

EXPLANATORY MEMORANDUM TO
THE VALUE ADDED TAX (PLACE OF SUPPLY OF GOODS) ORDER 2009

2009 No. 215

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 Goods supplied on board a ship or aircraft departing from the UK, on journeys to other EU member States, are treated as supplied in the UK. But there is a relief from VAT for goods intended for consumption during the journey. As a result of this Order, supplies of goods for consumption during similar journeys on board trains (made on or after 6th April 2009) will be similarly relieved.

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

3.1 This order relates to three other orders relating to ESCs, also laid before the House of Commons today. The main order, the Enactment of Extra-Statutory Concessions Order 2009, is made under section 160 of the Finance Act 2008 (c. 9).

4. Legislative Context

4.1 This instrument is made under the powers conferred by section 7 of the Value Added Tax Act 1994 ("VATA 1994"). However, it is laid before the House of Commons to the same broad timescale as the Enactment of Extra-Statutory Concessions Order 2009, as it forms part of the same policy package.

4.2 The Value Added Tax (Place of Supply of Goods) Order 2004 (SI 2004/3148) operates so that any goods supplied on board a ship or aircraft in the course of a Community transport for consumption on board are treated as supplied outside the member States. "Community transport" is defined in article 4 of the 2004 Order as meaning the transportation of passengers between the point of departure and the point of arrival in the course of which (a) there is a stop in a member State other than that in which lies the point of departure; and (b) there is no stop in a country which is not a member State. This instrument extends the existing Order so that it applies to supplies of goods for consumption on board trains in addition to other forms of intra-Community transport.

4.2 It exercises an option available to member States in Article 37 of Directive 2006/112/EC ("The Principal VAT Directive"). Under the second sub-paragraph of 37(3) Member States may relieve (from VAT), supplies of goods for consumption on board forms of intra-Community transport (including trains) which would otherwise be liable to VAT in the member State of departure in accordance with Article 37(1) of the Principal VAT Directive.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

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 (*R v HM Commissioners of Inland Revenue ex p Wilkinson* [2005] UKHL 30) 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.

7.4 Article 37 of the Principal VAT Directive has its roots in the package of measures that created the Single Market from 1 January 1993. From that time goods supplied during the course of intra-Community transport undertaken by ship, aircraft or trains have been treated as supplied (and therefore subject to VAT) in the Member State of departure. However, to meet industry concerns about the initial impact this would have on travellers, member States were given the option of relieving supplies of goods consumed during the journey.

7.5 The option of relieving these supplies from VAT was originally intended as a short term transitional measure and was not intended to run past 31 December 1993. By that time it was envisaged that permanent rules would have been put in place. In the event, however, this did not happen. The transitional measure continues as an open ended option under Article 37(3) of the principal VAT Directive pending eventual action by the Commission.

7.6 In implementing the Single Market the UK adopted the relief by placing the supplies in question outside the scope of UK VAT. However, with the opening of the Channel Tunnel rail link still some time away and the perceived limited duration of the

relief, trains were disregarded. Consequently, Article 5 of the then Value Added Tax (Place of Supply of Goods) Order 1992 (SI 1992/3283) was limited to ships and aircraft.

7.7 Later, with the commencement of Channel Tunnel rail services, the relief was extended by concession to goods consumed on board intra-Community rail transport. The concession was recently reviewed and the purpose of this Order is to provide the necessary legislative provisions to cover rail transport.

- **Consolidation**

7.8 There are no plans to consolidate The Value Added Tax (Place of Supply of Goods) Order 2004 (SI 2004/3148) as a result of this minor amendment.

8. Consultation outcome

8.1 This instrument was included in a wider consultation document published on 3 November 2008¹ about providing legislative effect to a package of concessions. No responses have been received in connection with this item.

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 does not apply to small business.

12. Monitoring & review

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

13. Contact

Phil Bryant at HM Revenue & Customs Tel: 020 7147 0067 or email: phil.bryant@hmrc.gsi.gov.uk can answer any queries regarding the instrument.

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