EXPLANATORY MEMORANDUM TO THE NATIONAL INSURANCE CONTRIBUTIONS (APPLICATION OF PART 7 OF THE FINANCE ACT 2004) (AMENDMENT) REGULATIONS 2009

2009 No. 208

1. This explanatory memorandum has been by prepared HM Revenue and Customs (HMRC) and is laid before Parliament by Command of Her Majesty.

2. Purpose of Instrument

2.1.1 The Regulations make amendments to provisions in the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007 ("the principal regulations") relating to tax tribunals, bringing them in line with changes made to other legislation by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56).

2.1.2 In particular they amend references to the Special Commissioners, to transfer the Special Commissioners functions to the tribunal constituted under section 3 of the Tribunals, Courts and Enforcement Act 2007 ('the TCEA').

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

None.

4. Legislative background

Tribunal Reform

4.1.1 The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 made legislative changes to transfer the functions of the four existing tax tribunals to the tribunals established under the TCEA, abolished existing tax tribunals (in particular the Special Commissioners) and consequentially amended tax and other enactments.

4.1.2 The National Insurance Contributions (Application of Part 7 of the Finance Act 2004) (Amendment) Regulations 2009 ('the 2009 amendment regulations') make the necessary changes to the principal regulations, which were not amended by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.

Income Tax

4.1.1 Part 7 of Finance Act 2004 (sections 306 – 319) provides for the notification to HMRC of certain tax arrangements and proposals for those arrangements ("schemes").

4.1.2 Finance Act 2007 introduced powers for HMRC to investigate non-compliance by promoters with the duty to notify schemes. HMRC may by notice require promoters to explain why a scheme is not notifiable and may apply to the Special Commissioners for orders to provide further information, or for orders that a scheme is or is to be treated as notifiable. Penalties are

increased where non-compliance continues after a notifiability order has been made.

National Insurance Contributions

4.2.1 Section 7 of the National Insurance Act 2006 inserted section 132A in the Social Security Administration Act 1992.

4.2.2 Section 132A provides that the Treasury may by regulation make provisions requiring, or relating to, the disclosure of information in relation to National Insurance Contributions ("NICs") schemes.

4.2.3 The only provisions which may be made under section 132A are provisions corresponding to or applying, with or without modification, tax provisions requiring, or relating to, the disclosure of information in relation to income tax avoidance arrangements.

4.2.4 The principal regulations corresponded to and applied the tax provisions as they stood in May 2007, and the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) (Amendment) Regulations 2008 (SI 2008/2678) ('the 2008 amendment regulations') amended the principal regulations in respect of changes made to the tax regime in Finance Acts and secondary legislation in 2007 and 2008, including the Special Commissioners' order-making functions mentioned above.

EU legislation

4.3.1 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

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The TCEA received Royal Assent on 19 July 2007. It provides for a new judicial and legal framework for appeal tribunals with a clearly independent judiciary under a Senior President, and creates a single two-tier national tribunal structure.

7.2 The new tribunal will be sub-divided into Chambers, both in the First-tier and Upper Tribunal. There will be a Chamber in the First-tier that will consider most first instance appeals, applications and other matters relating to tax, duties and NICs. A small number of cases involving complex legal argument may exceptionally be heard by the Upper Tribunal at first instance.

7.3 The policy intention behind the TCEA 2007 is to provide a better quality service through the development of more coherent and consistent procedures across tribunals. This will also support more flexibility in the deployment of existing judiciary and improved judicial career paths. The new tax chamber will operate with one set of rules for all regimes. The tribunals will be manifestly independent of decision-making Government departments.

7.4 The functions of the existing tax tribunals will transfer into the new tribunal structure on 1 April 2009.

8. Consultation outcome

8.1 The Ministry of Justice issued a consultation document 'Transforming Tribunals – Implementing Part 1 of the Tribunals, Court and Enforcement Act 2007' on 28 November 2007: the Government's response was published on 19 May 2008. Consultation responses supported a new unified Tax Chamber, with cases heard by a unified professional judiciary and administrative support provided by the Tribunals Service.

8.2 The Tribunal Procedure Committee commenced consultation on tribunal procedure rules for the First-tier Tax Chamber and the rules for tax in the Upper Tribunal on 20 August 2008: the consultation closed on 12 November.

9. Guidance

HMRC and Tribunals Service guidance products, for both staff and customers, are in preparation and will be available, as needed, before 1 April 2009.

10. Impact

No additional Impact Assessment has been prepared in respect of this instrument. Full impact assessments of the effect that the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 will have on the costs of business and the voluntary sector are available at http://www.hmrc.gov.uk/ria/index.htm and http://www.financeandtaxtribunals.gov.uk/taxAppealsModernisation.htm. These are attached to the Explanatory Memorandum for that instrument, which is available alongside the instrument on the OPSI website.

11. Regulating small business

11.1 The changes apply to small business.

11.2 The Explanatory Memorandum to the principal regulations explained that it was not appropriate to exempt small business for the following reasons;

- revenue protection: small businesses may promote avoidance schemes where the tax at risk is significant and disproportionate to the size of the promoter;
- fairness: avoidance puts compliant businesses, large and small, at a disadvantage and distorts competition.

11.3 Under the principal regulations as amended by the 2008 amendment regulations, the Commissioners for Revenue and Customs may make applications in respect of certain orders to the Special Commissioners. This is a safeguard for business. The 2009 amendment regulations update this to take account of tribunal reform. It would therefore be inappropriate to exclude small business from these regulations.

12. Monitoring and review

Implementation will be closely monitored. MoJ expect to assess data gathered after the first year of operation.

13. Contacts

Helen Latham at Her Majesty's Revenue and Customs can answer any queries regarding the changes in these Regulations.

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ANNEXE

GENERAL

Overview of the Regulations

These Regulations make amendments related to the abolition of the Special Commissioners and the transfer of their functions to the new tribunal.

NOTES ON DETAIL

Citation and Commencement

REGULATION 1

This regulation sets out the name of the instrument and provides for it to come into force on 1 April 2009.

Amendments to the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007

REGULATION 2

This regulation provides for the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007 to be amended as described in regulation 3.

REGULATION 3

Regulation 3(1) provides that in regulation 2 of the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007 a definition of tribunal be substituted for the definition of Special Commissioners. The definition of tribunal is the same definition as that inserted into other relevant legislation by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.

Regulation 3(2) omits entries in the table in regulation 4(2), to reflect the repeal of section 317A of FA 2004 by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.

Regulation 3(3) to 3(6) provide that the references to the Special Commissioners which occur in regulations 5A(1) and (3), 7A(2) and (3), 12B(1), 12C(1) and (3), are substituted with references to the tribunal.

Regulation 3(7) provides that regulation 13A (Special Commissioners procedure) be omitted. Regulation 13A applies sections 56B – D of the Taxes Management Act 1970. The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 omits these sections as it does other matters which are proper to the Tribunal Procedural Rules.

Regulation 3(8) omits regulation 15(3), which is no longer required.