

**EXPLANATORY MEMORANDUM TO
THE VALUE ADDED TAX (FOOD) ORDER 2004
2004 No.3343**

1. This explanatory memorandum is laid before the House of Commons by Command of Her Majesty. This memorandum contains information for the House of Commons Select Committee on Statutory Instruments. It is submitted by H M Customs and Excise.

This Order is made by the Treasury in exercise of their powers in sections 30(4) and 96(9) of the Value Added Tax Act 1994 (c.23; “the Act”). By section 97(3) of the Act¹, this Order is subject to the affirmative resolution procedure and is required to be laid before the House of Commons only.

2. **Description**

2.1 This Order in principle removes from the zero rate of VAT certain foods that have been baked or otherwise heated in order for them to be eaten hot and that are still hot at the time they are provided to the customer. The foods affected are those that are cooked at a point in time later than the formal time of supply or “tax point”.

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

3.1 None

4. **Legislative background**

4.1 Schedule 8 to the Act sets out in Groups the types of supply that benefit from the zero rate of VAT. Group 1 is entitled “Food”. Excluded from the general zero-rating of “food of a kind used for human consumption” is any supply “in the course of catering”.

4.2 Note (3) defines this latter expression as including, inter alia, “any supply of hot food for consumption off [the] premises” (paragraph (b)). “Hot food” is defined as food which, or any part of which:

“(i) has been heated for the purposes of enabling it to be consumed at a temperature above the ambient air temperature, and

(ii) is at the time of the supply above that temperature.”

This means that hot takeaway food is not zero-rated, and is accordingly subject to the standard rate of VAT.

4.3 It has recently been argued that the words “the time of the supply” in sub-paragraph (ii) are capable of being construed as referring to the tax point determined in accordance with section 6 of the Act. By section 6(2), in relation to supplies of goods (such as food),

¹ Section 97(4) of the Act lists the instruments that are subject to the affirmative resolution procedure. Paragraph (c)(iii) includes orders varying Schedule 8 to the Act so as to abolish the zero-rating of a supply.

the basic tax point is, inter alia, when the goods are “removed” (so when the customer collects the takeaway food himself, or when it leaves the shop to be delivered to his home).

4.4 However, section 6(4) provides for an earlier tax point when, inter alia, payment is received before the basic tax point. A customer, especially when collecting his takeaway himself, may well pay for it when he places his order so, if this argument were right, it would mean that the time of supply occurs before his food is cooked. This would lead to the conclusion that the food is not above the ambient air temperature when it is paid for, and so is not “hot food” within the meaning of Note (3).

4.5 Although the Commissioners of Customs and Excise do not accept this construction, this Order will remove any possible doubt that it is the temperature at the time the customer receives his food, and not the temperature when it is paid for, that determines whether or not the food is supplied in the course of catering and accordingly excluded from the zero rate.

5. Extent

5.1 This Order applies to the whole of the United Kingdom, as VAT does generally.

6. European Convention on Human Rights

6.1 The Paymaster General has made the following statement regarding Human Rights:

I am satisfied that the provisions of the Value Added Tax (Food) Order 2004 are compatible with the Convention rights.

7. Policy background

7.1 Hot takeaway food was standard-rated in 1984 in order to (a) provide equal VAT treatment with restaurant meals and other forms of catering and (b) raise revenue. Since that time it has been generally understood that supplies of hot takeaway food were standard-rated irrespective of the timing or method of payment.

7.2 Although there has been no change to the Commissioners’ view on this matter, this view has recently been challenged. The purpose of this Order is to remove any possible uncertainty and confirm that supplies of hot takeaway food are standard-rated irrespective of the timing of payment.

7.3 If the timing of payment for the supply were to be a determining factor in deciding the VAT liability, it would encourage businesses in the sector to alter their procedures to ensure they receive payment prior to heating the food, so that their supplies of takeaway food could be zero-rated. This would be likely to cause confusion among businesses, inconsistencies in VAT treatment leading to distortion of competition within the hot takeaway food market, and ultimately a potential loss of revenue of around £360 million per year.

7.4 The effect of this measure is to confirm the VAT treatment for hot takeaway food as it has been commonly understood and applied by the Commissioners and taxpayers for the past twenty years. For this reason, no consultation has been undertaken.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 There is no impact on the public sector.

8.3 The reason there is no impact in either case is that this Order clarifies and confirms the VAT treatment for sales of hot takeaway food that has applied for the past twenty years.

9. Contact

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