EXPLANATORY MEMORANDUM TO

THE TAXATION (INTERNATIONAL AND OTHER PROVISIONS) ACT 2010 (AMENDMENT) ORDER 2010

2010 No. 2901

1. This explanatory memorandum has been prepared by the Commissioners for Her Majesty's Revenue and Customs 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

The purpose of this Order is to restore the law to its original position before the Taxation (International and Other Provisions) Act 2010 ("TIOPA"). The Order corrects minor errors concerning one provision of the Taxation of Chargeable Gains Act 1992 ("TCGA") and three provisions of TIOPA and makes a consequential amendment to the Income Tax (Trading and Other Income Act) 2005 ("ITTOIA").

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

The amendments that are contained in the Order take effect retrospectively from the date on which TIOPA came into force. The authority for this is contained in sections 375(4) and 376(4) of TIOPA.

4. Legislative Context

4.1 The Tax Law Rewrite project was established in 1996 and came to an end on 31 March 2010. TIOPA was the project's seventh (and final) Act. The project's aim was to rewrite the United Kingdom's primary direct tax legislation to make it clearer and easier to use, without changing the law (apart from minor identified changes).

4.2 Following, rewriting the legislation to TIOPA a number of errors and a consequential amendment have been identified. As a result, this Order makes amendments to provisions in TCGA, ITTOIA and TIOPA. This is the first time these powers have been used.

Section 151T of TCGA

4.3 New section 151T of TCGA rewrites section 48B(4) of the Finance Act 2005 ("FA 2005"). Sections 48A and 48B of FA 2005 formed a continuous single story about alternative finance investment bonds. Section 48B(4) of FA 2005 used the phrases "the capital", "the redemption payment", "the additional payments" and "the bond assets". Those phrases were given a particular meaning by section 48A

of FA 2005. Those phrases, and other phrases that were given a particular meaning by section 48A of FA 2005, were also used in provisions of section 48B of FA 2005 other than subsection (4) of that section.

4.4 Section 48B of FA 2005 did not say expressly that those phrases, where used in that section, had the meaning given by section 48A of FA 2005. Despite that, it was clear from the context that those phrases, where used in section 48B of FA 2005, did have the meaning given by section 48A of 2005. This is recognised by the new sections rewriting some of the provisions of section 48B of FA 2005.

4.5 For example, section 48B(1) of FA 2005 is rewritten for capital gains tax purposes by the new section 151S(3) of TCGA inserted by paragraph 39 of Schedule 2 to TIOPA. Section 48B(1) of FA 2005 used the phrase "the additional payments" that was given a particular meaning by section 48A(1) of FA 2005. New section 151S(4) of TCGA states expressly that the reference to "additional payments" in new section 151S(3) of TCGA has the meaning given by new section 151N of TCGA (which rewrites section 48A(1) and (2) of FA 2005 for capital gains tax purposes and is inserted by paragraph 34 of Schedule 2 to TIOPA).

4.6 Similarly, in new sections 151U and 151V of TCGA (which rewrite section 48B(2) and (3) of FA 2005 for capital gains tax purposes and are inserted by paragraphs 41 and 42 of Schedule 2 to TIOPA), sections 151U(7) and 151V(3) also expressly apply meanings given by new section 151N of TCGA.

4.7 Accordingly, although section 48B(4) of FA 2005 got the benefit of the particular meanings given by section 48A of FA 2005 without them being expressly applied, it is less clear that the meanings given by new section 151N of TCGA carry through into new section 151T of TCGA. Although it seems likely that those meanings do carry through, the amendment made in section 151T of TCGA is intended to put this beyond doubt.

Section 832A(6) of ITTOIA

4.8 Section 832A(6) of ITTOIA defines "double taxation relief arrangements" by reference to section 788 of the Income and Corporation Taxes Act 1988 ("ICTA")." This section has now been rewritten and repealed by TIOPA.

4.9 Users of the legislation are likely to find the reference to section 788 of ICTA confusing, since that provision is no longer on the statute book. Accordingly, this Order updates the reference. As amended, section 832A(6) of ITTOIA will refer to section 2(1) of TIOPA. The amendment to section 832A(6) of ITTOIA makes no substantive change to the law as paragraph 5 of Schedule 9 to TIOPA (transitionals and savings etc: general provisions) ensures that the statutory reference carries over to the rewritten legislation.

Sections 59(6)(b) and 62(5)(b) of TIOPA

4.10 Sections 57 to 62 of TIOPA rewrite section 799 of ICTA. When section 799 of ICTA was rewritten, it became apparent that it existed as two parallel versions.

4.11 One version, broadly speaking the section as amended by the Finance Act 2000 ("FA 2000") and the Finance Act 2001 ("FA 2001"), applied in relation to dividends paid by a company resident outside the United Kingdom to a company resident in the United Kingdom (see paragraphs 8(5) and 9(3) of Schedule 30 to FA 2000 and paragraph 2(4) of Schedule 27 to FA 2001). That version was taken forward by section 57(2)(a), and sections 58 to 60, of TIOPA.

4.12 The other version, broadly speaking the section without the amendments made by FA 2000 and FA 2001, applied in relation to other dividends. That version was taken forward by section 57(2)(b), and sections 61 and 62, of TIOPA.

4.13 Section 799(4) of ICTA was common to both versions of section 799 of ICTA. It qualified the meaning of "relevant profits" in the earlier provisions of the section. In particular, it contained a rule to the effect that "relevant profits" did not include profits previously treated as relevant profits for the purposes of section 799 of ICTA.

4.14 Accordingly, in rewriting section 799(4) of ICTA, the reference to profits previously treated as relevant profits for the purposes of section 799 of ICTA should have been rewritten so as to include a reference to profits previously treated as relevant profits for the purposes of the rewrite of either version of that section.

Section 210 of TIOPA

4.15 Section 210 of TIOPA rewrites section 110(1) to (3) of the Finance Act 1998 ("FA 1998"). Section 110(1) to (3) of FA 1998 related to determinations requiring the Board's sanction. The definition of "determination requiring the Board's sanction" was to be found in section 110(4)(a) and (5) to (7) of FA 1998. That definition had two limbs: the basic definition in section 110(4)(a) of FA 1998; and the exception provided for by section 110(5) to (7) of FA 1998.

4.16 In sections 208 to 210 of TIOPA, the subject-matter of the basic definition in section 110(4)(a) of FA 1998 is referred to as a "transfer-pricing determination" and is defined in section 208(2) of TIOPA. But the definition in section 208(2) of TIOPA is only for the purposes of section 208(1) of TIOPA.

4.17 Accordingly, section 209(6) of TIOPA provides that, in section 209 of TIOPA, "transfer-pricing determination" has the meaning given by section 208(2) of TIOPA. Section 210 of TIOPA does not similarly define "transfer-pricing determination" as used in section 210 of TIOPA even though "transfer-pricing determination", as used in

section 210 of TIOPA, likewise rewrites references in section 110(1) to (3) of FA 1998 to the concept defined by section 110(4)(a) of FA 1998.

4.18 Although it seems likely that "transfer-pricing determination" in section 210 of TIOPA would be given the same meaning as in sections 208(1) and 209 of TIOPA, the amendment made in section 210 of TIOPA is intended to put this beyond argument.

5. Territorial Extent and Application

The Order applies to all of the United Kingdom.

6. European Convention on Human Rights

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

"In my view the provisions of the Taxation (International and Other Provisions) Act 2010 (Amendment) Order 2010 are compatible with the Convention rights".

7. Policy background

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

7.1 This Order makes amendments to provisions of TCGA, ITTOIA and TIOPA. They are necessary as minor errors contained within TIOPA inadvertently changed the law. The Order restores the law to its original position before TIOPA and in relation to the consequential amendment to ITTOIA clarifies the position.

The amendments that are contained in the Order take effect retrospectively from the date on which TIOPA came into force. Making the Order retrospective ensures that there will be no period of time during which the law is unclear and the general understood meaning of the provisions is therefore maintained.

- ***Consolidation***

7.2 Not applicable.

8. Consultation outcome

8.1 In the Second Reading Committee on 15 December 2009 the Financial Secretary to the Treasury gave an assurance that the powers in sections 375 and 376 of TIOPA would not be used without the agreement of the Tax Law Rewrite Consultative and Steering Committees. These Committees continue in existence for this purpose despite the Tax Law Rewrite project having come to an end.

8.2 Papers explaining the reasons for the amendments made by this Order have been considered by those Committees and their agreement has been obtained to the exercise of these powers.

9. Guidance

This Order does not impose new obligations. It returns the law to its original position before TIOPA. No Guidance is therefore necessary.

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 An Impact Assessment has not been prepared for this Order.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to introduce these amendments with retrospective effect, so that there is no uncertainty at any time about the effect of the rewritten legislation. This fulfils the aim of the Tax Law Rewrite project which was to make the legislation clearer and easier to use, without changing the law (apart from minor, identified changes).

11.3 The basis for the final decision on what action to take to assist small business is the consultation with the Tax Law Rewrite Consultative Committee. The membership of this committee includes representatives of a number of organisations and professional bodies which represent, or whose members' clients include, small businesses.

12. Monitoring and review

No monitoring or review is required as a result of this Order.

13. Contact

Benjamin Aldred at HM Revenue and Customs (Tel: 020 7147 2400 or e-mail: benjamin.aldred@hmrc.gsi.gov.uk) can answer any queries regarding the Order.