

**EXPLANATORY MEMORANDUM TO
THE TAX INFORMATION EXCHANGE AGREEMENT (TAXES ON
INCOME) (VIRGIN ISLANDS) ORDER 2005**

1. i) Title of instrument

The draft Tax Information Exchange Agreement (Taxes on Income) (Virgin Islands) Order 2005, laid before the House of Commons on 17 May 2005.

Laying Authority and Purpose

This Explanatory Memorandum is laid before the House of Commons by Command of Her Majesty and contains information for the Select Committee on Statutory Instruments.

To give effect within the domestic legal system of the United Kingdom, so far as necessary, to the provisions of an arrangement on tax information exchange entered into by the United Kingdom and the British Virgin Islands (“BVI”).

ii) Departments responsible

HM Treasury and HM Revenue and Customs.

2. Description

This draft Order brings into effect those arrangements specified in the Agreement set out in Part I of the Schedule attached to the draft Order, and the exchange of letters set out in Part II of that Schedule.

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

i) Type of resolution

This draft Order is subject to the affirmative resolution procedure.

ii) Details of the Agreement

Further details of the Tax Information Exchange Agreement scheduled to the draft Order are annexed to this Memorandum.

4. Legislative Background

i) General

This Order is made under section 815C of the Income and Corporation Taxes Act 1988 (c.1), which was amended by section 198 of the Finance Act 2003 (c.14).

Section 815C of the Income and Corporation Taxes Act (ICTA) 1988 provides the mechanism by which arrangements made with overseas territories (including dependencies and overseas territories of the United Kingdom) for the exchange of information necessary for carrying out the domestic laws of the United Kingdom concerning income tax, capital gains tax, corporation tax in respect of income and capital gains and taxes of a similar character in the other territory are given effect in the United Kingdom.

The relevant Convention or Agreement is scheduled to an Order made under section 815C ICTA 1988.

5. Extent

The draft Order applies to the whole of the United Kingdom.

6. European Convention on Human Rights

The Paymaster General (Dawn Primarolo) has confirmed that, in her view, the provisions of this draft Order are compatible with the European Convention on Human Rights.

7. Policy background to the instrument

This Agreement with the BVI is one of the agreements by which certain dependent territories of Member States will implement the same measures as those contained in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (“the Directive”). Application of the Directive is contingent on the application of “same measures” by those territories, and “equivalent measures” by certain third countries. The Directive rules and the rules provided for under these agreements will therefore all take effect from the same date.

The Agreement is concluded in form of a Tax Information Exchange Agreement (TIEA). These instruments are designed to facilitate the exchange of information between tax authorities for direct tax purposes, in order to help the authorities counter cross-border tax evasion and avoidance.

Like TIEAs, the Agreement includes safeguards to ensure both the confidentiality of the information exchanged and that such information is used only for tax purposes.

8. Impact

i) On business, charities, voluntary bodies or individuals

The impact of implementing the specific changes required of relevant bodies by this Agreement are marginal, and occur as a part of the system changes necessary to the implementation of the Directive.

The detailed Regulatory Impact Assessment (RIA) for the Directive can be found at <http://www.hmrc.gov.uk/ria/eusd-ria.pdf>.

ii) On the Exchequer

Tax Information Exchange Agreements enable countries to obtain information to assist them to properly enforce their domestic tax laws. Agreements do not generally have an Exchequer cost; rather they improve HM Revenue and Customs' ability to tax UK residents on their world-wide income and gains and collect the proper amount of tax due.

The impact on the Exchequer of this Agreement will be positive and a factor of the overall benefits to the Exchequer of the implementation of the Directive (also covered in the Directive RIA mentioned above).

9. Contacts

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**AGREEMENT ON THE TAXATION OF SAVINGS INCOME BETWEEN
THE BRITISH VIRGIN ISLANDS (BVI) AND
THE UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND**

GENERAL

This Tax Information Exchange Agreement between the United Kingdom and the BVI secures application in the BVI of the same measures as are contained in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (“the Directive”).

This is to fulfil the condition in the Directive (Article 17) under which application of the Directive is contingent on application, from the same date of same measures by certain territories¹, and equivalent measures by certain third countries.

The Agreement provides for a reciprocal arrangement between the United Kingdom and the BVI allowing information to be exchanged by each party on savings income in the form of interest payments made cross-border to individuals resident in the other Contracting Party. For a transitional period corresponding to the transitional period in the Directive, however, the BVI will levy a withholding tax corresponding to transitional withholding tax that will be levied by three Member States under the Directive, unless the owner of the income opts for exchange of information.

As the Agreement enshrines all the provisions of the Directive, it not only prescribes the information covered by Agreement and the mutual obligations of the competent authorities, but also the mechanisms to be followed by the agents who make interest payments for collecting the relevant information.

¹ Per Article 17(2)(ii) of the Directive, the territories concerned are the Channel Islands, Isle of Man and the relevant dependent or associated territories in the Caribbean. The relevant third countries – Article 17(2)(i) – are Switzerland, Liechtenstein, San Marino, Monaco and Andorra.

NOTES ON DETAILS

RECITALS

The recitals explain the genesis of the Agreement in relation to the Directive. They confirm that the BVI will apply a transitional withholding tax corresponding to the transitional withholding tax to be applied by three Member States under the Directive.

ARTICLE 1 – DEFINITIONS

Article 1 contains general definitions used throughout the Agreement.

ARTICLE 2 - WITHHOLDING TAX BY PAYING AGENTS

Article 2 provides for a transitional withholding tax to be applied in The BVI on payments made cross-border from the BVI to United Kingdom residents. The start of the transitional period is governed by Article 16 and corresponds to the start of the transitional period under the Directive.

The rate of withholding tax parallels the rates of withholding tax under the Directive, rising to 35% after six years. As in the Directive, provision is made for individual owners to choose reporting of income instead of withholding tax (Article 4).

ARTICLE 3 – REPORTING OF INFORMATION BY PAYING AGENTS

Article 3 concerns reporting of information.

Paragraph 1 summarises the information to be reported by United Kingdom and BVI paying agents to their competent authority for the purposes of exchange of information. This includes details of

- the individual owner's identity and residence;
- identity of the paying agent;
- the account (where the interest is paid) or the security giving rise to the interest;
- the type of interest payment in accordance with the rules at Article 5.

Paragraph 2 confirms the timetable for exchange of information from the United Kingdom competent authority to the competent authority of the BVI.

ARTICLE 4 – EXCEPTIONS TO THE WITHHOLDING TAX PROCEDURE

Article 4 states that the BVI shall provide for one or both of two specified procedures to enable individuals to avoid withholding tax being applied to their savings income.

Paragraph 1 summarises the two methods: they will permit the individual either

- (i) to authorise a paying agent in the BVI to make a report on the interest payment; or
- (ii) to authorise gross payment of the interest on the basis of a certificate drawn up for him by his competent authority. (This demonstrates his competent authority is aware of the payment.)

Paragraph 2 sets out the details the certificate must contain, if the certificate procedure is used.

Paragraph 3 confirms the timetable for the exchange of information from The BVI to the United Kingdom under the voluntary disclosure procedure in paragraph 1(a).

ARTICLE 5 – BASIS OF ASSESSMENT FOR WITHHOLDING TAX

Article 5 sets out the basis for withholding tax in the BVI in respect of each type of interest payment.

Paragraph 1 identifies the amount that is subject to tax for each of four types of interest payment. (This parallels the equivalent provisions on withholding tax in the Directive and also serves to identify the amount of interest that has to be reported under the voluntary disclosure procedures for the purposes of Article 4.)

Paragraph 2 confirms (in line with the Directive) that the tax is to be applied pro rata to the length of period of ownership by the individual. There is a default rule where this information is not available.

Paragraph 3 confirms that the levying of withholding tax shall not prevent the normal operation of other taxes on that income in the United Kingdom.

Paragraph 4 confirms that where the payment of interest is made from The BVI to a residual entity in the United Kingdom (as identified in Article 8), the BVI paying agent may levy the withholding tax on that payment instead of following the reporting rules for entities under that Article.

ARTICLE 6 – DEFINITION OF BENEFICIAL OWNER

Article 6 provides the definition of individual beneficial owner relevant to the Agreement. This follows the definition in the Directive.

Paragraph 1 confirms that an individual is to be regarded as the beneficial owner unless specified condition apply, for example, that he provides evidence that he is acting himself as a paying agent.

Paragraph 2 notes that if the paying agent has information suggesting the purported owner may not be the beneficial owner, he is to take reasonable steps to identify the beneficial owner.

ARTICLE 7 – IDENTITY AND RESIDENCE OF BENEFICIAL OWNERS

Article 7 sets out the rules to be followed for identifying individual beneficial owners.

Paragraph 1 confirms that the rules provide minimum standards for the identification of individuals by paying agents in each Contracting Party.

Paragraph 2 sets out the rules for confirming the beneficial owner's identity.

Paragraph 3 sets out the rules for confirming the beneficial owner's residence.

ARTICLE 8 – DEFINITION OF 'PAYING AGENT'

Article 8 provides the definition of paying agent relevant for the Agreement. The definition corresponds to the definition of paying agent in the Directive.

Paragraph 1 gives the basic definition of paying agent, as the economic operator that makes the payment of interest cross-border to the individual owner.

Paragraph 2 provides that certain entities may also be considered paying agents on receipt of interest payments. (These are entities that could otherwise be used by individuals to shield their identity.) Paragraph 2 (together with paragraph 5) defines the entities – known as “residual entities” - and provides that economic operators paying interest to them should make a simplified report of the payment.

Paragraph 3 states that the contracting parties must make provision for residual entities in their jurisdiction to be treated as UCITS, rather than residual entities.

Paragraph 4 states that the Contracting Parties shall take any necessary measures regarding the case where the economic operator and residual entity are both in their own jurisdiction.

ARTICLE 9 – DEFINITION OF ‘INTEREST PAYMENT’

Article 9 reproduces the definition of interest from the Directive, with amendments to incorporate relevant BVI products.

Paragraph 1 provides the definition of interest. The definition includes certain payments that derive directly or indirectly from interest payments.

Paragraphs 2 and 3 provide rules to help paying agents, where there is no information on the exact amount of derived interest.

Paragraph 4 deems interest made to a residual entity to be interest paid by a residual entity.

Paragraph 5 allows Contracting Parties to require annualising of certain payments, in line with the corresponding rule in the Directive.

Paragraph 6 provides for derogation from the definition of interest regarding funds that are largely invested in non-interest bearing instruments.

Paragraph 7 adjusts the rules for the definition of derived forms of interest from 2011 onwards.

Paragraph 8 provides further rules for determining whether payments from collective investment funds will be reportable or subject to withholding tax.

ARTICLE 10 – WITHHOLDING TAX REVENUE SHARING

Article 10 provides that 75% of the withholding tax collected by the BVI is to be shared with the United Kingdom. (The rules on revenue sharing mirror the revenue sharing rules for Member States applying withholding tax.)

Paragraph 1 provides the basic rule for withholding tax sharing.

Paragraph 2 provides that this same rule will apply for any withholding tax withheld by BVI paying agents on payments to residual entities under Article 4(4).

Paragraph 3 confirms the timing for revenue sharing: this will take place annually, six months after the end of the tax year of the paying agent in the BVI.

Paragraph 4 confirms that responsibility for the smooth functioning of the revenue sharing system rests with the BVI.

ARTICLE 11 – ELIMINATION OF DOUBLE TAXATION

Article 11 deals with the elimination in the United Kingdom of double taxation arising from the imposition of withholding tax. The rules mirror the rules in the Directive.

Paragraph 1 sets out the requirements for crediting and repayment in relation to withholding tax applied on interest payments. Legislation for the elimination of double taxation relating to all withholding taxes connected with the Directive is contained in the Finance Act 2004.

Paragraph 2 provides an alternative option to the crediting procedure. (This part of the model text is relevant for Member States that have a different process from the United Kingdom for relieving double taxation.)

ARTICLE 12 – TRANSITIONAL PROVISIONS FOR NEGOTIABLE SECURITIES

Article 12 sets out transitional arrangements for certain debt securities, mirroring the equivalent provision in the Directive.

Paragraph 1 provides the basic rule that removes payments relating to certain negotiable securities from the definition of interest. This is to avoid the problem of “gross-up” that would otherwise have adversely affected the financial markets.

Paragraph 2 confirms that this rule does not affect any rules in the Contracting Parties concerning the taxation of income from these securities.

ARTICLE 13 – MUTUAL AGREEMENT PROCEDURE

Article 13 provides for a consultation procedure, in the event of any disagreement between the parties as to the interpretation of the Agreement.

ARTICLE 14 – CONFIDENTIALITY

Article 14 contains confidentiality rules concerning the use and disclosure of the information exchanged.

Paragraph 1 provides that information received is to be treated as confidential.

Paragraph 2 provides that the information can only be used for direct taxation purposes although it may be used for other purposes if the relevant government authorities give written consent.

Paragraph 3 provides that information can only be disclosed to certain specified persons or authorities. Such information may be disclosed in public court proceedings or in judicial proceedings.

Paragraph 4 provides that if information is received that is thought to be useful to another EU Member State such information can be sent to that other Member State with the agreement of the competent authority who originally supplied the information.

ARTICLE 15 – TRANSITIONAL PERIOD

Article 15 confirms that at the end of the Directive transitional period, the BVI will move to full, automatic exchange of information under the Agreement.

In line with the provisions for Member States applying withholding tax under the Directive, however, the BVI has discretion to elect to apply automatic exchange earlier in the transitional period if it wishes.

ARTICLE 16 – ENTRY INTO FORCE

Article 16 deals with the date of entry into force of the Agreement and the date from which its provisions shall have effect. The latter date is 1 July 2005.

ARTICLE 17 – TERMINATION

Article 17 provides for the possibility of termination. This is usual for an international agreement.

Paragraph 1 confirms that the Agreement will remain in force unless terminated by either Contracting Party.

Paragraph 2 specifies the procedures to be followed in the event that a Contracting Party desires to terminate; and the timetable that will follow for termination.

ARTICLE 18 – APPLICATION AND SUSPENSION OF APPLICATION

Article 18 sets out the conditions for the Agreement to apply. These conditions are intended to ensure that a level playing field is maintained between Member States and, on the one hand, all third countries applying “equivalent measures” and, on the other, territories applying “same measures”, as the Directive.

Paragraph 1 confirms the application of the Agreement is conditional on the adoption and implementation of all the international agreements and arrangements tied to the Directive, for the same date of implementation.

Paragraph 2 confirms that the Contracting Parties will confirm the date for application of the Agreement, six months before the expected start date.

Paragraph 3 makes provision for suspension of the Agreement and the conditions and procedures governing any suspension.

EXCHANGE OF NOTES

The Exchange of Notes contained in Part II to the Schedule constitutes a formal agreement between the Government of United Kingdom and the Government of the British Virgin Islands, and confirms that the date of application of the Agreement shall correspond with the date of application of the Directive.