

EXPLANATORY MEMORANDUM TO
THE ENACTMENT OF EXTRA-STATUTORY CONCESSIONS ORDER 2012

2012 No. 266

AND

THE VALUE ADDED TAX (LAND EXEMPTION) ORDER 2012

2012 No. 58

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 instruments**
 - 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.
 - 2.2 The Enactment of Extra-Statutory Concessions Order 2012 (“the ESC Order”) preserves the tax effect of six ESCs by putting them on a statutory footing. The Value Added Tax (Land Exemption) Order 2012 (“the VAT Order”) has the same effect for an additional ESC.
3. **Matters of special interest to the Select Committee on Statutory Instruments**
 - 3.1 The ESC Order is the fourth 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 2011 SI 2011/1037¹. 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 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.
 - 3.2 The predominant effect of the VAT Order is to put an existing ESC that provides for VAT exemption for the supply of seasonal caravan pitches used for residential as opposed to holiday purposes on a statutory footing. However, following the High Court decision in *HMRC v Tallington Lakes*

¹ <http://www.legislation.gov.uk/ukdsi/2011/9780111508053/contents>

[2007] EWHC (Ch) 1955, it also clarifies the law to ensure that supplies of some pitches which are used as holiday pitches do not benefit from VAT exemption due to the non-enforcement of planning conditions. As this could have the effect of removing some supplies from the exemption, the VAT Order is subject to the affirmative procedure in accordance with section 97(4)(c)(iii) of the Value Added Tax Act 1994 (“VATA”).

4. Legislative Context

4.1 Section 160 of 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 six existing ESCs, is made under those powers. The VAT Order which deals solely with seasonal pitches for caravans is made under the powers at section 31(2) of VATA.

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 referred to in paragraph 8. Details of the legislative changes that are being 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

6.1 David Gauke, 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 2012 and the Value Added Tax (Land Exemption) Order 2012 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

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 each of 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. 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.

- ***Consolidation***

Not applicable.

8. Consultation outcome

8.1 The legislation in these two Orders has been subject to consultation. The consultation document, entitled *'Extra statutory concessions: fourth technical consultation on draft legislation'*² was published on 13 December 2010.

8.2 The purpose of this consultation was to seek views on whether the legislation accurately translated the effect of the ESCs concerned. The major tax and accountancy bodies were consulted, as were representative bodies from the particular sectors affected.

8.3 As a result of the consultation, some amendments were made to each of the Orders. For example, in line with consultation responses, the VAT Order now deals specifically with employees of site operators living on pitches on holiday sites. In addition; in the legislation relating to ESC C16 within the ESC Order, the monetary limit which is being introduced for anti-avoidance reasons in relation to distributions which may be treated as the equivalent of a distribution in a formal winding up has been increased.

8.4 A full response to the comments received during the December 2010 consultation exercise is set out in the formal response document "Extra Statutory Concessions - fourth technical consultation on draft legislation: Summary of Responses" published on the HMRC website on 6 December 2011.

² [Extra Statutory Concessions](#)

9. Guidance

9.1 Appropriate amendments will be made to existing guidance but as the ESC Order in most cases simply confirms existing treatment only minor changes are generally required.

9.2 The amendments to Note (14) (definition of a seasonal pitch) to Group 1 (land) of Schedule 9 (exemptions) to VATA, as detailed in paragraph 3.2, are intended to limit the exclusion from exemption to the provision of seasonal caravan pitches which are not used for residential use. As such, new guidance will be prepared to explain the changes.

10. Impact

10.1 In line with government commitments, a Tax Information and Impact Note has not been prepared for the majority of the legislation enacting ESCs in the ESC Order as there has been no change in policy. This instrument simply puts a number of existing ESCs on a statutory footing and there is no change to the tax, administrative or other impacts.

10.2 The exception is a Tax Information and Impact Note for ESC C16, which forms part of the ESC Order, which was published on the HMRC website at <http://www.hmrc.gov.uk/tiin/autumn-dec11.htm> on 6 December 2011. As detailed at paragraph 8.3, the legislation enacting ESC C16 narrows the category of distributions which are to be treated as equivalent to distributions following a formal winding up by imposing a monetary limit for anti avoidance reasons.

10.3 In addition a Tax Information and Impact Note covering the VAT Order was also published on the HMRC website at <http://www.hmrc.gov.uk/tiin/autumn-dec11.htm> on 6 December 2011. As detailed at paragraph 3.2, the VAT Order is not confined to putting an existing ESC on a statutory footing, there may be changes to the tax effect for a minority of businesses.

11. Regulating small business

11.1 The legislation may apply to small business but a Small Firms Impact Test has not been undertaken on the ESC Order because the legislation does not alter the existing tax effect. The monetary limit in the legislation enacting ESC C16 has been set at a level higher than the cost of winding up a small business with straightforward affairs. It is expected that distributions made by small businesses on cessation of business will usually come within this limit.

11.2 A Small Firms Impact Test has been undertaken on the VAT Order because the legislation may alter the tax effect for a minority of businesses, some of which will be small firms. The outcome will be explained in the Tax Information and Impact Note (see paragraph 10.2).

12. Monitoring & review

12.1 The legislation contained within the ESC Order will be monitored and reviewed as appropriate within the context of the wider legislative schemes relating to the relevant tax regimes.

12.2 The VAT Order may be kept under review through communication with the taxpayer groups it affects.

13. Contact

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