

EXPLANATORY MEMORANDUM

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

2009 No. 3013

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

The Order gives domestic legislative effect to an Agreement for the Exchange of Information Relating to Taxes between the Governments of the United Kingdom and the Virgin Islands and an Agreement Relating to the Avoidance of Double Taxation with respect to Taxes on Income 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 agreements

Further details of the Agreements 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 FA 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, among 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

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 (Virgin Islands) 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 the Virgin Islands 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 Agreements 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 agreements 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 the Virgin Islands have also concluded a Memorandum of Understanding (MoU) concerning the liability for costs of obtaining and providing information under the Agreement for the Exchange of Information Relating to Taxes. 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 tax administration of the Virgin Islands 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 UK's Double Taxation Agreements is contained in the Double Taxation Relief Manual:

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

New pages to the Manual regarding the Double Taxation Agreement with the Virgin Islands will be added as soon as the Agreement enters into force.

10. Impact

10.1 None of the provisions of these Agreements 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 Agreement for the Avoidance of Double Taxation with respect to Taxes on Income are estimated to be negligible. Under such an Agreement 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 an Agreement 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 Agreements affect the taxation of small business.

12. Monitoring and review

Both the UK Government and the Government of the Virgin Islands will keep the Agreements 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

AGREEMENT FOR THE EXCHANGE OF INFORMATION RELATING TO TAXES

GENERAL

Part 2 of the Schedule to the Order contains the text of a comprehensive Agreement for the Exchange of Information Relating to Taxes (Tax Information Exchange Agreement - TIEA) between the United Kingdom and the British Virgin Islands (BVI). The UK had previously concluded a limited agreement with the BVI providing for the exchange of information in relation to the taxation of income from savings. The TIEA broadly follows the OECD Model Agreement on Exchange of Information on Tax Matters. Notably it allows the parties, in particular cases, to obtain banking and other third party information held by persons within the jurisdiction of the other party. The TIEA will enter into force once both the UK and the BVI 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 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 Paragraph limits the obligation on a party to provide information held by its authorities or in the possession or control of persons within its territorial jurisdiction.

ARTICLE 3 – TAXES COVERED

This Article identifies the existing taxes imposed by each party that are covered by the Agreement. 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 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 in 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 its domestic laws.

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 details the specific information that, notwithstanding the previous paragraphs, the parties are not obliged to provide.

Paragraph 6 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 7 provides that the competent authority of the requested party shall acknowledge receipt of the request to the competent authority of the requesting party within 60 days and advise if there are any unexpected delays in writing within 90 days.

ARTICLE 6 – TAX EXAMINATIONS (OR INVESTIGATIONS) 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 additionally states that a party is not obliged to supply information that would disclose trade, industrial or commercial secrets.

Paragraph 3 states that a party is not obliged to obtain or provide, in certain circumstances, information that is subject to legal privilege.

Paragraph 4 states that a request for information may not be refused simply because a tax claim to which it relates is disputed by the taxpayer.

Paragraph 5 states that the requested party shall not be required to provide information that the competent authority of the requesting party could itself not obtain under its domestic law, if the information was within its jurisdiction.

Paragraph 6 provides that the requested party may decline a request for information if the information is requested to enforce a provision of the of a tax law that discriminates against a resident or citizen of the requested party vis-à-vis a resident or citizen of the requesting party in the same circumstances.

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 the taxes

covered by the Agreement) and describes the conditions attached to any wider disclosure.

ARTICLE 9 – SAFEGUARDS

This Article confirms that the legal rights and safeguards conferred on persons by the requested party's laws or administrative practices continue to apply but they may not be applied in such a way that effective exchange of information is unduly prevented or delayed.

ARTICLE 10 – ADMINISTRATIVE 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 the Virgin Islands, signed in London on 29th October 2008 and in Road Town on 6th November 2008 (text reproduced below), provides details of the initial cost-sharing arrangements.

ARTICLE 11 – 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 12 – 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 charges to tax arising) on or after that date.

ARTICLE 13 – 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 the Virgin Islands taxation authority, pursuant to Article 10 of the TIEA and signed in London on 29th October 2008 and in Road Town on 6th November 2008:

MEMORANDUM OF UNDERSTANDING
between
BETWEEN THE COMPETENT AUTHORITY OF THE GOVERNMENT OF
THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN
IRELAND (“THE UNITED KINGDOM”)
and
THE COMPETENT AUTHORITY OF THE GOVERNMENT OF THE
VIRGIN ISLANDS CONCERNING THE AGREEMENT BETWEEN THE
GOVERNMENT OF THE UNITED KINGDOM AND THE GOVERNMENT
OF THE VIRGIN ISLANDS, FOR THE EXCHANGE OF INFORMATION
RELATING TO TAXES

The competent authorities of the governments of the United Kingdom and the Virgin Islands, desiring to facilitate the exchange of information relating to taxes, have reached the following understanding regarding the application and interpretation of the above-mentioned Agreement:

Costs

1. Pursuant to Article 10 of the Agreement, costs that would be incurred in the ordinary course of administering the domestic tax laws of the requested party will be borne by the requested party when such costs are incurred for the purpose of responding to a request for information. Such ordinary costs would normally include the costs of international communication and any minor external costs.
2. All other costs that are not ordinary costs are considered extraordinary costs and will be borne by the requesting party. Examples of extraordinary costs include, but are not limited to, the following:
 - (a) reasonable fees charged by third parties for carrying out research;
 - (b) reasonable fees charged by third parties for copying documents;
 - (c) reasonable costs of engaging experts, interpreters, or translators;
 - (d) reasonable costs of conveying documents to the requesting party;
 - (e) reasonable litigation costs of the requested party in relation to a specific request for information; and
 - (f) reasonable costs for obtaining depositions or testimony.
3. The competent authorities will consult each other in any particular case where extraordinary costs are likely to exceed US\$500 to determine whether the requesting party will continue to pursue the request and bear the cost.
4. In the event that the competent authority of Virgin Islands finds it difficult to comply with a request or multiple requests for information from the competent authority of the United Kingdom because of limited staff or financial resources, the competent authorities will consult, and if mutually agreed, the competent authority of the United Kingdom will bear some or all of the costs of complying with a request or multiple requests.

Interpretation of Article 5

5. The competent authorities will not, pursuant to Article 5 of the Agreement, engage in fishing expeditions or request information that is unlikely to be relevant to the tax affairs of a given taxpayer. Only a small number of named senior officials in the United Kingdom are designated as a competent authority for the purposes of this Agreement and only those named persons may make requests for information. The Commissioners for HM Revenue and Customs will regularly (normally, once a year) provide the competent authority of the Virgin Islands with a list of the designated senior officials.

Andrew J Dawson
Head of the Tax Treaty Team
For the Competent Authority of
the United Kingdom

Date: 29 October 2008

Neil Smith
Financial Secretary
For the Competent Authority of
the Virgin Islands

Date: 6 November 2008

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE VIRGIN ISLANDS FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME

Part 3 of the Schedule to the Order contains an Agreement for the purposes of affording relief from double taxation in relation to taxes on income.

NOTES ON DETAILS OF THE AGREEMENT

ARTICLE 1 – PERSONS COVERED

This Article sets out the general scope of the Agreement.

It provides that the Agreement is to apply to individuals who are residents of one or both of the parties (the United Kingdom and the Virgin Islands).

ARTICLE 2 - TAXES COVERED

This Article provides that the Agreement will apply to United Kingdom income tax and any taxes imposed by either party that are identical or substantially similar to UK income tax after the date of signature.

ARTICLE 3 – GENERAL DEFINITIONS

This Article defines a number of terms used in the Agreement and provides that any term not defined in the Agreement shall have the meaning that it has under the domestic law of the parties.

ARTICLE 4 - RESIDENT

This Article defines a “resident” of each party for the purposes of the Agreement. It further provides that where an individual is a resident of both parties under those definitions, that individual shall be treated for the purposes of the Agreement as a resident of the UK.

ARTICLE 5 – PENSIONS

Paragraph 1 provides that pensions and other similar remuneration paid to an individual who is a resident of one of the parties shall be taxable only in that party.

Paragraph 2 provides that, notwithstanding the provisions of paragraph 1, such payments arising in the United Kingdom may also be taxed there unless the recipient is someone who is considered to belong to the Virgin Islands under the constitution of the Virgin Islands or has a certificate of residence of the Virgin Islands, subject to the

individual having lived outside the United Kingdom for at least the preceding ten years.

ARTICLE 6 – GOVERNMENT SERVICE

This Article contains rules for the taxation of remuneration paid in respect of Government Service.

Paragraph 1 provides that salaries, wages and other similar remuneration paid by the Government of the Virgin Islands to an individual employed by that Government who is not resident in the United Kingdom, or only resident there for the purposes of that employment, will be exempt from UK income tax; similarly, such remuneration paid by the United Kingdom under identical circumstances will be exempt from tax in the Virgin Islands.

Paragraph 2 provides that paragraph 1 shall not apply to remuneration for services rendered in connection with the carrying on of a business.

ARTICLE 7 – STUDENTS

This article contains the rules which govern the taxation of visiting students and business apprentices. It provides that payments for the maintenance, education or training of a student or business apprentice who is present in one of the parties for the purposes of full-time education or training and who, immediately before visiting that party, was a resident of the other party, will not be taxed in the first-mentioned party, provided the payments are made from sources outside the territory of that party. The tax exemption is subject to a period of time not exceeding one year from the date the individual first arrives in the territory of that party.

ARTICLE 8 – ELIMINATION OF DOUBLE TAXATION

This Article sets out the methods by which the countries will relieve double taxation.

Paragraph 1 provides that where a resident of a party derives income which, under this Agreement, may be taxed in the other party, the first-mentioned party shall, subject to any of its tax credit provisions, allow as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in that other party, provided that the deduction does not exceed that part of the income tax attributable to the income taxable in the other party.

Paragraph 2 states that such income derived by a resident of one party and taxable in the other party under this Agreement shall be deemed to arise from sources in that other party.

ARTICLE 9 – MUTUAL AGREEMENT PROCEDURE

This Article authorises the competent authorities of the parties to endeavour to resolve, by mutual agreement, cases of taxation not in accordance with the Agreement and to settle points of doubt or difficulty in its application or interpretation. To this end they may mutually determine the procedures to be used and communicate with each other directly.

ARTICLE 10 – EXCHANGE OF INFORMATION

This Article contains rules governing the exchange of information between the countries for the purposes of this Agreement.

Paragraph 1 requires the competent authorities to exchange such information as is foreseeably relevant for carrying out the provisions of the Agreement or of their domestic laws.

Paragraph 2 provides that any information exchanged shall be treated as secret in the same way as information obtained under the domestic laws of that party and shall be disclosed only to the relevant persons or authorities, the latter using the information only for the specified purposes. The information may be disclosed in public court proceedings or in judicial decisions.

Paragraph 3 states that the provisions of paragraphs 1 and 2 shall not be construed as to impose on a party the obligation to carry out measures at variance with the laws and administrative practice of that or of the other party, to supply information unobtainable under the laws or in the administration of that or of the other party, to supply information disclosing any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

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 of its entry into force as the date of the later notification provided that the accompanying Agreement for the Exchange of Information Relating to Taxes is in force.

It further provides that the Agreement shall have effect in the United Kingdom, for any year of assessment beginning on or after 6th April next following the date on which this Agreement enters into force and in the Virgin Islands, on or after 1st January next following the date on which this Agreement enters into force.

ARTICLE 12 – TERMINATION

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