EXPLANATORY MEMORANDUM TO
THE CORPORATION TAX ACT 2010 (AMENDMENT) ORDER 2010

2010 No. 2902

1. This explanatory memorandum has been prepared by the Commissioners for Her Majesty's Revenue and Customs 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

The purpose of this Order is to restore the law to its original position before the Corporation Tax Act 2010 ("CTA 2010"). The amendments made by the Order are necessary as a result of minor errors in some consequential amendments and transitional provisions contained within CTA 2010.

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

The amendments that are contained in the Order take effect retrospectively from the date on which CTA 2010 came into force. The authority for this is contained in section 1179 of CTA 2010.

4. Legislative Context

4.1 The Tax Law Rewrite project was established in 1996 and came to an end on 31 March 2010. CTA 2010 was the project's sixth (and penultimate) Act. The project's aim was to rewrite the United Kingdom's primary direct tax legislation to make it clearer and easier to use, without changing the law (apart from minor identified changes). As a result of rewriting the legislation to CTA 2010 a number of consequential amendments and transitional provisions were necessary. Errors have been identified with three consequential amendments and one transitional provision. As a result, this Order makes amendments to provisions in the Taxation of Chargeable Gains Act 1992 ("TCGA"), the Corporation Tax Act 2009 ("CTA 2009") and CTA 2010. This is the first time this power has been used.

4.2 Three of the errors relate to the application of Schedule 18 of the Income and Corporation Taxes Act 1988 (**"**ICTA**"**) (group relief: equity holders and profits or assets available for distribution) for the purposes of provisions other than group relief. That Schedule is

rewritten in Chapter 6 of Part 5 of CTA 2010. These errors relate to the consequential amendment of the following provisions:

- section 170(8) of TCGA (as amended by paragraph 242(4) of Schedule 1 to CTA 2010) (groups of companies: interpretation of sections 171 to 181),

- paragraph 8(2) of Schedule 7AC to TCGA (as amended by paragraph 269(3) of Schedule 1 to CTA 2010) (exemptions for disposals by companies with substantial shareholdings: meaning of "substantial shareholding"), and

- section 772(2) of CTA 2009 (as amended by paragraph 646 of Schedule 1 to CTA 2010) (intangible fixed assets: equity holders and profits or assets available for distribution).

The fourth error concerns a transitional provision in paragraph 64(6) of Schedule 2 of CTA 2010 relating to section 376 of CTA 2010 (long funding leases of plant or machinery: films).

Section 170(8) of TCGA, Schedule 7AC paragraph 8(2) of TCGA and Section 772(2) of CTA 2009

4.3 As a result of section 170(8) of TCGA, paragraph 8(2) of Schedule 7AC to TCGA and section 772 of CTA 2009 the expression "equity holder" in section 170(6) and (7) of TCGA, paragraph 8(1) of Schedule 7AC TCGA and sections 768(5) to (7) and 771(2) and (3) of CTA 2009 respectively were to be read in accordance with Schedule 18 to ICTA. Paragraph 1(1) of Schedule 18 to ICTA provided that the equity holders of a company include "a person who is a loan creditor of the company in respect of a loan which is not a normal commercial loan". Paragraph 1(4) of Schedule 18 to ICTA defined "loan creditor" for the purposes of paragraph 1(1)(b) of that Schedule by applying section 417(7) of ICTA "but with the omission of the reference to subsection (9) of that section". For the purposes of group relief a bank was not excluded from being a "loan creditor" by section 417(9) of ICTA. But the effect of the words in section 170(8) of TCGA, paragraph 8(2) of Schedule 7AC to TCGA and section 772(2) of CTA 2009 to omit the words in paragraph 1(4), from "but" to the end" was that the exclusion of banks by section 417(9) of ICTA did apply in the definition of "loan creditor" in Schedule 18 to ICTA as applied for the purposes of the meaning of "equity holder".

4.4 Schedule 18 to ICTA is rewritten in Chapter 6 of Part 5 of CTA 2010 and section 158(2) in that Chapter gives the meaning of "loan creditor" based on section 417(7) of ICTA with the omission, as directed by paragraph 1(4) of Schedule 18 to ICTA, of the reference to the exclusion for banks in section 417(9) of ICTA.

4.5 However, in applying Chapter 6 of Part 5 of CTA 2010 and, therefore, the definition of "loan creditor" in section 158(2) of that Act, the need

to give effect in the substituted section 170(8) of TCGA, paragraph 8(2) of Schedule 7AC to TCGA and section 772(2) of CTA 2009 to the exception for banks in section 417(9) of ICTA provided for in the provision(s) it replaced was overlooked.

Schedule 2 paragraph 64(6) of CTA 2010

4.6 Paragraph 1 of Schedule 33 to the Finance Act 2009 ("FA 2009") inserted section 502GD (cases where sections 502B to 502G do not apply: films) in Chapter 5A of Part 12 of ICTA (special rules for long funding leases of plant or machinery: corporation tax), subject to the commencement and transitional provisions in paragraphs 3 to 8 of that Schedule. Section 502GD of ICTA is rewritten in section 376 of CTA 2010 and paragraph 64 of Schedule 2 to CTA 2010 rewrites the commencement and transitional provisions in paragraphs 3 to 8 of Schedule 33 to FA 2009.

4.7 Paragraph 4 of Schedule 33 to FA 2009 provides that the transitional provisions in paragraphs 5 to 8 of that Schedule apply to a long funding lease of a film whose inception is before 13 November 2008 and which has not terminated before that date. Paragraph 5 of Schedule 33 to FA 2009 disapplies the rules in section 502B of ICTA in relation to periods of account that begin on or after 13 November 2008 and to which no part of any rental due to be paid before that date refers.

4.8 Paragraph 6 of Schedule 33 to FA 2009 applies to periods of account that end on or after 13 November 2008 and to which paragraph 5 of that Schedule does not apply. In this case the lessor is treated by paragraph 6(1) as receiving an amount of income in addition to that which is brought into account (under section 502B(2) of ICTA) as representing the finance charge element of the lease rentals. This amount is known as the "relevant amount". Paragraph 6(2) defines the "relevant amount" as the proportion of the "capital" element of the rentals (referred to there as that part of the rentals as would not reasonably be regarded as reflected in the rental earnings for that period of account) which are payable on or after 13 November 2008 and which relate to the period of account.

4.9 Paragraph 64(6) of Schedule 2 to CTA 2010 is intended to rewrite paragraph 6(2) of Schedule 33 to FA 2009 but inadvertently omits the words that limit the amount treated as income by paragraph 64(5) (based on paragraph 6(1) of Schedule 33 to FA 2009) to that part of the rentals "as would not reasonably be regarded as reflected in the rental earnings for that period of account".

5. Territorial Extent and Application

The Order applies to all of the United Kingdom.

6. European Convention on Human Rights

The Exchequer Secretary to The Treasury, David Gauke, has made the following statement regarding Human Rights:

"In my view the provisions of the Corporation Tax Act 2010 (Amendment) Order 2010 are compatible with the Convention rights".

7. Policy background

- ***What is being done and why***

7.1 This Order makes amendments to provisions of TCGA, CTA 2009 and CTA 2010. They are necessary as minor errors in the consequential amendments and transitional provisions contained within CTA 2010 inadvertently changed the law. The Order restores the law to its original position before CTA 2010.

The amendments that are contained in the Order take effect retrospectively from the date on which CTA 2010 came into force. Making the Order retrospective ensures that there will be no period of time during which the law could be said to be unclear and the general understood meaning of the provisions is therefore maintained.

- ***Consolidation***

7.2 Not applicable.

8. Consultation outcome

8.1 In the Third Reading Committee on 4 February 2010 the Financial Secretary to the Treasury gave an assurance that the power in section 1179 of CTA 2010 would not be used without the agreement of the Tax Law Rewrite Consultative and Steering Committees. These Committees continue in existence for this purpose despite the Tax Law Rewrite project having come to an end.

8.2 Papers explaining the reasons for the amendments made by this Order have been considered by those Committees and their agreement has been obtained to the exercise of this power.

9. Guidance

9.1 This Order does not impose new obligations. It returns the law to its original position before CTA 2010. No Guidance is therefore necessary.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this Order.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to introduce these amendments with retrospective effect, so that there is no uncertainty at any time about the effect of the rewritten legislation. This fulfils the aim of the Tax Law Rewrite project which was to make the legislation clearer and easier to use, without changing the law (apart from minor, identified changes).

11.3 The basis for the final decision on what action to take to assist small business is the consultation with the Tax Law Rewrite Consultative Committee. The membership of this committee includes representatives of a number of organisations and professional bodies which represent, or whose members' clients include, small businesses.

12. Monitoring and review

No monitoring or review is required as a result of this Order.

13. Contact

Benjamin Aldred at HM Revenue and Customs (Tel: 020 7147 2400 or e-mail: benjamin.aldred@hmrc.gsi.gov.uk) can answer any queries regarding the Order.