

EXPLANATORY MEMORANDUM

THE DOUBLE TAXATION RELIEF AND INTERNATIONAL TAX ENFORCEMENT (GUERNSEY) ORDER 2009

2009 No. 3011

1. This explanatory memorandum has been prepared by the Commissioners for 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 The Order gives domestic legislative effect to an amending Arrangement to the 1952 Arrangement between the Government of the UK and the States of Guernsey relating to the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; and to a Tax Information Exchange Agreement between the two Governments, both set out in the Schedule to the Order and summarised in the attached Annex.

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

3.1 Type of resolution

The Order is subject to the affirmative resolution procedure.

3.2 Details of the Agreement

Further details of the Agreement and Arrangement scheduled to the Order are annexed to this memorandum.

4. Legislative Context

4.1 General

The Order is made under section 788(1) of the Income and Corporation Taxes Act ("ICTA") 1988 (c. 1) and section 173(1) of the Finance Act ("FA") 2006 (c. 25). Section 788 was amended by section 88(1) of the Finance Act 2002 (c. 23) and extended by section 277 of the Taxation of Chargeable Gains Act 1992 (c. 12).

Section 788 of ICTA 1988 provides the mechanism by which arrangements made with overseas territories for the purpose of affording relief from double taxation in relation to income tax, corporation tax and capital gains tax and taxes of a similar character in the other territory are given effect in the United Kingdom.

Section 173 of FA 2006 provides the mechanism by which arrangements may include provisions about, amongst other things, the exchange of information foreseeably relevant to the administration, enforcement or recovery of any tax or duty.

The relevant arrangements are scheduled to the Order. They are thus given domestic legislative effect.

In accordance with section 788(10) of ICTA 1988 and section 173(7) of FA 2006, a draft of this Order is required to be laid before and approved by a resolution of the House of Commons prior to submission to Her Majesty in Council. Section 788(10) of ICTA was substituted by section 176 of FA 2006.

4.2 EU Legislation

This instrument does not implement EU legislation.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Financial Secretary, Stephen Timms, has made the following statement regarding Human Rights:

In my view the provisions of the Double Taxation Relief and International Tax Enforcement (Guernsey) Order 2009 are compatible with the Convention rights.

7. Policy background

7.1 Tax Information Exchange Agreements facilitate the exchange of information between tax authorities for tax purposes. They assist Her Majesty's Revenue and Customs (HMRC) to carry out tax compliance activities by allowing them to receive information from and disclose information to other countries or territories which helps to ensure that taxpayers pay the right amount of tax at the right time in the right country or territory. Tax Information Exchange Agreements include safeguards to ensure that the information exchanged remains confidential and is used for tax purposes only. The UK and Guernsey are committed to the elimination of harmful tax practices and this includes a commitment to the effective exchange of information on tax matters.

7.2 Double Taxation arrangements aim to eliminate the double taxation of income or gains arising in one territory and paid to residents of another territory. They do this by dividing the taxing rights that each party has under its domestic law over the same income and gains and/or providing relief from taxation in the form of credits. More generally, such arrangements benefit the taxpayer by ensuring certainty of treatment and, as far as possible, by reducing compliance burdens. They also encourage and maintain international consensus on the appropriate tax treatment of cross-border economic activity and thus promote international trade and investment.

7.3 The competent authorities of the UK and Guernsey have also concluded a Memorandum of Understanding (MoU) concerning the liability for costs of obtaining and providing information under the Tax Information Exchange Agreement. The text of the MoU is included in the attached Annex.

8. Consultation outcome

Not relevant to this instrument.

9. Guidance

Only HMRC and the Guernsey tax administration will use the Tax Information Exchange Agreement. The department already operates the terms of many other very similar Agreements and existing internal guidance will apply.

Guidance on the 1952 Arrangement between the Government of the UK and the States of Guernsey relating to the avoidance of double taxation is contained in the Double Taxation Relief Manual:

<http://www.hmrc.gov.uk/manuals/dtmanual/index.htm>

The pages relevant to that Arrangement will be updated to take account of the amendments made by the amending Arrangement scheduled to this Order. The amendments will be made as soon as the amending Arrangement enters into force.

10. Impact

10.1 None of the provisions of the Agreement or the Arrangement affect the taxation of businesses, charities and voluntary bodies and the impact on these sectors is negligible.

10.2 There is no impact on the UK public sector. HMRC already operates the terms of many other very similar Agreements currently in force.

Impact on the Exchequer:

Tax Information Exchange Agreements enable countries to obtain information to assist them to properly enforce their domestic tax laws. Such Agreements do not have an exchequer cost; rather, they improve HMRC's ability to assess and collect the correct amount of tax owed by UK taxpayers and should therefore lead to an increase in revenue.

The exchequer effects of the amending Arrangement are estimated to be negligible. Under arrangements for the avoidance of double taxation, one or both of the parties gives up all or part of their taxing rights so that a given source of income is taxed only once. Measured against a baseline of single taxation only, by encouraging cross-border economic activity such arrangements can lead to an increase in tax revenue. But where double taxation is unrelieved, the economic activity in question, and hence the higher tax revenue attributable to it, will often be only temporary.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

None of the provisions of the Agreement or of the Arrangement affect the taxation of small business.

12. Monitoring and review

Both the UK Government and the States of Guernsey will keep the Agreement and the Arrangement scheduled to the instrument under continuous review to ensure that they meet the policy objectives set out above.

13. Contact

Jeff Worrell at HM Revenue and Customs, Tel: 020 7147 2723 or e-mail: jeff.worrell@hmrc.gsi.gov.uk can answer any queries regarding the instrument.

ANNEX

TAX INFORMATION EXCHANGE AGREEMENT

GENERAL

Part 2 of the Schedule to the Order contains the text of a comprehensive Tax Information Exchange Agreement (TIEA) between the UK and Guernsey (“the Parties”). The Agreement, which broadly follows the OECD Model Agreement on Exchange of Information on Tax Matters, extends the current scope of information exchange between the parties provided for under the UK’s Double Taxation Arrangement with Guernsey. Notably it allows the UK, for the first time and in particular cases, to obtain banking and other third party information held by persons within the jurisdiction of Guernsey. The Agreement will enter into force once both the UK and Guernsey have completed the domestic legislative procedures necessary to give it effect.

NOTES ON DETAILS OF THE AGREEMENT

ARTICLE 1 – OBJECT AND SCOPE OF THE AGREEMENT

This Article states that the competent authorities of the UK and Guernsey (“the Parties”) will provide assistance through the exchange of information foreseeably relevant to administering or enforcing the domestic laws of the Parties in respect of the taxes covered by this Agreement.

ARTICLE 2 – JURISDICTION

This Article limits the obligation on a Party to provide information held by its authorities or in the possession or power of persons within its territorial jurisdiction.

ARTICLE 3 – TAXES COVERED

This Article identifies the taxes covered by the Agreement currently imposed by the UK and Guernsey. It further states that the Agreement will also apply to any identical or substantially similar taxes imposed after the date of its signature. The competent authorities of the Parties will notify each other of any major changes to their domestic taxation and related information gathering laws.

ARTICLE 4 – DEFINITIONS

This Article defines the terms used in the Agreement.

Paragraph 1 lists the definitions alphabetically.

Paragraph 2 states that any term not defined in the Agreement will be construed by a Party in accordance with its domestic law.

ARTICLE 5 – EXCHANGE OF INFORMATION UPON REQUEST

This Article describes the specific elements, constraints and requirements for the effective exchange of information between the Parties.

Paragraph 1 provides that the competent authority of the requested Party will provide, upon request, information irrespective of whether conduct being investigated would constitute a crime under the laws of the requested Party.

Paragraph 2 provides that if the competent authority of the requested Party does not already hold the information requested, it will use all relevant information gathering powers to obtain the information regardless of whether it requires that information for its own tax purposes.

Paragraph 3 states that information may be provided in the form of depositions of witnesses and authenticated copies of original records to the extent this is permitted under the domestic laws of the requested Party.

Paragraph 4 provides that each Party must ensure that its competent authority has the authority to obtain and provide information held by banks, other financial institutions or by any person (including a nominee or trustee) acting in an agency or fiduciary capacity and information on the ownership of companies, partnerships, etc.

Paragraph 5 provides that requests for information should give specific details such as the identity of the person, the nature of the information and the purpose for which it is sought, etc.

Paragraph 6 provides that the competent authority of the requested Party shall acknowledge receipt of the request to the competent authority of the requesting Party and advise if there are any unexpected delays.

ARTICLE 6 – TAX EXAMINATIONS ABROAD

This Article provides that officials from one Party may, under certain conditions, visit the other Party to pursue tax investigations.

Paragraph 1 provides that representatives from one Party may enter the other to interview individuals and examine records.

Paragraph 2 provides that representatives from one Party may attend tax examinations undertaken by the authorities in the other.

Paragraph 3 prescribes the procedures applicable to examinations referred to in paragraph 2.

ARTICLE 7 – POSSIBILITY OF DECLINING A REQUEST

This Article describes various circumstances in which the competent authority of the requested Party may (and may not) decline a request for information.

Paragraph 1 provides that a Party may decline to assist where the request is not valid (e.g. is outside the scope of the Agreement or does not conform to the requirements of Article 5), on public policy grounds, or where the requesting Party's domestic laws would prevent it obtaining the same information from a person within its jurisdiction.

Paragraph 2 states that a Party is not obliged to obtain or provide, in certain circumstances, information that is subject to legal privilege. It additionally states that a Party is not obliged to supply information that would disclose trade, industrial or commercial secrets.

Paragraph 3 states that a request for information shall not be refused simply because a tax claim to which it relates is disputed by the taxpayer.

Paragraph 4 provides that a Party is not obliged to provide information which, if it were within the jurisdiction of the other Party, the latter Party could not obtain under its domestic law.

Paragraph 5 provides that a Party may decline a request for information made by the other Party to administer or enforce a provision of the latter Party's tax law which thereby unequally discriminates against a citizen of the requested Party.

ARTICLE 8 – CONFIDENTIALITY

This Article provides that any information received by a Party under this Agreement will be treated as confidential, indicates to whom the information may be disclosed (broadly, only persons concerned with the assessment or enforcement of tax) and describes the conditions attached to any wider disclosure.

ARTICLE 9 – COSTS

This Article provides that the incidence of any costs incurred in providing assistance will be agreed by the Parties' competent authorities. A Memorandum of Understanding between the competent authorities of the UK and Guernsey, signed on 10th March 2009 (text reproduced below), provides details of the initial cost-sharing arrangements.

ARTICLE 10 – MUTUAL AGREEMENT PROCEDURE

This Article states that the Parties' competent authorities will jointly endeavour to resolve any difficulties in interpreting or applying this Agreement and to this end may mutually determine the procedures to be used and communicate with each other directly.

ARTICLE 11 – ENTRY INTO FORCE

This Article provides for mutual notification by the parties of completion of the procedures required for the bringing this Agreement into force and stipulates the date its provisions will have effect. With respect to criminal tax matters (as defined in Article 4 of the Agreement), the Agreement will apply from the date of entry into force. For all other tax matters, it will apply in relation to taxable periods beginning (or to tax charges arising) on or after that date.

ARTICLE 12 – TERMINATION

This Article provides for termination of the Agreement by either Party and stipulates the date termination becomes effective and the conditions attached to it.

Text of the Understanding reached between HMRC and Guernsey taxation authority, pursuant to Article 9 of the TIEA and signed on 10th March 2009

MEMORANDUM OF UNDERSTANDING

between

**THE COMPETENT AUTHORITY OF THE UNITED KINGDOM OF GREAT
BRITAIN AND NORTHERN IRELAND (“THE UNITED KINGDOM”) and
THE COMPETENT AUTHORITY OF GUERNSEY**

concerning the liability for costs of obtaining and providing information in response to a request under the Agreement between the United Kingdom and Guernsey for the exchange of information relating to tax matters and concerning technical assistance and the sharing of best practice in the operation of the Agreement.

The competent authorities of the United Kingdom and Guernsey, desiring to facilitate the exchange of information relating to tax matters, have reached the following understanding.

Costs

Article 9 of the Agreement regarding the costs of obtaining and providing information in response to a request will be applied by the Parties as follows:

1. The term ‘direct costs’ includes, but is not limited to:
 - (i) reasonable costs of reproducing and transporting documents or records to the competent authority of the requesting Party;
 - (ii) reasonable fees charged by a financial institution or other third party record keeper for copying records and research related to a specific request for information;
 - (iii) reasonable costs for stenographic reports and interviews, depositions or testimony;
 - (iv) reasonable fees and expenses, determined in accordance with amounts allowed under applicable law, of a person who voluntarily appears in the United Kingdom or in Guernsey for an interview, deposition or testimony relating to a particular information request;
 - (v) reasonable legal fees for non-government counsel appointed or retained, with the approval of the competent authority of the requesting Party, for litigation in the courts of the requested Party related to a specific request for information;

2. The term ‘indirect costs’ includes, but is not limited to, ordinary administrative and overhead expenses incurred by the requested Party in reviewing and responding to information requests submitted by the requesting Party.

3. If the direct costs pertaining to a specific request are expected to exceed £500, the competent authority of the requested Party will contact the competent authority of the requesting Party to determine whether the requesting Party wants to pursue the request.

4. The competent authorities will consult not later than 12 months after the date the Agreement enters into force, and upon request of either competent authority thereafter, with respect to costs incurred or potentially to be incurred under the Agreement and with a view to minimising such costs.

Technical assistance and sharing of best practice

For the purposes of improving the efficiency of exchange of information under the terms of the Agreement, the competent authority of the United Kingdom will, as required, provide non-financial assistance to the competent authority of Guernsey in the development of exchange of information systems and share best practice.

For the competent authority of
The United Kingdom

Andrew Dawson
Head of the Tax Treaty Team
HM Revenue and Customs

Date: 10th March 2009

For the competent authority of
Guernsey

Rob Gray
Director of Income Tax

Date: 10th March 2009

ARRANGEMENT FOR THE AVOIDANCE OF DOUBLE TAXATION

Part 3 of the Schedule to the Order contains an Arrangement which amends the 1952 Double Taxation Arrangement. Notably it adds a new provision on the taxation of pensions and a mutual agreement procedure.

NOTES ON DETAILS OF THE ARRANGEMENT

Paragraph 1 makes clear that the term “1952 Arrangement” means that Arrangement as previously amended.

Paragraph 2 provides a new definition of the term “taxation authority” in both the United Kingdom and Guernsey for the purposes of the 1955 Arrangement and Paragraph 6 deletes the existing definition.

Paragraph 3 amends the provisions of the 1952 Arrangement relating to associated enterprises. This provision governs the evaluation for tax purposes of transfers of goods, services, finance and intangible property between associated enterprises. It requires such transfers to be evaluated as if they had taken place between independent enterprises. The existing associated enterprises provision in the 1952 Arrangement is deleted and replaced with the latest OECD Model Tax Convention wording. The effect of the change is that where such an adjustment is made to the profits of an enterprise by one territory, the other territory will make an appropriate adjustment to the amount of tax charged on those profits, in order to relieve any double taxation which might otherwise arise.

Paragraph 4 adds a new provision to the 1952 Arrangement stating that pensions and similar remuneration (with the exception of government service pensions) paid to someone who is a resident of one of the territories shall be taxable only in that territory.

Paragraph 5 adds a new provision to the 1952 Arrangement which authorises the competent authorities of the two territories to endeavour to resolve, by mutual agreement, cases of taxation not in accordance with the Arrangement and to settle points of doubt or difficulty in the application or interpretation of the Arrangement. In particular:

Sub-paragraph (1) provides that, where a person considers that the actions of one or both territories will result in taxation not in accordance with the Arrangement, he may present a case to the competent authority of the country of which he is a resident. This right applies irrespective of any remedies provided by domestic law. The paragraph also sets out time limits for the presentation of a case.

Sub-paragraph (2) requires the competent authority to which the case is presented to endeavour, if it considers the objection justified and if it is unable to deal with the matter unilaterally, to resolve the case by mutual agreement with the competent authority of the other country.

Sub-paragraph (3) provides that the competent authorities shall endeavour to resolve by mutual agreement any difficulties or doubts arising over the interpretation or application of the Arrangement. They may consult also on cases not provided for in this Arrangement, for the purposes of eliminating double taxation.

Sub-paragraph (4) permits the competent authorities to communicate directly with one another for the purposes of reaching agreement under this Paragraph.

Paragraph 7 describes the completion of procedures required by law for entry into force of the Arrangement and the effective dates thereof in respect of income tax and corporation tax in the United Kingdom and of income tax in Guernsey.