

**EXPLANATORY MEMORANDUM TO
THE VALUE ADDED TAX (BETTING, GAMING AND LOTTERIES) ORDER 2006**

2006 No.2685

THE VALUE ADDED TAX (GAMING MACHINES) ORDER 2006

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1. This explanatory memorandum has been prepared by HM Revenue and Customs and 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.

2. **Description**

- 2.1 The Value Added Tax (Betting, Gaming and Lotteries) Order 2006 (“the Group 4 order”) amends the provisions of the exemption from VAT of, among other things, facilities for playing games of chance, including gaming machines.

- 2.2 The Value Added Tax (Gaming Machines) Order 2006 (“the section 23 order”) amends the provision that limits the amount on which VAT is chargeable in relation to gaming machines to the net takings, after winnings have been deducted.

- 2.3 The orders amend the definitions of certain expressions used in section 23 of, and Group 4 of Schedule 9 to, the Value Added Tax Act 1994 (“the VAT Act”), but there is also a restriction of the scope of the exemption in Group 4. Section 97(3) and (4)(c)(iii) of the VAT Act mean that the Group 4 order is subject to the affirmative resolution procedure.

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

- 3.1 Although not remarkable, there is perhaps one matter that deserves mention. Section 23(6), as amended by section 16 of the Finance Act 2006 (c. 25), provides in paragraph (f) that “game of chance” has the meaning assigned by a Treasury order. However, section 16(7) preserved the existing meaning of that expression until 1 November 2006, (so that it has continued to have the meaning given by the Gaming Act 1968, specifically, section 52 of that Act).

- 3.2 At the same time, the new subsection (7) of section 23 provides that subsections (4) to (6) may be amended by Treasury order. That includes subsection (6)(f), of course. Instead of making provision for a free-standing definition of game of chance that would apply for the purposes of section 23, the section 23 Order will provide a definition by incorporating it as a provision of section 23.

- 3.3 This approach was adopted primarily so that the reader should not have to consult another piece of legislation in order to find the meaning of the expression. Not only

would subsection (6)(f) have been left just beating the air if there were a definition of game of chance elsewhere within section 23, but it would have had the potential to cause confusion. In the circumstances, the most prudent course seemed to be to repeal it. It is accepted that subsection (6)(f) cannot be reinstated by a future order. Any further changes to the definition of game of chance can be made by utilising the power in subsection (7) again.

4. Legislative Background

4.1 Section 1 of the VAT Act charges VAT on supplies of goods and services. In the context of gaming, whether by use of a machine or otherwise, only services are relevant. However, the supplies mentioned in the various groups in Schedule 9 to the VAT Act are exempt from VAT. Group 4 describes certain supplies relating to betting, gaming and lotteries. The provision of a gaming machine is excluded from exemption, so it is taxable.

4.2 Put briefly, section 19 of the VAT Act provides that VAT is charged on the money paid for the (goods or) services supplied. However, section 23 provides that, where gaming machines are concerned, VAT is to be charged on the takings after credit has been given for the winnings paid out – the net takings. This had anticipated correctly the jurisprudence of the European Court of Justice that has consistently confirmed that VAT should only be charged on net takings of gaming machines.

5. Extent

Both instruments apply to all of the United Kingdom, just as VAT does generally.

6. European Convention on Human Rights

The Financial Secretary to the Treasury, John Healey MP has made the following statement regarding Human Rights:

In my view the provisions of the Value Added Tax (Gaming Machines) Order 2006 and Value Added Tax (Betting, Gaming and Lotteries) Order 2006 are compatible with the Convention rights.

7. Policy background

7.1 At the time of the Chancellor's Pre-Budget Report on 6 December 2005, the definition of 'gaming machine' for VAT liability purposes in Group 4 of Schedule 9 to the VAT Act was amended by the Value Added Tax (Betting, Gaming and Lotteries) Order 2005 (SI 2005/3328). This was intended to ensure that all gaming machines were excluded from the exemption, and so liable to VAT, in the process updating some of the elements of the definition by reference to the Gambling Act 2005. The corresponding definition of gaming machine in the provision which determines the value on which VAT is accounted for on gaming machines (section 23 of the VAT Act) could only be amended by primary legislation. That was done by section 16 of the Finance Act 2006, with retrospective effect from 6 December 2005.

7.2 One aspect of the definition of gaming machine which was not updated in either section 23 or Group 4 was the definition of 'game of chance', which currently relies on

the Gaming Act 1968 definition. That Act is to be repealed by an appointed day order made under the Gambling Act, most probably next year. For the purposes of section 23, the Gaming Act 1968 definition continues to apply only until 31 October 2006. We therefore require a new definition to be put in place from 1 November. There is a definition of game of chance in Group 4 also, where it also determines the scope of the VAT exemption for gaming; item 1 of the Group currently reads ‘the provision of any facilities for the placing of bets or the playing of any games of chance’.

7.3 At present the Group 4 definition of game of chance refers to both the Gaming Act 1968 and the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 – the two definitions are identical, but the Gaming Act does not apply in Northern Ireland (the Gambling Act will similarly not apply in Northern Ireland). Section 23 refers only to the Gaming Act. The definition should be the same across the UK, in both provisions.

7.4 When the definition of ‘gambling’ was introduced into Group 4 and section 23 respectively at PBR and in the Finance Bill respectively, this was done by inserting cross-references to the definitions of ‘betting’ and ‘gaming’ in the Gambling Act. The latter can be amended by regulations made by the Secretary of State. We have replaced the cross-reference to the Gambling Act to preclude the possibility that the VAT definition is affected by such amendments. Instead, stand-alone definitions will be used, albeit based on provisions in section 6 and section 239 of the Gambling Act.

7.5 Betting is no longer to be defined. This removes the admittedly low potential for a debate as to whether the concept in section 9 of the Gambling Act is wider than that in the exemption laid down in European Community legislation (Article 13B(f) of the Sixth VAT Directive¹). Although the section 9 Gambling Act definition only applied in relation to gaming machines, a court might have been minded to assume that it also had some application in relation to the betting referred to in the exemption in item 1. In any case, betting does not need to be defined (it is not defined in the legislation concerning the excise duty charged on betting, for example).

7.6 The cross-reference to the definition of ‘real’ in the Gambling Act has been retained. This definition cannot be amended by the Secretary of State by means of secondary legislation, and it is quite a complex definition, as it in turn relies on a definition of ‘virtual’.

7.7 Finally, the Group 4 order restores the application of VAT to pinball machines, by making it clear that the exemption only applies to games of chance played for a prize. Prize will be defined so as to exclude free plays, so there can be no doubt that pinball machines will not be exempt. There are no policy reasons for exempting pinball machines from VAT – they do not offer gambling, they are not subject to any excise duty, and they do not fall within the scope of the Sixth Directive exemption.

7.8 Pinball machines had been brought within the scope of the exemption at PBR inadvertently, when the Gambling Act concept of gaming was imported. Section 6(1) of that Act provides that gaming is playing a game of chance for a prize, and machines not played for a prize have not been excluded from the exemption as a result. Although currently the exemption is not confined to playing games for prizes, the definition of a gaming machine prior to PBR had not mentioned prizes either, so pinball machines were

¹ 77/388/EEC; OJL145, 13.6.1977, p.1.

excluded because they were gaming machines. In future, any game of chance not played for a prize, whether or not played on a machine, will fail to qualify for exemption in any event.

7.9 The Order ensures that, for the first time, any game of chance which is not played for a prize does not fall within the exemption, not just pinball machines, although we are not aware that other games of chance are habitually played other than for prizes as part of a business activity. This is in line with the reasoning behind the exemption for betting and gaming in EU law. The relevant exemption in Article 13B(f) of the Sixth Directive does not exist for any defined social reason, but only because of the difficulties in establishing the basis of valuation of betting and gaming transactions which can entail the flow of money in both directions. Not only does the punter have to pay money to the provider of the gambling, but also the provider must pay out money to the punter if he wins. This causes valuation difficulties especially where more than one player is involved, or where the individual stake or prize cannot be readily separated from others. However, if a game of chance does not offer a prize then the valuation difficulties do not exist and there is no reason for exempting such a game.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has negligible impact on business, charities or voluntary bodies.

8.2 The impact on the public sector is negligible.

9. Contact

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