to provide quicker and less expensive dispute resolution, but it does so in a manner that is more compatible with and that advances the objectives of securing justice. Against this backdrop, this research evaluates mediation as an alternative dispute resolution strategy to complement the existing process for resolving Pakistan taxpayer's disputes. The case for tax mediation made in this research work follows Pakistan tax legislative framework. And to facilitate such evaluation certain successful tax mediation procedures from all over the world is considered.

### **Mechanism of ADRC in Fiscal Statutes**

ADR was introduced in fiscal statutes through the Finance Act, 2004. Government extended such facility taking cognizance of the need of alternative body for expedite settlement of disputes. This realization was reportedly due to Federal Tax Ombudsman recommendation that initiated the amendments in fiscal statutes. Even though, with further introduction of ordinance not much has been put forth on ADR mechanism. Sections 134-A of the Income tax Ordinance was the first to develop this concept which acts as para material to other fiscal statutes such as the Customs Act, 1969, the Sales Tax Act, 1990, and Federal Excise Act, 2005.

## **Right to Appeal: A Procedural Mechanism**

The main object of the formation of judicial system is the redressal of public grievances to encourage a civilized society. An efficient judicial system is to be considered where such redressal is addressed immediately and expeditiously. For such purpose the right to appeal is considered by the public bestowed to them through the Constitution of their land, as this is a right provided to every individual seeking justice to their grievance. Ultimate consideration is accorded by the courts to this bestowed right which eventually maintains public faith in the system.

Similarly, it is recognized that against tax disputes the right to appeal has been provided by the relevant laws to the individual concerned. These disputes are mainly the disparity between the taxpayer and tax collectors which are usually settled through deliberation and correspondence at the intermediate level of respective collector or commissioner. However, the situation is not always the same and the parties may not find themselves to a mutual solution through such correspondence because of their incongruities over statistics figures, factual dilemmas or interpretation of relevant laws. This tends to keep the dispute unresolved at the initial level and further aggravates into accumulated liabilities over the admitted one.

In order to resolve such un-settled disagreements between the parties concerned, the tax laws provide for a procedural mechanism that caters such contentious issues. It provides a forum for a tax payer through the appeal as a mean for appropriate redressal before a higher forum. This is the regular dispute resolution mechanism taken up by the aggrieved party, and such mechanism comprises of three appeals:

- The first appeal lies before the concerned Collector or Commissioner (Appellant jurisdiction)
- The second appeal lies before the Appellate Tribunals
- The third appeal is in the form of reference maintained to a High Court and further in form of petition to the Supreme Court.

With its own respective development, the existing traditional appellate system operates in the ambit of complex technicalities with respect to the relevant laws, proceeding in a course of time frame and manner deemed unsatisfactory by the parties. To avoid such unnecessary cost and time individuals would prefer an alternate system over the conventional mechanism of resolution. Alternative dispute resolution system has been

introduced by the tax law that operates side by side with the existing traditional mechanism. Through this alternative system the taxpayer can refer their issue before an independent expert for recommendation for the purpose of an out of court settlement with the benefit of a simple procedural requirement free of any hardship.

### **Provision With Regard To Taxation Laws**

The provision provided under the taxation laws pertaining to ADR are:

- Section 195C of Customs Act, 1969 and Chapter XVII of the Customs Rules, 2001 Section 134A of the Income Tax Ordinance, 2001 and Rule 231 C of the Income Tax Rules, 2002.
- Section 47A of the Sales Tax Act, 1990 and Chapter X of the Sales Tax Rules, 2004.
- Section 38 of the Federal Excise Act, 2005 and Rule 53 of the Federal Excise Rules, 2005

The gist of all these provisions provides that where a person is aggrieved of any dispute in relation to tax liability or penalty or under any other provision of the provided Ordinance, Act or Rules may apply before FBR for the purpose of resolution through the means of ADR. Such application may pertain to any matter that is pending before an Appellate Authority, with the exception to prosecution proceedings or on question of law. It is to be noted that during any stage an application to ADR could be made by an aggrieved person and such may include; An individual, association, company, and legal representative (in case of deceased). The general process with respect to the application submission includes filing of an application to the Chairman in the prescribed format which includes the claim requested from the Chairman to direct. Such application is then further examined to ascertain whether the application could be maintained, upon the approval of the same, the Board forms the ADRC within the prescribed time limit. This committee comprises of members nominated by the Board with respect to the circumstances of each case. With respect to the determination of the issue, the committee is empowered with certain powers such as it may call for expert opinion or conduct an inquiry. The committee then upon the determination of the issue makes their respective recommendations, a conclusive report of the same is submitted to the FBR. These recommendations are examined at FBR, which may agree or not either in full or in part. And lastly, on agreement the Board may appropriate

any such order as it may deem with in lieu of recommendations. It is to be duly considered that referring a matter to ADRC does not affect any of the rights already available with the applicant that includes a recourse to other fora to claim grievance subject to the order. The Board may appoint one or two of its officers only for the purpose of being members of the ADR. Besides the Chartered Accountants, advocates etc., the Board should also appoint an assessed who is well versed with the subject of disputes such as an advocate of high repute who is engaged in the business of a hospital who may be appointed as one member of the committee. The rules of the act only provides for procedure with respect to filing and examination of application and as such does not assist the Committee in the manner in which the proceedings are to be followed.

### **Implementation Overview**

In some cases a person aggrieved from a tax discrepancy files a petition under Article 199 of the Constitution of Pakistan, 1973. However, where being an aggrieved stand as *locus standi* but such stance could only be availed in the case where there is no alternative remedy prescribed with respect to that contention put forth. For such purpose even though a writ petition provides for an immediate readdressed is still unachievable. As in case law Associated Industries Ltd Versus Federation Of Pakistan,<sup>2</sup> it was affirmed Where there is a self-contained mechanism prescribed by a statute and being adequate and efficacious, was available to the petitioner, then in such case it would be deemed as a well-defined forum of redressal for the determination of questions of law or fact. And as such could serve the purpose of the petitioner could not be allowed to invoke the Constitutional jurisdiction of High Court without exhausting the same. The same was applied to the ADRC which was deemed as forum to resolve dispute and which was to be exhausted for the purpose of invoking the jurisdiction of High Court.

Similarly, the importance of ADRC as a forum for resolving a plethora of disputes could be maintained through the case law, Chicago Metal Works, Multan versus Secretary, Revenue Division,<sup>3</sup> and Islamabad which ascertained that delay in passing of order on the recommendations of the Committee was established as tantamount to maladministration. It is also to be duly noted that first word used before the provided provisions with respect to formation of ADRC is “notwithstanding”. The *status quo* of

the same could be reviewed from the observation considered in Arif Husain Shah versus The Operative Director Administration, Electric Equipment Manufacturing Co. Ltd. Lahore<sup>4</sup>. It sustained that the word non obstante means notwithstanding. It means despite of, or in spite of. A non obstante clause is used in a provision to indicate that the provision should prevail despite anything to the contrary in any provision. However, the same status has not been considered yet.

### **Modification of ADRC through Finance Act**

Through the promulgation of Finance Act, 2018 the government has modified the ADR mechanism to make it the first stage for any aggrieved person to seek relief. This choice is an out-of-court settlement procedure for resolving tax disputes. The revamping of provisions concerning fiscal statutes where any aggrieved person, who has filed and appealed before any appellate authority, will file an appeal before the FBR and simultaneously withdraw the earlier appeal. And for such purpose and ADRC will be set up which will decide cases within 120 days. By virtue of the act the decision of ADRC are made binding on both the board and taxpayers. Upon which the aggrieved applicant is obliged to perform as substantiated by the committee and in reference to such all decisions, orders and judgment shall stand modified to that extent. The amendment has changed the composition of committee by making mandatory upon the board to appoint a retired judge of the superior courts to head the committee. Furthermore, where before no stay to recovery of liability was made during proceeding in forum of ADRC, the act grants the same till the decision in a dispute is adjudicated. It is to be noted that the committee shall stand dissolved where the decision is not communicated within 75 days of appointment of ADRC.

### **Access to Justice through ADRC**

It has been years since an initiative has been taken up by the Board to empower ADRC. However, the question arises that what are the reason behind such allocation of liberal power to this committee. The answer to this could be achieved from the review of the Act itself, in which FBR clearly states that, “The desired results, however, were not achieved.” It maintains that the initial purpose of introducing ADR mechanism into the system was for a swift settlement between the concerned parties with

respect to the international practices. In achieving the same the amendments were proposed by the Board, the ultimate purpose being to make the alternative dispute resolution mechanism more effective in regards to the developing dilemma of society.

The amendment recommended by the Board are quite appreciated by the community with respect to making it mandatory upon the committee for deciding the dispute by majority within 120 days of its appointment, composition of members of the committee, and with respect to stay on liability where the matter has been taken up by ADRC. However, one the recommendation that is deemed as the most vital is that the, "Decision of ADRC is proposed to be binding on FBR and the aggrieved person." Having a "Binding effect" entails the process to be more formal and systematic as the result would be coerced upon the parties involved. One of them essentially being the beneficiary and the other being an official to the tax system.

ADR is known as an alternative mechanism, which is considered by the parties who deem the litigation or Arbitration, being an independent system, intimidating or more formal with respect to resolving their dispute. ADRC was introduced as an alternative to already set formal system of law such as judicial system and arbitration.<sup>5</sup> According to the Board this committee was introduced in line with international best practices which clearly seen from the successful worldwide phenomena is mediation. As the only other left is conciliation or negotiation however such process involves negotiation between the party themselves, there entails no requirement of any committee in acting under this phenomenon. World Intellectual Property Organization (WIPO) in the publication *Guide to WIPO Mediation asserts that foremost characteristic of Mediations* its non-binding nature. Such nature entails that the decision cannot be imposed by the parties. In other words, it stipulates that where submission of dispute to mediation has been made by the parties, the parties remain in control of medication and they are obliged to continue with the process.<sup>6</sup>The mediator is not a decision-making body, it rather is rather to assist the parties in reaching the decision on their own. The parties must voluntarily agree to accept it for any settlement to be



concluded. As WIPO asserted that, “The continuation of the process depends on their continuing acceptance of it.”

### **Attitudes Necessary for Effective ADRC**

Reflecting the nature of committee, prior to the recommendations, it is understood that where a decision is proposed by committee and it is not taken up by the parties the next step would entail in taking up the course of litigation as the liability is still accrued upon the party. However, where the matter is taken up before the court it does not stipulate that the recommendation as accounted by the committee would not be considered. Such recommendation would deem essential where courts have neglected to take into account ADRC decisions. Fortunately, this is not the stance approved by the courts, it does have persuasive value before the court. In litigation process, the courts usually adjudicate the matter in response to the decision of the committee. Such could be inferred from the case law, *Waheed Shahzad Butt Versus Federation of Pakistan*.<sup>7</sup> In this case it was maintained that the recommendations of the ADRC, did not fall in the preview of deliberative process of authority leading up to the formation of a policy or passing of a decision. However, this does not entail that it doesn't have any authority. Under the scheme of fiscal statues such as Sales Tax Act<sup>8</sup> and Income Tax Ordinance,<sup>9</sup> finality was attached to the opinion rendered by the ADRC. After the opinion of the ADRC, the decision thereon rested with the Board or the Appellate Authority where the matter was pending before the same had been sent to the ADRC. This does not entail that such decision could be neglected by the board unless strong contrary sanctions exists. The court in *Jordan v. Department of Justice*<sup>10</sup> countered that Recommendations of the ADRC could potentially form basis for an out of court settlement between the tax payer and the Revenue pertaining to matters of liability to pay duties, taxes, admissibility of refund or rebate, waiver or fixation of penalty or fine, confiscation of goods and relaxation to time limitation, procedural and technical conditions.

Similarly, it was recognized in case law that where the recommendations of the committee pertains the liability to be settled, if the same allegations are charged than it would trigger the provisions related to double jeopardy. The court in this case upheld the recommendations of ADRC by asserting that the Sale Tax liability have already been discharged by the appellants as determined by the ADR Committee, and such could not stand to the contrary. The court in this case valued the recommendation of ADRC with department and authority by virtue of case laws. As it took into

consideration the findings of the Honorable Sindh High Court on the order passed by the Additional Collector Adjudication, which stated, "it militates against the principles applicable to the tax matters, that the issues once settled and accepted by the Department shall not be allowed to be deviated, because it will create uncertainty which has always been deprecated and disapproved by the Superior Courts, Legislature, as well as the Board itself." Similarly, reverting to the judgment of the Superior Court in the case of Mehran Motor Car Co. v. Collector of Customs,<sup>11</sup> wherein it was held that, "If after the enforcement of demand on account of short levy, the Authority, through separate proceedings, again called upon the importer to pay the short levied amount, then the same would be a case of double jeopardy." Thus, this entails that the decision of the committee does have a binding effect indirectly without taking into consideration the proposed amendment. It is to be understood that even where the parties may not be able to reach an agreed resolution the ADR process can help to improve the efficiency of any subsequent litigation e.g., by clarifying/agreeing the facts and narrowing the dispute to the key issues needed to be tested at Tribunal or other authority.

### **Mediation Tax Depletes**

According to the Business Recorder, a news organization, the main purpose for establishing an alternate channel was to reduce the pendency of cases at appellate forums by introducing an expeditious settlement of disputes between FBR and taxpayers and to reduce the pendency of cases at various appellate forums. Countering its disadvantages, it stated, "However, the existing mechanism for resolution of disputes through Alternative Dispute Resolution Committee had not been entirely successful in mitigating the hardship of taxpayers." As maintained in order to cater such reaction FBR made some recommendations, which as this paper discuss is not the precise need of the society with respect to tax dispute.

Tax dispute could be resolved by the process of mediation if considered. Not every situation is catered by empowering the authority more and more as maintained by the positivist's jurist whereon ground to return remains. This time being might lead to a temporary obedience, but it certainly caused adverse effect to the long term compliance. The British adversarial system introduced in our country may be distinguished by its laissez fare emphasis on party controlled litigation process, however it is still confined to win or lose legal outcomes. Which is certainly not the need in this case. As in

regards to tax, the ultimate beneficiary will always remain the citizens, making as a whole a state.

In 2011, Her Majesty's Revenue and Customs (HMRC), conducted a pilot study for the purpose of exploring ADR in the field of taxation. This study was considered in order to seek that whether such mechanism could resolve tax dispute, as it was already flourishing with respect to facilitating the agreement heading towards litigation or had stalled.

HMRC concluded ADR to be a huge success, having identified appropriate on going tax cases the streamlined process did provide for resolution of dispute in a relatively short period of time. Ultimately, proposing significant time and cost savings for all parties involves, as well as the benefit of earlier certainty.

According to a senior officer of FBR, approached by the express news, due to more than 1000 pending tax cases at various legal forums, tax worth more than Rs1276 billion remains un-recovered. According to details given in the documents, it has been learnt that there are 1,674 cases in the Supreme Court with revenue worth Rs50.810 billion. Cases with revenue worth Rs359.287 billion in the high courts. Apart from this, 8011 cases are pending in commissioner appeals all over the country that amounts to a revenue of Rs203.702 billion.

The board concluding this further stated that the case would finally be resolved after the implementation of the following rules and that the FBR will avail heavy revenue. The only aim for FBR being as could easily be inferred is generating revenue. On November 2018, The FBR announced that it had decided to grant the facility to resolve more than 31,000 tax cases at different legal forums through mediation committees. But has this Board defined the process of medication committee. The answer to this is no.

Instead, of paving a path to an alternative mechanism essentially being mediation, the FBR is set to reverting it way back to litigation. First by incorporating the binding nature in the recommendations of the committee, which as discussed was not needed for. Secondly, according to the draft copy available with Express News the amended rules, the ADRC will have the authority to conduct inquiry into the case and will be able to take expert opinion from the concerned experts and will be able to issue instructions to any officer of the inland revenue or anyone else to carry out an audit who

will then give its recommendations to the committee to solve the issue. It was further stated that the decision of the majority of the committee will be considered the committee's decision.

Growing disputes between the government agencies and the citizens essentially being tax disputes had burdened the courts. Such disputes benefits neither the government nor the citizens, as nothing better could be achieved from harassing each other when both form a major part of country's economy. Such dispute is a hurdle in the growth of the economy of the country. Mediation between the state agencies and the citizens developed in other countries, should by this time be considered by the board. Mediation allows the parties an opportunity to have a dispute resolved quickly, and privately rather than suffering from an imbalance in representation, specifically in case of involvement of government apartments, leading to an expensive and public mauling in the courts.<sup>12</sup> The same would be lead in this committee where it is empowered to act like an assessing officer and consumes hours in checking records and books, not like a mediator but like an assessing officer. It is not that the Board could not foresee what it's going to happen upon the implementation of such rules, it could see the litigation process where thousands of cases are pending. A field for confrontation instead of an alternative remedy for mutual settlement.

According to Sohail Sarfraz, in his article assessing ADRC role, the proceedings of conventional assessment proceedings require the applicant to produce all the records and the taxation officer is made to be present during all the proceedings to present his case after referring to the files in a time consuming and cumbersome manner. Such an affair will create a bad opinion for the ADR and the assesses may not prefer to approach the FBR for the ADR.

Taking up a dispute before ADRC or Mediation process entails that such does not affect any of the rights already available with the applicant under the Federal Excise Act, 2005, Customs Act, 1969, Income Tax Ordinance, 2001 and Sales Tax Act, 1990 or Rules made there under.

### **Practices in Different Jurisdictions**

Countries like South Africa, Bangladesh, United States of America, Italy, United Kingdom, Australia, and Netherland, Canada have developed ADR legal practices and have their own ADR legislative frameworks. South Africa, after making considerable progress in ADR, has developed a

mechanism for the settlement of disputes through mediation. Moreover, this article provides for further scrutiny into other models of mediation practices in revenue cases, in order to perceive the set back of society and the need of incorporating new regime which could be more evolved in making the mediation phenomena more effective.

On 1<sup>st</sup> April, 2003 in pursuance of enhancing South African Revenue Service (SARS) client services, alternative dispute resolution procedures as a form of dispute resolution other than litigation were introduced under the Income Tax Act. The enactment included the process of settlement through the process of Mediation which can be initiated by either the taxpayer or SARS.

The taxpayer can initiate ADR against the assessment by indicating “refer to ADR”. Within 20 business days SARS determines whether the matter is appropriate for ADR. For this purpose the Commissioner is the designated authority to give opinion that a matter is appropriate for ADR, within 10 days he must inform the taxpayer of the receipt of the notice of appeal. The taxpayer is further required to notify in writing within 10 days to the Commissioner whether he approves to ADR. In case the taxpayer approves to the process, a facilitator will be appointed by the SARS who endeavor to settle the dispute between the concerned parties. The facilitator is not allowed to compel the parties or make a ruling which binds the parties involved. He is required to arrange for an informal sessions wherein parties present their respective case through providing evidence. The facilitator is obliged to follow a code of conduct by employing equitable and fair means.

Bangladesh has been introducing new reforms in its fiscal and administrative statues. In 2011, it amended its Finance Act by employed several reforms one of significant being the ADR mechanism. ADR mechanism was adopted by this state to cater public dues, prominent being Value Added Tax (VAT), customs and income tax. Due to the significant increase in the tax case workflow, the National Board of Revenue (NBR) were considering for a quick settlement process facilitating the existing tax load. NBR required a holistic approach which could provide for long- term resolution agreements to complex tax disputes. With adoption of new amendment to Finance Bill, NBR introduced mediation programs which could be initiated any time by the taxpayer. However, the same is to be agreed by the concerned tax authority. This programme is expected to reduce the tax backlog developed over the time.

Mediation for resolving tax disputes has been termed as “mainstream” in the United States, no longer attaining the status as alternative.<sup>13</sup> The Internal Revenue Service (IRS) provides participation in a Post-Appeal Mediation (PAM) programme to the taxpayer. The procedure and the statutory authority concerned with the mediation permitted in Appeal administrative process has been provided by the Revenue Bulletin and Reform Act of United States. The PAM is designed by IRS in resolving mature tax disputes developed through the failed internal processes managed by the IRS. The procedure maintains the availability of mediation in case of both legal and factual issues (transfer pricing issue /valuation), excluding those where the decision of court differs or there is no legal precedent. Fast track Mediation (FTM) process is one of other processes designed by IRS facilitating self-employed enterprises or where in situation the dispute is merely anticipated. Through this process mediation trained personnel facilitates the concerned parties in discussing the respective issue and to conclude the possible mean of its resolution in accordance with law in a time period of 40 days. However, an agreement must be signed by the parties in order to initiate the mediation sessions. IRS has termed the FTM programs successful on the basis that it saves time by providing expedited resolutions. The pilot study conducted in early 2000’s credited the efficacy of the programme over the status quo adjudicative process.

In accordance to the IRS Restructuring and Reform Act (1998), to retain appeal rights through filing of written protest in case the issue does not get resolved through the FTM is not required. One of the other process is simple mediation for resolving tax disputes. It involves the resolution by mediator in case negotiations in good faith have been unsuccessful in appeals. The mediators can be non-IRS (generally; Appeals employee), however such are employed on the taxpayers’ expense. The process encompasses classic features of mediation. The process is voluntary which can be terminated at any time by either party with the primary goal being to bring taxpayer and IRS to a mutually agreed. The Annual Report of The New York State Bureau of Conciliation and Mediation Services (BCMS, 2008-2009) reported success rate of 75% in reaching successful agreement, 90% of the caseload essentially being personal income tax and sales tax.

In 2012, Italy adopted mediation process to be reached within 90 days against the complaints of tax agency decisions. The process was considered in the case with value up to 20,000 Euros, disputes without any specified value, for example denial of registration, could not be considered before the mediator. The primary objective of the procedure is to improve the trust relation between tax administrative authorities and concerned taxpayers by

providing for an informal procedure concluding in a complete and written agreement. This process is deemed to be a mix of ADR mechanism and traditional protest however it differs from the civil and commercial mediation. The process does not suspend tax obligation and is deemed as a prerequisite for instituting a judicial appeal. The administrative protest is to be accompanied by a reasoned proposal for mediation. If there is no proposal, the office taking into account the hazards of litigation will make a mediation proposal. The proposal could also be an offer to reduce the penalty to 40% of the tax owing which is essentially a result of the agreement.

These agreements intermittently involve renunciation of public revenue, thus entailing risk to civil servants. To circumvent such issue, the responsibility before the “Corte dei Conti”, concerning public accounts is limited to intentional actions of the Civil servant evolved in the procedure. In case the tax payer fails to pay tax within 20days subject to the agreed terms, the agreement would be nullified. If an agreement is not reached the administrative protested decision has to be motivated in case no agreement is reached subject that the taxpayer would have 30 days to go to court. Such initiation of proceedings is subject to a specified fee that does not apply in mediation process.

Practically in UK, the facilitative mediation has been favored by tax disputants for the purpose of pre-litigation settlement instead of the other methods for the purpose that it duplicates the role of courts and tribunals. The facilitative method is defined as one where an independent third-party mediator offers no opinion but brings the two parties together. The other two methods provided in the note being; Evaluative mediation and Non-binding Neutral Evaluation. After implementation of such methods in tax dispute, the HMRC concluded the out-come resulted in successful resolution of 58% of cases.

Between 2010 and 2013, HMRC piloted mediation as strategies for both complex cases and small sized businesses for resolving tax disputes. HMRC on the basis of pilot projects evaluated certain aspects concerning tax mediation. It observed mediation as a cost-effective strategy for a successful resolution tax disputes providing for a measurable time (8 and 23 months to 61 days) particular concerning individuals. HMRC noted that “qualitatively, HMRC are confident that they have made significant savings in both cost and time in resolving disputes through the alternative dispute resolution process for both HMRC and the customer.” It further observed that even in

case of its failure to conclude an agreement, the process assists with narrowing down the issues and encouraging an improved relationship by catering to factual misunderstandings.

ADR mechanism has been considered by Australia for the purpose of dispute resolution particularly concerning taxation. The alternative to judicial mechanism practiced by Australia is mediation, in-house facilitation, conciliation and early neutral evaluation. Mediation is a process where the participants negotiate with the assistance of an ADR practitioner, who helps the parties identify disputed issues, develop options, consider alternatives and attempt to reach an agreement.<sup>14</sup> Mediators do not normally give advice, unless the parties have requested an advisory mediation. Mediation is usually voluntary, but can be ordered by a court or tribunal. In-house facilitation is the Australian Taxation Office's (ATO) version of mediation where a trained independent ATO officer assists participant to negotiate their dispute. The facilitator will not establish facts, take sides, give advice, make a decision or decide who is 'right or wrong'. The website of ATO provides for different strategies in which great outcome could be achieved through the employing the mediation process and in-house facilitation.<sup>15</sup> If a Conference Registrar forms the view that the matter would benefit from the availability of an independent view on the substantive issues and possible settlement options, that factor may influence the case being referred to mediation. ADR can also be initiated by the courts or tribunals in litigation cases or be referred by the Administrative Appeals Tribunal (AAT) or Federal Courts.

Australian practitioners do have considerable experience with compulsory mediation. The Courts of Victoria and Queensland have been exercising power of compulsory referral to mediation for many years. The evidence to this practice is anecdotal, however acceptance of this phenomena in certain jurisdictions is deemed as valuable. The Chief Justice of Queensland is regard to the assessment to this phenomena remarked that, "...I am absolutely convinced of the desirability of our approach, with relation primarily of course to the interests of the litigating public, and ultimately, addressing the issue of the principal concern: enhancing access to justice. In Singapore a large number of cases have been subject to compulsory mediation. The Chief Justice of Queensland further quoted in his speech about the statistics of disposal rates of "Mandatory Mediation Programme" which concluded 304 cases of which only 9 were subsequently tried before



the court. Same programme was appreciated in Singapore where 95% (3746 of 3943 cases) were resolved.

Mediation in Netherland with reference to tax disputes can be requested by both the Tax Authorities and the Judiciary. The Dutch Tax Authorities website indicates certain cases in which mediation could be followed as not all disputes are qualified to mediate, it also provides for an exhaustive information concerning mediation.

The Tax Authorities' mediation coordinator has a pivotal role in this process, as where any party request for mediation, the coordinator will approach the other party. The coordinator will further schedule the meetings and appoint for mediator where the parties have agreed to mediate. The mediator is obliged to observe professional conduct and discipline prescribed by the Netherlands Mediators Federation (MFN). Upon the initiation of mediation, tax proceedings are temporarily halted and the same would be terminated in case of a mutual agreement. The Dutch Tax Authorities have stated that almost 80% of mediation proceedings have a positive outcome which is deemed economically effective.

The mediation process follows the traditional procedure. The first meeting is proceeded with a comprehensive clarification of rules and obligations of all concerned parties. The MFN rules states the duty of confidentiality and impartiality of mediator to act in expeditiously manner. The Dutch Tax Mediation Association (VFM) was founded in the Netherlands in 2007. The objective of this VFM is to promote the awareness and applicability of mediation in tax disputes. The VFM website provides for a list of the VFM members in case parties concerning tax dispute requires a tax expert as a mediator.

The tax cases preparation involves a bulk of cost which is to be carried by the government and equally upon the individuals causing a major adverse effect on the economy. In 1997-98 a survey concluded that the cost of work for litigating tax matters for Revenue Canada by lawyers of the Department of Justice was \$5.4 million. The number of cases proceeding before court signifies the dispute resolution process deemed not satisfactory at Revenue Canada's Appeals Division level. For this purpose, mediation is considered as it is generally successful in other field, however it is not effective but according to other researches it is deemed compatible with the backdrop of it legal system.

With respect to the successful mediation in other fields, a well-designed mandatory system of referral to mediation is considered. In January 1999 a Rule was introduced into the Ontario Court Rules for the Ontario Superior Court of Justice (Rule 24.1) that made mediation mandatory except if the Court granted leave to the parties to be excused. The common statistics encounters that 73% of Ottawa litigants and 60% of Toronto litigants agreed with the statement "one of the benefits of Mandatory Mediation was that it required the parties and their counsel to begin negotiations earlier than would otherwise have been the case." It has been instituted that it saves a substantial amount of money. In Ottawa where mandatory mediation had been a part for quite a time client satisfaction were observed better than in Toronto that had not the respective experience. In many cases partial settlement was observed if not the complete settlement. There has been extensive research conducted of a two year trial in Canada Courts that resulted in observing that legislators and the Courts need not be afraid of any adverse effects in this system as there is none. In general, litigants and lawyers have expressed considerable satisfaction with the mediation process under Rule 24.1.

### **Recommendations for the improvement of the system of Mediation in Pakistan**

In order to improve the process of Mediation within the Pakistani Courtrooms, it is essential that certain steps be taken and certain techniques be followed so that resolution of disputes outside the court rooms becomes the first option that the parties tend to resort to. In lieu of the same, certain recommendations have been made below:

- Special Tribunals can be established in relation to the resolution of housing disputes in particular which can also be attached to the courtrooms. These tribunals will consist of trained lawyers who will act as mediators and provide legal assistance to the parties to resolve their housing disputes such as disputes between husband and wife, tenancy related disputes, etc. With the help of these Tribunals, parties will reach a settlement through mediation, negotiation or conciliation. Similar Housing Part has been established in the New York City with the Civil Courts where housing disputes are resolved before the Housing Court Judges who settle matters through

mediation, negotiation and conciliation, and in case no settlement was reached due to any reason, the parties then proceeded to the court rooms for resolution.

- An immediate need to revise the rules concerning ADRC and incorporation of independent mediation commission instead of the committee for resolving tax disputes. Such commissioners should be appointed in accordance with the recommendations of Finance Act 2018. However, parties may wish to use their own mediator.
- Formal mediation training sessions should be introduced for its Members. Including different skills necessary for engaging into bilateral or multilateral negotiations designed according to the variation of issues those communities across Pakistan face. Similar sessions, open to the general public, is to be introduced for the purpose of developing trust in the relationship of tax authorities and citizens of the state.
- A schedule by the Board should be prepared consisting of the disputes which are qualified to be resolved through the mediation process and the disputes including certain elements not appropriated to be proceeded before mediation.
- To prevent Boards from influencing the impartial body by introducing in-house mediation and fast track mediation.
- A well-designed yet less complicated mandatory system of referral to mediation is to be considered by the Board. Or the mediation proposal could also be initiated with an offer to reduce the penalty to 20% of the tax owing. Or is made subject to a fee which does not apply in the mediation procedure.
- A mediator should not testify or provide documentary evidence.
- A guideline should be incorporated for the commission to follow. This guild line should include extensive approaches and instruction for the commission to follow concerning the manner of sessions.

- The public website of FBR should reflect the same commitment of bringing forward mediation as a primary strategy for dispute resolution. Fair policies and strategies should be available online. The national government should provide support by encouraging participation in mediation in case of tax dispute.
- Piloted mediation programs for both large and complex cases, and for individuals and small case should be considered to seek the desired outcome and address it accordingly by minimizing that likely adverse effect to the process.
- A need to determine a clearer strategy for ensuring that the mediation process is streamlined along national and international guidelines. To ensure that the justice is observed in consonance the ethical propositions involved in the provision of justice marginalized by society.

## **Conclusion**

The concept of mediation is relatively new in the Pakistani court rooms, and certain amendments are being made in the existing laws to make the system of mediation more common so that the burden on court rooms can be lessened. The success rate of mediation is currently satisfactory however, there is still room for improvement and for the very same purpose, and certain recommendations have been made that extremely essential in order to serve the very purpose behind mediation i.e. easier and quicker access to justice and the limitation of burden on court rooms.

In recent years mediation exclusively considered has been gaining quite a success in Pakistan, however the tax field strives pertinaciously to be dealt with the same. A relic of this attitude is to be found in Article 1 of the European Union Directive on Mediation. This article aims at encouraging the use of mediation in cross-border disputes in commercial disputes and civil disputes. However, Article 1 excludes from the scope of the Directive disputes about revenue, customs and administrative matters. ADR committee has been introduced by the Board to cater tax disputes through quick settlement. The working of ADRC though provides for an alternative mechanism however it is not rich in providing for a mediated dispute on the mutual benefit of the concerning parties. Growing dispute between tax authorities and citizen have started to create a hurdle in the economic growth of the country due to the deprecation of revenue on both sides. This

study focuses that taxation is deemed as public law which requires for uniform and fair approach. Such approach enunciates on the basis of the principle of fairness and thus should be regarded in the practice of justified departure of issue, which could only be achieved through tax mediation.

The lack of precedents in taxation field is one of the significant reasons for causing uncertainty about what mediation would involve or entail. However it does not mean that such process should not be incorporated. Beyond the specific criticism and analysis, this study has sought to demonstrate the need for a more wide-ranging mediation mechanism concerning tax disputes in Pakistan. It further highlights the need for further research to evaluate the institutional capacity of system to support international practices concerning mediation. This in less intrusive manner has been provided in this paper which focuses on other tax detain models of the world to seek for the practice that could facilitate this process of mediation, particularly to tax dispute, in Pakistan.

## End Notes and Bibliography

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