EXPLANATORY MEMORANDUM TO

THE ENACTMENT OF EXTRA-STATUTORY CONCESSIONS ORDER 2018

2018 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 2018 preserves the tax effect of four 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 eighth 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 2017 SI 2017/495[1]. 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 four ESCs is preserved.

[1] http://www.legislation.gov.uk/uksi/2017/495/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 document 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, Mel Stride, has made the following statement regarding Human Rights:

"In my view the provisions of the Enactment of Extra-Statutory Concessions Order 2018 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: eighth technical consultation on draft*

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

legislation[5] was published on 14 September 2017, and covered the legislation included in this Order.

8.2 The purpose of the consultation was to seek views on whether the legislation accurately translated the effect of the ESCs concerned. HMRC received four responses and all were supportive of legislating the concessions. As a result of consultation changes have been made to the legislation at Article 2 to ensure the definition of 'relevant authority', for the purposes of compensation for financial loss of voluntary office-holders and volunteers, includes local medical committees, as well as companies that perform some or all of the functions of a relevant authority otherwise than for profit.

9. Guidance

9.1 Amendments will be made to existing guidance to cover various points raised in the consultation responses.

9.2 For the legislation covering the former concession EIM01120 (Articles 2 and 3 of this Order), the guidance will include examples of how to calculate 'lost employment income' and 'lost profits'.

9.3 For the legislation covering the former concessions ESCA37 and EIM03002 (Articles 4 to 6 of this Order) the guidance will define 'insubstantial' for the purposes of the legislation, and cover how the paying company will be notified as to whether this legislation applies, state that the director must hand over the fees to the company for the legislation to apply, and set out how the receiving entity accounts for the payment.

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.

11.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), no specific activity is proposed as this Order replicates reliefs previously available to taxpayers by concession, which are covered in HMRC guidance.

11.3 The basis for the final decision on what action to take to assist small businesses is that this legislation makes no changes to the process of claiming these reliefs.

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-escs-technical-consultation-on-draft-legislation

13. Contact

13.1 Stephanie Allistone HMRC (telephone: 03000 586496 or email: stephanie.allistone@hmrc.gsi.gov.uk) can answer any queries regarding the instrument.