EXPLANATORY MEMORANDUM TO

THE FINANCE ACT 2021 (MODIFICATION OF SECTION 26) (CORONAVIRUS) REGULATIONS 2022

2022 No. 275

1. Introduction

1.1 This explanatory memorandum has been prepared by Her Majesty's Revenue & Customs (HMRC) on behalf of Her Majesty's Treasury 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 measure extends the current income tax exemption to ensure that employees who are provided with or reimbursed for the cost of a relevant coronavirus diagnostic test by their employer, will not be liable to an income tax charge. The exemption will have effect for the 2022-23 tax year.

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments

3.1 Section 26 of the Finance Act 2021 (FA 2021) exempted employer-provided and employer-reimbursed coronavirus diagnostic tests from income tax for the tax years and 2021-22. Section 26(5) conferred on the Treasury the power to provide that the exemption would apply to such subsequent tax years as may be specified in regulations. This instrument is made in the first exercise of that power. It is a negative procedure instrument. The parliamentary procedure for this instrument is contained in section 1014 of the Income Tax Act 2007, which applies to all regulation-making powers under the Income Tax Acts. The Interpretation Act 1978 defines "the Income Tax Acts" as being all enactments relating to income tax, which includes section 26 of FA 2021.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

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

5. European Convention on Human Rights

5.1 The Rt Hon Lucy Frazer QC MP, Financial Secretary to the Treasury, has made the following statement regarding Human Rights:

"In my view, the provisions of the Finance Act 2021 (Modification of Section 26) (Coronavirus) Regulations 2022 are compatible with the Convention rights"

6. Legislative background

6.1 A coronavirus diagnostic test referred to throughout includes a test which can detect the presence of a viral antigen or viral ribonucleic acid (RNA) specific to severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) and cannot be an antibody test.

6.2 There are two ways in which an employee can receive a coronavirus diagnostic test in relation to their employment:

- employer-provided coronavirus diagnostic tests - where the employer provides a coronavirus diagnostic test to an employee, so that they don't have to purchase their own; and
- employer-reimbursed coronavirus diagnostic tests - where the employee purchases their own test, and the employer reimburses the employee for the cost of the test.

6.3 Under general rules, employer provided coronavirus diagnostic tests are taxable as a Benefit In Kind (BiK). This means that employees are subject to income tax on the cash equivalent of the employer-provided coronavirus test, and employers are subject to Class 1A National Insurance contributions (NICs).

6.4 Employer reimbursed coronavirus diagnostic tests are subject to income tax and Class 1 NICs for both employers and employees.

6.5 On 8 December 2020, the Government introduced an income tax exemption and NICs disregard for employer-provided coronavirus diagnostic tests for the 2020-21 tax year.

6.6 The exemption was done by way of regulations (The Income Tax (Exemption of Minor Benefits) (Coronavirus) Regulations 2020 (SI 2020/1293)) under the powers in section 210 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003) to exempt minor benefits from a charge to income tax. As the NICs position follows the income tax position, the income tax regulations were effective in disregarding the Class 1A NICs liability on employers.

6.7 On 25 January 2021, the Government introduced an income tax exemption and NICs disregard for employer-reimbursed coronavirus diagnostic tests for the 2020-21 tax year.

6.8 As the Treasury may only use regulations under section 210 ITEPA 2003 to exempt minor benefits from income tax, those powers could not be used to exempt employer-reimbursed coronavirus diagnostic tests from income tax. Therefore, the income tax exemption on employer-reimbursed coronavirus diagnostic tests was introduced via section 26 of the Finance Act 2021. Separate regulations (the Social Security Contributions (Disregarded Payments) (Coronavirus) (No. 2) Regulations 2020 (SI 2020/1523)) were introduced to disregard the NICs liability on employers and employees.

6.9 The income tax exemption for both employer-provided, and employer-reimbursed coronavirus diagnostic tests were then extended into the 2021-22 tax year under section 26 of the Finance Act 2021.

6.10 Section 26(5) of FA 2021 conferred on the Treasury a power to extend the exemption for both employer-provided, and employer-reimbursed coronavirus diagnostic tests for subsequent tax years by regulations.

7. Policy background

7.1 The Government has decided to extend the income tax exemption and NICs disregard on both employer-provided, and employer-reimbursed coronavirus diagnostic tests into the 2022-23 tax year.

7.2 This measure extends the income tax exemption on both employer-provided and employer-reimbursed coronavirus diagnostic tests. The NICs disregard is dealt with via separate regulations. Please see the Social Security Contributions (Disregarded Payments) (Coronavirus) Regulations 2022 (SI 2022/276).

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 There are no plans to consolidate ITEPA 2003.

10. Consultation outcome

10.1 No consultation has been held.

11. Guidance

11.1 Guidance can be found on the following gov.uk website: https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim21683

12. Impact

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

12.2 There is no significant, impact on the public sector.

12.3 A Tax Information and Impact Note covering this instrument will be published on the website at https://www.gov.uk/government/collections/tax-information-and-impact-notes-tiins.

13. Regulating small business

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

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 The basis for the final decision on what action to take to assist small businesses is that this measure is designed to reduce regulatory burdens by ensuring that businesses are no longer required to report a BiK on employer-provided coronavirus diagnostic tests or pay Income Tax on employer-reimbursed coronavirus diagnostic tests.

14. Monitoring & review

14.1 This instrument will be monitored and reviewed as appropriate through communication with affected taxpayer groups.

14.2 This regulation does not include a statutory review clause because of an exemption for tax provisions in section 28(3)(a) of the Small Business, Enterprise and Employment Act 2015.

15. Contact

15.1 Nicholl Lynch, policy lead at HMRC. Telephone: 03000 583032 or email: employmentincome.policy@hmrc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Jackie McGeehan, Deputy Director, Income Tax Policy at HMRC, can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt Hon Lucy Frazer QC MP, Financial Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.