EXPLANATORY MEMORANDUM TO

THE DRAFT DOUBLE TAXATION RELIEF AND INTERNATIONAL TAX ENFORCEMENT (LUXEMBOURG) ORDER 2009

2009 No. [XXXX]

1. This explanatory memorandum has been prepared by HM REVENUE & 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

The Order brings into effect those arrangements specified in the Protocol set out in the Schedule to the Order.

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

None

4. Legislative context

4.1 General

The Order is made under section 788(1) of the Income and Corporation Taxes Act 1988 ("ICTA") (c. 1) and section 173(1) of the Finance Act ("FA") 2006 (c. 25). Section 788 was amended by section 88(1) of the Finance Act 2002 (c. 23) and extended by section 277 of the Taxation of Chargeable Gains Act 1992 (c. 12) and section 194 FA 1993.

Section 788 of ICTA provides the mechanism by which arrangements made with overseas territories for the purpose of affording relief from double taxation in relation to income tax, corporation tax and capital gains tax and taxes of a similar character in the other territory are given effect in the United Kingdom.

Section 173 of FA 2006 provides the mechanism by which arrangements relating to international tax enforcement have effect in the United Kingdom if Her Majesty, by Order in Council, specifies the arrangements and declares that it is expedient that they be given effect.

In accordance with section 788(10) of ICTA and section 173(7) of FA 2006, a draft of this Order is required to be laid before and approved by a resolution of the House of Commons prior to submission to Her Majesty in Council. Section 788(10) ICTA was substituted by section 176 of FA 2006.

4.2 EU legislation

This instrument does not implement EU legislation.

5. Territorial extent and application

This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Financial Secretary to the Treasury, Stephen Timms, has made the following statement regarding human rights:

'In my view the provisions of the Double Taxation Relief and International Tax Enforcement (Luxembourg) Order 2009 are compatible with the Convention rights'.

7. Policy background

7.1 The Protocol updates the exchange of information article in the 1967 double taxation convention between the United Kingdom and Luxembourg to bring it into line with the new international standard for exchange of information as set out in article 26 of the Model Tax Convention on Income and on Capital published by the Organisation for Economic Cooperation and Development. The substitution of a new article was made possible by the withdrawal by Luxembourg of its reservation against part of that article in the model convention. The main difference between the old article and the new article is that the new article contains for the first time the provisions in paragraphs 4 and 5 (for details, see below).

8. Consultation outcome

HMRC regularly consults with external stakeholders, including business representatives, about the effectiveness of existing arrangements for the avoidance of double taxation as well as new needs. The need for the exchange of information provisions contained in such arrangements to be updated was considered and acknowledged in the course of such consultation. The annual treaty negotiating programme is agreed with Ministers and published on the HMRC web site http://www.hmrc.gov.uk/si/dtc-2010.htm.

9. Guidance

General guidance on the operation of the UK's double taxation conventions can be found on the HMRC web site at http://www.hmrc.gov.uk/manuals/intmanual/INTM150000.htm. There is also more detailed guidance on the existing UK-Luxembourg Convention at http://www.hmrc.gov.uk/manuals/dtmanual/DT12250+.htm , which guidance will be updated.

10. Impact

10.1 None of the provisions of the Protocol affects the taxation of businesses, charities and voluntary bodies and the impact on these sectors is negligible.

10.2 There is no impact on the UK public sector. HMRC already operates the terms of many other very similar exchange of information articles currently found in tax information exchange agreements and double taxation conventions in force.

Impact on the Exchequer

The new article will only improve HMRC's ability to assess and collect the correct amount of tax owed by UK taxpayers and should therefore lead to an increase in revenue.

10.3 No impact assessment has been prepared for this instrument.

11. Regulating small business

None of the provisions of the Protocol affects the taxation of small business.

12 Monitoring & review

Both the UK Government and the Government of Luxembourg will keep the Protocol scheduled to the instrument under review to ensure that it meets the policy objectives set out above.

13. Contact

Douglas Rankin at HM Revenue & Customs (Tel: 020 7147 2696/Email: Douglas.Rankin@hmrc.gsi.gov.uk) can answer any queries regarding the instrument.

ANNEX

GENERAL

All of the United Kingdom's recent double taxation conventions largely follow the approach adopted in the OECD's *Model Tax Convention on Income and on Capital*. This Protocol continues that approach.

ARTICLE 1 – EXCHANGE OF INFORMATION

This article provides for the substitution of a new article XXVIII in the 1967 double taxation convention between the United Kingdom and Luxembourg. The substituted article contains rules governing the exchange of information between the states.

Paragraph 1 of the substituted article requires the competent authorities to exchange such information as is foreseeably relevant for carrying out the provisions of the Convention or of their domestic laws. The exchange of information is not restricted by Articles 1 and 2, which means that information concerning persons not resident in either state and information relevant to all taxes, not just those covered by the Convention, may be exchanged.

Paragraph 2 provides that information exchanged in accordance with paragraph 1 shall be treated as secret, although it may be disclosed to certain specified persons or authorities. Such information may be disclosed in public court proceedings or in judicial decisions.

Paragraph 3 imposes certain limitations on the exchange of information. Sub-paragraphs (a), (b) and (c) cannot impose an obligation on a contracting state to carry out administrative measures at variance with the laws and administrative practices of either state or to supply information which is not obtainable under the laws or in the normal course of the administration of either country or to supply information that would disclose any trade, business, industrial, commercial or professional secret or trade process, or information whose disclosure would be contrary to public policy.

Paragraph 4 provides that the country from which information is requested shall use its information gathering powers to obtain the requested information even though that state may have no domestic tax interest in that information. The obligation is subject to the limitations of paragraph 3 but a state cannot decline to supply information solely because it has no domestic tax interest in that information.

Paragraph 5 makes clear that paragraph 3 cannot be applied to permit a country to decline to supply information requested solely because the information is held by a financial institution or a nominee, or because it relates to ownership information.

ARTICLE 2 – ENTRY INTO FORCE

This article contains the provisions governing how and when the Protocol will enter into force and take effect.

Paragraph 1 provides that each state will notify the other through diplomatic channels of the completion of the necessary domestic legal procedures required to bring the Protocol into force.

Paragraph 2 provides that the Protocol shall enter into force on the date of the later of these notifications and shall have effect with regard to tax years beginning on or after January 1st next following the date of the entry into force.

EXCHANGE OF NOTES

The exchange of notes contained in Part II to the Schedule constitutes a formal agreement between the governments of both states, and clarifies the intended interpretation of the paragraphs of the Protocol referred to in the exchange of notes.