EXPLANATORY MEMORANDUM TO

THE ENACTMENT OF EXTRA-STATUTORY CONCESSIONS ORDER 2017

2017 No. [XXXX]

1. Introduction

1.1 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.

1.2 This memorandum contains information for the Select Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument gives legislative effect to extra statutory concessions (ESCs). The House of Lords' decision in *R v HM Commissioners of Inland Revenue ex p Wilkinson* [2005] UKHL 30 (the *Wilkinson* case) clarified the scope of HMRC's administrative discretion to make concessions that depart from the strict statutory position.

2.2 The Enactment of Extra-Statutory Concessions Order 2017 preserves the full tax effect of three ESCs.

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments

3.1 This Order is the seventh exercise of the power conferred by section 160 of the Finance Act 2008 (c. 9) (FA 2008). The last Order made under that power was the Enactment of Extra-Statutory Concessions Order 2014 SI 2014/211[1]. Further orders are planned. The definition of "existing HMRC concession" at section 160(3) FA 2008 refers to a statement made by the Commissioners for HMRC. This includes a statement made by either the Commissioners of Inland Revenue or the Commissioners of Customs and Excise in exercise of their respective functions before the passing of the Commissioners for Revenue and Customs Act 2005 (see section 5 of that Act), provided that statement continued to have effect at the passing of FA 2008.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

4.1 Section 160 of FA 2008[2] provides an enabling power which allows the tax treatment afforded by existing concessions to be legislated by Treasury order. This Order makes provision to ensure the effect of three ESCs is preserved.

[1] http://www.legislation.gov.uk/uksi/2014/211/contents/made

[2] http://www.legislation.gov.uk/ukpga/2008/9/section/160

4.2 Details of the individual ESCs and explanations can be found in the HMRC consultation documents referred to in paragraph 8. Details of the legislative changes that are being made by this instrument can be found in the explanatory note.

5. Extent and Territorial Application

5.1 The extent of this instrument is the United Kingdom.

5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

6.1 The Financial Secretary to the Treasury, Jane Ellison, has made the following statement regarding Human Rights:

"In my view the provisions of the Enactment of Extra-Statutory Concessions Order 2017 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 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 ESC refers to any statement made by the Commissioners of HMRC made before the passing of the FA 2008 on 21 July 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 ESCs described as such in the former Inland Revenue booklet IR1[3] and the former HM Customs and Excise booklet Notice 48[4], 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 clarified the scope of HMRC's administrative discretion to make concessions that depart from the strict statutory position.

7.3 In light of that decision, HMRC is reviewing its published concessions. Most ESCs can continue in their current form as they are within the scope of HMRC's administrative discretion. However, where an existing ESC exceeds the scope of that discretion, where it is appropriate to do so, its effect will be maintained by putting it on to a legislative basis. While the aim is to retain as many ESCs as possible, some may be withdrawn either because they are no longer required or because they do not fall within HMRC's administrative discretion and it is not possible to legislate for their effect.

8. Consultation outcome

8.1 The legislation in this Order has been subject to consultation. A consultation document, entitled *Extra statutory concessions: seventh technical consultation on*

[3] https://www.gov.uk/government/publications/extra-statutory-concessions-ex-inland-revenue
[4] Public Notice 48

draft legislation[5] was published on 2 October 2014, and covered the legislation at Articles 2 to 6 of this Order. A second consultation entitled *Extra statutory concessions – technical consultation on draft legislation*[6] was published on 4 November 2015, and covered the legislation at Articles 7 to 9 of the Order.

8.2 The purpose of the consultations was to seek views on whether the legislation accurately translated the effect of the ESCs concerned. HMRC received six responses to the first consultation and changes have been made to the legislation at Article 4 to reflect some of the points made regarding clarity of the definition of a 'participator'. A number of other suggestions to change particular words have not been adopted as they either do not conform to drafting practice or change the meaning of the provision. One respondent was concerned that the concessions would be withdrawn retrospectively, but HMRC has assured them that the concessions will remain in place until the legislation replacing them is enacted.

8.3 HMRC received 4 responses to the second consultation and changes have been made to the legislation at Articles 7 to 9 to ensure it captures the range of insolvency procedures in the UK, taking account of the differences between English and Scottish law, and to cover Northern Ireland procedures. Changes were also made to ensure limited liability partnerships are covered by the provisions and to remove members' voluntary liquidations from scope as these are solvent rather than insolvent liquidations. Respondents also asked for clarification around the application of the term "tax advantage" in relation to this legislation and this will be set out in HMRC guidance.

9. Guidance

9.1 Appropriate amendments will be made to existing guidance as mentioned above, but as this Order simply confirms existing treatment only minor changes are required.

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 A Tax Information and Impact Note has not been prepared for this Instrument as it contains no substantive changes to tax policy.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The legislation contained within this Order will be monitored and reviewed as appropriate within the context of the wider legislative schemes relating to the relevant tax regimes.

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[5] https://www.gov.uk/government/consultations/extra-statutory-concessions-seventh-technical-consultation-on-draft-legislation.

[6] https://www.gov.uk/government/consultations/extra-statutory-concessions-technical-consultation-on-draft-legislation

13. Contact

13.1 Joanna Were at HMRC Telephone: 03000 590559 or email: joanna.were@hmrc.gsi.gov.uk can answer any queries regarding the instrument.