

EXPLANATORY MEMORANDUM TO
THE ENACTMENT OF EXTRA-STATUTORY CONCESSIONS (NO. 2) ORDER 2009

2009 No.

1. This explanatory memorandum has been prepared by Her Majesty's Revenue and Customs ("HMRC") and is laid before the House of Commons by Command of Her Majesty. This memorandum contains information for the Select Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument gives legislative effect to 7 extra-statutory concessions (ESCs). The House of Lords' decision in *R v HM Commissioners of Inland Revenue ex p Wilkinson* [2005] UKHL 30 ("the Wilkinson case") clarified the scope of HMRC's administrative discretion to make concessions that depart from the strict statutory position. This legislation preserves the tax effect of 7 ESCs by putting them on a statutory footing.

3. Matters of special interest to the Select Committee on Statutory Instruments

3.1 This is the second exercise of the power conferred by section 160 of the Finance Act 2008 (c. 9). The first Order made under that power is the Enactment of Extra-Statutory Concessions Order 2009 SI 2009/730. Further orders are planned.

4. Legislative Context

4.1 Section 160 of Finance Act 2008 provides an enabling power which allows the tax treatment afforded by existing concessions to be legislated by Treasury order. Details of the individual concessions and explanations can be found in the HMRC consultation document published on 15 July 2009 'Extra-statutory Concessions – Second Technical Consultation on Draft Legislation'¹. Details of the legislative changes that have been made by the instrument can be found in its explanatory note.

4.2 A further concession referred to in the consultation document is to be enacted using pre-existing powers contained in the legislation for Value Added Tax. The Order enacting this concession is to be made separately and will be the subject of a separate explanatory memorandum. The Value Added Tax concession to be enacted using existing powers is the 'Zero rating of nurses' prescriptions'. In addition the VAT Order amends the description of permitted prescribers to include other authorised medical professionals and updates references to the legislation which permits GPs to dispense. The Order is to be laid before the House of Commons on 10 November 2009.

4.3 In addition Regulations are to be made which mirror the effect of one of the concessions enacted within this Order (A61: Clergymen's heating and lighting etc expenses) for National Insurance Contributions. The Regulations are also to be made separately and be the subject of a separate explanatory memorandum. The Regulations will be laid before Parliament in early 2010 and shall come into force on 6 April 2010.

5. Territorial Extent and Application

¹ <http://www.hmrc.gov.uk/consultations/index.htm>

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Financial Secretary to the Treasury has made the following statement regarding Human Rights:

“In my view the provisions of the Enactment of Extra-Statutory Concessions (No. 2) Order 2009 are compatible with the Convention rights.”

7. Policy background

- *What is being done and why*

7.1 Extra-statutory Concessions (ESCs) have been a feature of the UK’s tax system for decades and will continue to be made and withdrawn as necessary. For this purpose the term ‘extra-statutory concession’ refers to any statement made by the Commissioners of HMRC made before the passing of the Finance Act 2008 on 21 July 2008, and having effect at that time, that they will treat persons as if they were entitled to a reduction to tax or duty, or any other concession relating to tax or duty to which they are not, or may not be, entitled in accordance with the law. Such statements might comprise extra-statutory concessions described as such in the former Inland Revenue booklet IR1 and the former HM Customs and Excise booklet Notice 48, or otherwise as a statement of practice, press release or a statement made in any other way.

7.2 The House of Lords’ decision in the *Wilkinson* case clarified the scope of HMRC’s administrative discretion to make concessions that depart from the strict statutory position.

7.3 In light of that decision, HMRC is reviewing its published concessions. The indications are that most ESCs will be able to continue in their current form as they are within the scope of HMRC’s administrative discretion. Where an existing concession exceeds the scope of the discretion of the *Wilkinson* judgment the effect of the concession will be maintained by putting it on to a legislative basis where it is appropriate to do so. Each concession will be considered carefully and, while the aim is to retain as many concessions as possible, some may no longer be required and it may not be possible to legislate for the effect of some others.

- *Consolidation*

Not applicable.

8. Consultation outcome

8.1 A 12 week consultation², published on 15 July 2009, was undertaken to seek views as to whether the legislation accurately translated the effect of the 10 ESCs. The major overarching tax-bodies were consulted, as well as representative bodies from the particular sectors affected. A number of responses made points around whether the concessionary effect was maintained via the legislation. Some small changes to the draft legislation were made as a result of consultation, for example D26 ‘Relief for exchanges of joint interests’ was amended to ensure it works correctly in Scotland and Northern Ireland, as well as in England and Wales.

² <http://www.hmrc.gov.uk/consultations/index.htm>

8.2 Some comments were made regarding B47 'Furnished lettings of dwelling houses - wear and tear of furniture' which necessitated a more significant consideration of the draft legislation. In order not to delay the remainder of the Order, legislation on B47 will be deferred until the next Order is made using this power.

9. Guidance

9.1 The instrument confirms existing treatment and so further guidance is not required.

10. Impact

10.1 An impact assessment has not been prepared for this instrument because no impact on business, charities, voluntary bodies or the public sector is foreseen. The instrument puts existing ESCs on a statutory footing, and there is no change to the tax effect.

11. Regulating small business

11.1 The legislation may apply to small business but a Small Firms Impact Test has not been undertaken because the legislation does not alter the existing tax effect.

12. Monitoring & review

12.1 Monitoring and review is not required as the instrument confirms existing treatment.

13. Contact

Richard Hopwood at HMRC. Tel: 020 7147 2424 or email: tap@hmrc.gsi.gov.uk can answer any queries regarding the instrument.