EXPLANATORY MEMORANDUM TO

THE ENACTMENT OF EXTRA-STATUTORY CONCESSIONS ORDER 2011

2011 No. 1037

THE INSURANCE PREMIUM TAX (DISCOUNTED INSURANCE PREMIUMS: HIGHER RATE) ORDER 2011

2011 No. 661

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

2. Purpose of the instrument

2.1 These instruments give 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. The Enactment of Extra-Statutory Concessions Order 2011 ("the ESC Order") preserves the tax effect of seven ESCs by putting them on a statutory footing. The Insurance Premium Tax (Discounted Insurance Premiums: Higher Rate) Order 2011 ("the IPT Order") legislation has the same effect for ESC 4.5 'Insurance premium tax: Arrangements for discounted insurance'.

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

3.1 The ESC Order is the third exercise of the power conferred by section 160 of the Finance Act 2008 (c. 9) ("FA 2008") which provides that legislative effect may be given to existing HMRC concessions. The last order made under that power was the Enactment of Extra-Statutory Concessions Order 2010 SI 2010/157[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 Her Majesty's Revenue and Customs. 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 the FA 2008.

3.2 Articles 2 to 5 of the ESC Order enact the ESC known as Equitable Liability. In addition to Tax Bulletin 18 which is referred to in the consultation document in respect of this ESC (see paragraph 8), further relevant "statements" within the meaning of section 160(3) FA 2008 have been made by HMRC concerning this ESC. These include HMRC's

[1] http://www.legislation.gov.uk/uksi/2010/157/resources/made

published guidance which can be found in the Insolvency Manual[2]. This refers to the advice given to insolvency practitioners in conjunction with the Insolvency Service in the form of "Dear IP" letter 27 of 1993[3]. Taken together, these statements demonstrate two relevant matters. First, in applying the ESC, HMRC exercised discretion both in determining whether in the particular circumstances of the case it would be unconscionable to recover the tax and in allowing relief in cases in which tax affairs had not been fully brought up to date, particularly in insolvency cases, as is reflected in the provisions inserted by articles 2 and 3. Secondly and more broadly, HMRC would grant relief whenever the conditions for that relief were met or, taking account of the foregoing point, they were met to HMRC's satisfaction, such that the concession itself comes within the terms of section 160(1) FA 2008.

4. Legislative Context

4.1 Section 160 FA 2008 provides an enabling power which allows the tax treatment afforded by existing concessions to be legislated by Treasury order. The ESC Order, which enacts seven existing ESCs, is made under those vires. The IPT Order deals solely with ESC 4.5 Insurance Premium Tax: arrangements for discounted insurance, and is made under the vires at section 51A(3) of the Finance Act 1994.

4.2 As these instruments give effect to existing HMRC ESCs and are to be laid before the House of Commons together, these instruments share an explanatory memorandum.

4.3 Details of the individual ESCs and explanations can be found in the HMRC consultation documents which are referred to in paragraph 8. Details of the legislative changes that have been made by these instruments can be found in the explanatory note which accompanies each instrument.

5. Territorial Extent and Application

5.1 These instruments apply to all of the United Kingdom.

6. European Convention on Human Rights

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

In my view the provisions of the Enactment of Extra-Statutory Concessions Order 2011 and the Insurance Premium Tax (Discounted Insurance Premiums: Higher Rate) Order 2011 are compatible with the Convention rights.

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[2] http://www.hmrc.gov.uk/manuals/insmanual/INS9351.htm

[3] http://www.hmrc.gov.uk/manuals/insmanual/INS9352.htm

7. Policy background

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

7.1 Extra-statutory Concessions ("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 "extra-statutory concession" refers to any statement made by the Commissioners of HMRC made before the passing of the Finance Act 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 extra-statutory concessions described as such in the former Inland Revenue booklet "Extra Statutory Concessions" and the former HM Customs and Excise booklet Notice 48, 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. The indications are that most ESCs will be able to continue in their current form as they are within the scope of HMRC's administrative discretion. Where an existing ESC exceeds the scope of the HMRC's administrative discretion, as clarified in the *Wilkinson* judgment, the effect of the ESC may be maintained by legislating to retain its effect using the specific power at section 160 FA 2008.

- ***Consolidation***

7.4 Not applicable.

8. Consultation outcome

8.1 All of the legislation in these Orders has been subject to consultation. The draft legislation for the ESC known as Equitable Liability was consulted upon in a consultation document entitled 'Consultation on draft legislation for Equitable Liability concession'[4] which was published on 12 July 2010. All but one of the remaining ESCs (including the ESC to which the IPT Order relates) were consulted upon in a separate consultation, entitled 'Extra statutory concessions: third technical consultation on draft legislation'[5] which was published on 9 December 2009.

8.2 Draft legislation for ESC B47 'Furnished lettings of dwelling houses - wear and tear of furniture, was included in an earlier consultation on ESCs[6] published on 15 July 2009.

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[4] Consultation on draft legislation for Equitable Liability concession

[5] Extra statutory concessions: third technical consultation on draft legislation

[6] http://www.hmrc.gov.uk/consultations/index.htm

8.3 The purpose of these consultations was to seek views on whether the legislation accurately translated the effect of the ESCs. Representative tax and accountancy bodies were consulted, as were representative bodies from the particular sectors affected.

8.4 Comments made regarding the draft legislation published in respect of ESC B47 prompted significant reconsideration and revised legislation is now included in the ESC Order. One change made ensures that the normal claims procedure will apply to the election for the allowance which will mean that it can be made outside of a return where the taxpayer is not required to make a return. Respondents also commented that the consultation draft did not permit apportionment and the revised legislation addresses this point. In addition only the person responsible for making the furnished letting eligible for the allowance can make the wear and tear allowance election in the revised legislation.

8.5 Some changes have also been made to the legislation giving effect to the Equitable Liability ESC as a result of the consultation, for example, to enable taxpayers to make more than one claim for relief. A number of respondents suggested that, notwithstanding the more limited scope of the ESC, the scope of the relief should be extended to all taxes; however, the statutory relief is restricted to those taxpayers in receipt of a determination under self assessment.

8.6 A more detailed response to matters raised during the December 2009 and July 2010 consultation exercises is set out in the Consultation Response Document published on the HMRC website on 7th March 2011.

9. Guidance

9.1 The instruments confirm existing treatment and so for all but one of the concessions no further guidance is required. It will be necessary to update existing HMRC guidance on the Equitable Liability concession to reflect the new rules for relief. This guidance will be available on the HMRC website prior to the enactment of the Extra Statutory Concessions Order 2011.

10. Impact

10.1 Impact assessments have not been prepared for these instruments because no impact on business, charities, voluntary bodies or the public sector is foreseen. The instruments simply put existing ESCs on a statutory footing and there is no change to the tax effect.

11. Regulating small business

11.1 The legislation may apply to small business but a Small Firms Impact Test has not been undertaken because the legislation does not alter the existing tax effect.

12. Monitoring & review

12.1 Monitoring and review is not required as the instruments confirm existing treatment.

13. Contact

Emma Cartledge at HMRC, telephone 020 7147 2417 or email: tap@hmrc.gsi.gov.uk can answer any queries regarding the instrument.