

EXPLANATORY MEMORANDUM TO
THE DOUBLE TAXATION RELIEF AND INTERNATIONAL TAX
ENFORCEMENT (GIBRALTAR) ORDER 2020

2020 No. 275

1. Introduction

1.1 This explanatory memorandum has been prepared by HM Revenue and Customs (HMRC) and is laid before the House of Commons by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Order brings into effect arrangements between the United Kingdom and Gibraltar (the Arrangements) for the elimination of double taxation and the prevention of tax evasion and avoidance. These are new Arrangements between the two governments.

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

3.3 In accordance with section 505 of the Taxation (International and Other Provisions) Act 2010 this instrument covers the entire United Kingdom and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 The Exchequer Secretary to the Treasury, Simon Clarke, has made the following statement regarding Human Rights:

“In my view the provisions of the Double Taxation Relief and International Tax Enforcement (Gibraltar) Order 2020 are compatible with the Convention rights.”

6. Legislative Context

6.1 The Order is being made to give effect in United Kingdom (UK) legislation to the Arrangements, which have been signed by the two governments. The Arrangements are specified in the Schedule to the Order, and are given domestic legislative effect. The Order does not implement European Union (EU) legislation.

7. Policy background

What is being done and why?

- 7.1 The Arrangements aim to prevent income or gains being subjected to double taxation, where income or gains are taxed both in the territory in which they arise and the territory in which the recipient is resident. They do this by allocating the taxing rights that each treaty partner has under its domestic law, over the same income, and gains and/or by providing relief from double taxation. They provide additional protection for taxpayers by specific measures combating discrimination in tax treatment. More generally, such arrangements benefit the taxpayer by ensuring certainty of treatment and, as far as possible, by reducing compliance burdens.
- 7.2 They protect the Exchequer by including provisions to combat tax avoidance and evasion. For example, measures providing for the exchange of information between revenue authorities make it more difficult for residents, of both territories, to evade taxation by concealing assets offshore.
- 7.3 Like all of the United Kingdom's double taxation arrangements (DTAs), the Arrangements largely follow the approach adopted in the Organisation for Economic Cooperation and Development's (OECD) *Model Tax Convention on Income and on Capital*. In doing so they encourage and maintain international consensus on the appropriate tax treatment of cross-border economic activity, and thus promote international trade, and investment.
- 7.4 This is a first-time DTA with Gibraltar, which has been negotiated, in advance of the UK and Gibraltar's departure from the EU. The DTA includes the latest provisions in the OECD Model Double Taxation Convention.
- 7.5 In particular, the DTA meets the minimum standards recommended by the OECD/G20 Base Erosion and Profit Shifting (BEPS) project, which are designed to prevent the DTA from being abused by those who try to reduce their tax liability where the Arrangements are not intended to apply. The BEPS project created a single set of consensus-based international tax rules to protect against tax avoidance while offering increased certainty and predictability to taxpayers.
- 7.6 The Arrangements introduce the expanded title and preamble from the latest OECD Model, which is one of the elements of the minimum standard on preventing treaty abuse agreed under Action 6 of the OECD/G20 BEPS project. The Arrangements also includes the Principal Purpose Test (PPT) rule and provisions. Together, these explain the purpose of the DTA is to eliminate double taxation, while also offering protection against fiscal avoidance, and evasion.
- 7.7 The agreement includes an Assistance in Collection article, enabling the two territories to lend assistance in the collection of tax debts.

The following paragraphs in this section explain the main points included in the Arrangements.

- 7.8 Article 1 (Persons covered) defines the scope of the agreement and includes provisions relating to transparent entities and the taxation of a territory's own residents. Both of the latter two provisions were recommended by the BEPS project.

- 7.9 Article 4 (Resident) includes the definition of a resident of a territory. It generally follows the OECD Model and includes provisions for establishing the status of dual residents.
- 7.10 Article 5 (Permanent establishment) includes an expansive definition of a permanent establishment (PE), including rules on construction sites and an expanded list of activities that will not be considered to constitute a PE. It also includes a rule to prevent companies fragmenting their activities in order to avoid the PE threshold.
- 7.11 Article 7 (Business profits) contains rules on the taxation of business profits which mirror the current OECD Model.
- 7.12 Article 10 (Dividends) provides for dividends paid by a company resident in one territory to a beneficial owner resident in the other territory to be exempt from tax in the paying territory. However, dividends paid by Real Estate Investment Trusts will be subject to a withholding tax of 15%.
- 7.13 Article 11 (Interest) exempts from withholding tax interest arising in one territory and beneficially owned by a resident of the other territory, but only where the beneficial owner of the interest falls under one of the categories listed in paragraph 3, for example the other territory itself, a bank or building society, a pension scheme or an individual.
- 7.14 Article 12 (Royalties) exempts from withholding tax royalties arising in one territory and beneficially owned by a resident of the other territory, but only where the beneficial owner of the royalties falls under one of the categories listed in paragraph 3 (for example where the owner is the other territory itself or an individual).
- 7.15 Article 13 (Capital gains) largely follows the OECD Model and provides that gains other than those specified will be taxable only in the territory where the person making the gain is resident. The article includes a securitised land provision, which allows a territory to tax a disposal of shares where those shares derive more than 50% of their value from immovable property in that territory.
- 7.16 Article 14 (Income from employment) contains provisions on the taxation of employment income in line with the current OECD Model article. It provides that, in general, employment income of a resident of one territory can be taxed in the other territory if the employment is exercised there. The article also provides a rule specific to individuals exercising employment in international traffic.
- 7.17 Article 15 (Directors' fees) mirrors the current OECD Model article and provides that directors' fees etc. can be taxed in the territory where the company paying them is a resident.
- 7.18 Article 16 (Artistes and sportsmen) mirrors the current OECD Model article and provides that income in respect of the personal activities of entertainers and sportsmen can be taxed in the territory in which those activities are exercised, whether it accrues to the entertainer or athlete themselves or to some other person (for example a company controlled by them).
- 7.19 Article 20 (Other income) follows the approach of the current OECD Model article and provides that income not dealt with elsewhere in the Agreement will be taxable only in the territory in which the beneficial owner is resident. It also includes provisions clarifying the treatment of income paid out of trusts, and estates, and excess amounts paid because of a special relationship.

- 7.20 Article 21 (Miscellaneous rules applicable to certain offshore activities) contains the rules for the operation of the Arrangements when activities are carried out offshore, primarily in respect of the exploration for, or exploitation of, oil and gas resources.
- 7.21 Article 22 (Elimination of double taxation) broadly provides for credit relief, but also includes provisions for the exemption from tax for dividends and the profits of permanent establishments in specified circumstances.
- 7.22 Article 23 (Non-discrimination) provides that, subject to certain conditions, neither territory shall impose discriminatory taxes (or requirements) on the entities, permanent establishments and enterprises of the other.
- 7.23 Article 24 (Mutual agreement procedure) establishes a mutual agreement procedure for resolving difficulties arising from the application of the DTA. The article is in line with the minimum standard on improving dispute resolution agreed under Action 14 of the OECD/G20 BEPS project. The article includes a deadline of three years for a person to present their case to a competent authority, confirmation that mutual agreements will be implemented notwithstanding time-limits in domestic law and a provision confirming that the competent authorities may consult to eliminate double taxation in cases not covered by the DTA. The article also provides for mandatory binding arbitration.
- 7.24 Article 25 (Exchange of information) follows the latest OECD Model and provides for the exchange of certain information between the competent authorities of the two territories in compliance with international standards.
- 7.25 Article 26 (Assistance in the collection of taxes) is introduced to provide for the mutual assistance in the collection of tax debts between the UK and Gibraltar.
- 7.26 Article 28 (Entitlement to benefits) includes the “the principal purpose test” (PPT) which aims to deny treaty benefits to those seeking to take advantage of the provisions of the Arrangements to secure a result, which is contrary to their object and purpose. The PPT is one of the elements of the minimum standard on preventing treaty abuse agreed under Action 6 of the OECD/G20 BEPS project.
- 7.27 Article 29 (Entry into force) explains when the DTA will take effect. The Arrangements will enter into force after each of the territories notify the other that the Arrangements have been made law. Provided that happens before 1 April 2020, the Arrangements will then have effect for taxes withheld at source from the first day of the second month following the entry into force, for Income Tax and Capital Gains from 6 April 2020 and for Corporation Tax from 1 April 2020.
- 7.28 The provisions of Article 25 (Exchange of information) and Article 26 (Assistance in collection) will take effect from the date of entry into force of the Agreement, without regard to the taxable period to which the matter relates.
- 7.29 The Protocol at Appendix 2 provides an explanation of the relationship between the UK and Gibraltar. The territories acknowledge the UK continues to be responsible for the international relations of Gibraltar in international law. There is also a provision in relation to Article 18 (Government service) which explains that subparagraphs (b) of paragraph (1) shall not apply for members of the Royal Gibraltar Regiment, meaning that they will continue to be taxed only in the UK.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 Consolidation is not appropriate because this is the first comprehensive DTA with Gibraltar. A copy of the text was made available on GOV.UK on 17 October 2019 following completion of the Exchange of letters on 15 October 2019:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/2019/Gibraltar_pdf

10. Consultation outcome

10.1 HMRC regularly consults with external interested parties, including business representatives, about the effectiveness of existing arrangements for information exchange, as well as new needs.

10.2 No representations were made about Gibraltar in response to this exercise.

11. Guidance

11.1 General guidance on the operation of the UK's double taxation agreements can be found on the HMRC pages of the gov.uk website at:

<https://www.gov.uk/hmrc-internal-manuals/international-manual/intm150000>

or in the Double Taxation Relief Manual at:

<https://www.gov.uk/hmrc-internal-manuals/double-taxation-relief>

This Manual will be updated once the Arrangements enter into force.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies. The provisions of the Arrangements do not introduce new tax burdens; rather, they provide relief from tax and thus are of benefit to business both large and small. Taxpayers may have to make a claim to HMRC or the other territory's fiscal authority in order to benefit from the Arrangements.

12.2 There is no, or no significant, impact on the public sector.

12.3 A Tax Information and Impact Note has not been prepared for this instrument because it gives effect to a DTA. DTAs impose no obligations on taxpayers, rather they seek to eliminate double taxation and fiscal evasion.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific steps are proposed to minimise the impact of the requirements on small businesses (employing up to 50 people).

13.3 The basis for the final decision on what action to take to assist small businesses is that the DTA only applies if they have taxed income arising in Gibraltar. As with other

businesses, the impact is negligible. No special approach for small businesses is therefore necessary.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that both Governments will keep the Arrangements scheduled to the Order under consideration to ensure that they continue to meet the policy objectives set out above in Section 7.
- 14.2 The Order does not include a statutory review clause. In accordance with section 28(3)(a) Small Business, Enterprise and Employment Act 2015 there is no requirement to make provision for review of any secondary legislation that makes or amends provision imposing, abolishing or varying any tax, duty, levy or other charge.

15. Contact

- 15.1 Adrian Coates at HM Revenue and Customs, Telephone: 03000 586041 or adrian.coates@hmrc.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Fiona Hay, Deputy Director for Business, Assets and International at HM Revenue and Customs can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Simon Clarke MP, Exchequer Secretary to the Treasury can confirm that this Explanatory Memorandum meets the required standard.