

EXPLANATORY MEMORANDUM TO
THE ENACTMENT OF EXTRA-STATUTORY CONCESSIONS ORDER 2009

2009 No. XXXX

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 16 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") made clear that the scope of HM Revenue & Customs' administrative discretion to make concessions that depart from the strict statutory position is not as wide as previously thought. This legislation preserves the tax effect of 16 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 first exercise of the power conferred by section 160 of the Finance Act 2008 (c. 9). The Order is the first of a series of Orders which are planned to be made in 2009 and 2010 using this power.

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 consultation document¹. Details of the legislative changes that have been made by the instrument can be found in its explanatory note.

4.2 Some concessions however are to be enacted using pre-existing powers contained in the legislation for the relevant tax or duty. These Orders will be made separately and be the subject of separate explanatory memoranda. The first group of concessions to be enacted using existing powers are:

3.12: VAT: Buses with special facilities for carrying disabled persons;

4.3: IPT: Insurance relating to motorcars and motorcycles;

Relief for goods supplied for consumption on board intra-Community rail journeys departing from the UK

These are to be laid before the House of Commons on 10 February 2009.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

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

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 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 HM Revenue and Customs made before the passing of the Finance Act 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 made clear that the scope of HM Revenue & Customs' (HMRC) administrative discretion to make concessions that depart from the strict statutory position is not as wide as previously thought.

7.3 In light of that decision, HMRC is reviewing its published concessions and 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 3 November 2008, was undertaken to seek views as to whether the legislation accurately translated the effect of the 16 ESCs. The major overarching tax-bodies were consulted, as well as representative bodies from the particular sectors affected. A number of responses sought clarification that similar terminology (for example, "living together" and "living with") had the same legal meaning. We were able to confirm that this was the case. Additionally, some very minor changes were made to the draft legislation as a result of the consultation.

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

8.2 A number of responses asked either about the status of ESCs not in this consultation, or petitioned for the widening of the ESCs. These were outside the scope of the consultation.

8.3 The consultation and responses document are published on HMRC's website.

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 there is no impact on business, charities, voluntary bodies or the public sector. 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

Toby Pearce at HMRC. Tel: 0207 147 0684 or email: toby.pearce@hmrc.gsi.gov.uk can answer any queries regarding the instrument.