

EXPLANATORY MEMORANDUM TO
THE VALUE ADDED TAX (ENFORCEMENT RELATED TO DISTANCE SELLING
AND MISCELLANEOUS AMENDMENTS) REGULATIONS 2022

2022 No. 226

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Her Majesty's Revenue and Customs (HMRC) on behalf of Her Majesty's Treasury and HMRC and is laid before the House of Commons by Command of Her Majesty.
- 1.2 This memorandum contains information for the Select Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument corrects a number of minor and consequential errors identified in legislation which provides for two Value Added Tax (VAT) simplified accounting schemes (the One Stop Shop (OSS) and the Import One Stop Shop (IOSS)). These schemes form part of the European Union (EU) e-commerce package that the United Kingdom (UK) implemented from 1 July 2021 under the Northern Ireland Protocol (NI Protocol).
- 2.2 This instrument also amends legislation to remove the potential for double taxation of certain goods that move from a place outside the UK to Northern Ireland (NI) via Great Britain (GB) or the Isle of Man (IoM). It also provides legal certainty for businesses and individuals in the UK for claiming a repayment of overpaid import VAT.
- 2.3 Additionally, the instrument corrects a minor error to remove the potential for confusion in regulation 133E of the Value Added Tax Regulations 1995 (SI 1995/2518) (VAT Regulations).

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments

- 3.1 Regulations 3 to 26 make amendments to the Value Added Tax Act 1994 (VATA) in relation to OSS and IOSS. These provisions rely on the powers in section 40A(7) VATA which permit the Treasury to make regulations amending Schedules 9ZD and 9ZE and Parts 1 and 2 of Schedule 9ZF to VATA. Regulations 27 to 30 amend the VAT Regulations in relation to repayment of overpaid import VAT and are made using powers in section 16(3), paragraph 1(7) of Schedule 9ZB, and paragraph 2(10)(b) and (c) of Schedule 11 to VATA. Section 97(5) VATA provides that subject to certain exceptions not applicable here a statutory instrument (SI) made under any provision of VATA is subject to the negative procedure.
- 3.2 Regulations 31 to 35 amend the VAT Regulations and other VAT secondary legislation in consequence of EU Exit and are made using the powers in section 51(1)(a) and (3) of the Taxation (Cross-border Trade) Act 2018 (TCTA). Under section 51(3) regulations under section 51(1) may make such provision as might be made by Act of Parliament. Section 51(5) provides: "A statutory instrument

containing regulations under this section that amends or repeals any Act of Parliament must be laid before the House of Commons, and, unless approved by that House before the end of the period of 28 days beginning with the date on which the instrument is made, ceases to have effect at the end of that period.” Section 51(8) TCTA provides: “A statutory instrument containing regulations under this section to which subsection (5) does not apply is subject to annulment in pursuance of a resolution of the House of Commons.”.

- 3.3 HMRC has considered carefully the Committee’s Eleventh and Thirteenth Reports of Session 2021-22 regarding the Value Added Tax (Amendment) (EU Exit) Regulations 2021 (SI 2021/715) and the Value Added Tax (Distance Selling and Miscellaneous Amendments) Regulations 2021 (SI 2021/1164) respectively regarding the appropriate parliamentary procedure for instruments where section 51 is used and amendments are made to an Act of Parliament.
- 3.4 The Committee’s construction of section 51(5) implies that, where provisions that would attract the negative procedure if made in two separate instruments are combined in the same SI, that SI becomes subject to the made affirmative procedure. This would not be helpful to taxpayers, who would need to consider two pieces of legislation instead of one. Nor would it appear to be a good use of parliamentary time. HMRC’s view is that, read in context and taking into account the anomalous outcome of applying a literal interpretation, section 51 should be construed purposively as requiring the made affirmative procedure only where an instrument actually relies on section 51 to make amendments to or repeal an Act of Parliament. As a consequence, HMRC’s view is that section 51(8) requires that the negative procedure applies to this instrument.
- 3.5 HMRC has also considered the Committee’s Eleventh and Fifteenth Reports of Session 2021-22 in relation to the appropriate parliamentary procedure where section 51 is used to make a non-textual change to the effect of an Act of Parliament as opposed to a textual amendment to it.
- 3.6 Regulation 35 introduces a new regulation 19A into the Value Added Tax (Northern Ireland) (EU Exit) Regulations 2020 (SI 2020/1546), and new regulation 19A(2)(a) makes a non-textual change to the effect of paragraph 4 of Schedule 9ZB to VATA, relying on section 51(1)(a) and (3) TCTA. HMRC’s view is that, in this case, a non-textual change is appropriate because the change made is limited and specific and it is clearer for the user of the legislation to set it out in new regulation 19A.
- 3.7 New regulation 19A also contains a power for the Commissioners for HMRC (the Commissioners) to specify in a public notice how NI import VAT is paid and accounted for in certain circumstances. The authority for this sub-delegation is section 51(3) TCTA.

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 Rt Hon Lucy Frazer QC MP, Financial Secretary to the Treasury, has made the following statement regarding Human Rights:

“In my view the provisions of the Value Added Tax (Enforcement Related to Distance Selling and Miscellaneous Amendments) Regulations 2022 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Under section 16(3) VATA (as modified by paragraph 1(6)(b) of Schedule 9ZB to VATA) the Commissioners may make regulations that provide for exceptions or modifications to the application of customs legislation in relation to import VAT. Paragraph 1(7) of Schedule 9ZB to VATA provides for the Commissioners to make regulations to supplement or modify any provisions which apply to VAT for goods imported into the UK as a result of their entry into NI. Powers contained in paragraphs 2(10)(b) and (c) of Schedule 11 to VATA provide for regulations in relation to adjustments in accounts.
- 6.2 Together these powers are relied upon to insert new regulations 121E, 133AN, 133AO and 133AP into the VAT Regulations. This is the first use of the power in paragraph 1(7) of Schedule 9ZB.
- 6.3 Regulation 121E provides that, where a person that is registered, or required to be registered, for VAT has not accounted for import VAT on goods moved into GB on the VAT return, and the import VAT has been overpaid, the repayment can be claimed on their VAT return.
- 6.4 Regulations 133AN, 133AO and 133AP provide for the circumstances when a person is entitled to a repayment of overpaid import VAT on goods moved into NI. These regulations deal with the circumstances in which a refund might arise, how a non-taxable person may apply for a repayment and how a taxable person may make a claim on their VAT return.
- 6.5 Sections 95 and 96 of and Schedule 18 to Finance Act 2021 implemented Council Directive (EU) 2017/2455 as regards VAT obligations for distance sales of goods in respect of NI and inserted Schedules 9ZD, 9ZE and 9ZF into VATA. Section 40A(7) VATA provides for the Treasury to make regulations to amend those Schedules. Schedule 9ZD determines the rules for the OSS scheme, Schedule 9ZE determines the rules for the IOSS scheme and Schedule 9ZF provides for modification of other legislation including Acts of Parliament in connection with Schedules 9ZD and 9ZE.
- 6.6 This instrument amends paragraphs 1(b) and (c) of Schedule 9ZD to ensure consistency with the wider e-commerce legislation and inserts new paragraph 15A into Schedule 9ZD to ensure that businesses accounting under the OSS scheme who are also registered for VAT in the UK do not have to account for OSS scheme supplies treated as made in NI on their VAT return.
- 6.7 This instrument also makes a number of minor changes to ensure the rules in connection with default surcharge, interest, adjustments to assessments and overpayments apply equally to businesses registered for OSS and IOSS in the UK as they do to businesses registered for OSS and IOSS outside the UK, if the businesses need to account for UK VAT.
- 6.8 This instrument replaces paragraph 5 of Schedule 9ZF to ensure that reference to output tax when determining whether there is credit for, or a repayment of, overstated or overpaid VAT, includes VAT paid under the OSS and IOSS schemes. It inserts new paragraph 8A into Schedule 9ZF to ensure that a VAT credit for which HMRC may require a security for protection of the revenue includes VAT paid under the OSS

and IOSS schemes. It amends paragraph 9 of Schedule 9ZF to correct a minor error and to insert a new sub-paragraph (4B) to ensure that a non-UK OSS or IOSS return submitted in a relevant EU member state is also regarded as having been given to HMRC.

- 6.9 This instrument relies on section 51 TCTA to amend provisions that were introduced on EU Exit to make the VAT system operate as required. This includes inserting a new regulation 19A into the Value Added Tax (Northern Ireland) (EU Exit) Regulations 2020 to provide that, subject to certain conditions being met, a credit is provided for VAT paid on goods imported into GB or IoM when those goods are to be delivered to an address in NI.
- 6.10 It also includes correction of a minor error in regulation 133E of the VAT Regulations which does not obscure the legislative intent but could confuse the reader. While this corrects an error introduced by a previous instrument, due to the number of substantive provisions in this instrument, HMRC is of the view that it would be disproportionate to apply the free issue procedure. HMRC has complied with the requirement in paragraph 4.7.6 of Statutory Instrument Practice to consult the SI Registrar.

7. Policy background

What is being done and why?

- 7.1 The e-commerce package, which came into effect on 1 July 2021, included two simplified accounting schemes: OSS and IOSS. The OSS scheme facilitates the collection of VAT on direct sales of goods to consumers between NI and the EU; and the IOSS scheme facilitates the collection of VAT on imports made in the course of direct sales to consumers into NI and the EU of certain goods valued up to £135 from non-EU countries, including GB. Both schemes are optional to use and are designed to reduce burdens on business and facilitate the collection of VAT on sales of goods across the EU and into NI.
- 7.2 A review of the e-commerce legislation has identified a number of minor and consequential errors that require legislative changes. When OSS and IOSS were introduced, existing legislation was amended to ensure that OSS and IOSS returns were included in the list of returns on which penalties for inaccuracies may be applied. The current wording only applies to returns submitted to HMRC and therefore excludes returns submitted in the EU for VAT on sales or imports to NI consumers. The measure amends legislation to ensure that penalties apply to all OSS and IOSS scheme users that make supplies in NI whether registered in the UK or in the EU.
- 7.3 The instrument also makes minor amendments to address inadvertent differential treatment that currently applies to UK OSS and IOSS users compared to non-UK OSS and IOSS users, where there is UK VAT due. These changes are in relation to default surcharge, interest, and adjustments to assessments and overpayments.
- 7.4 Import VAT is chargeable on the importation of goods into the UK. Where any import VAT paid on goods is overpaid, the person who has paid it is entitled to a repayment. HMRC's policy has been to provide for repayment of overpaid import VAT through the VAT return for businesses that are registered or required to be registered for VAT and by following the customs process for the repayment of import duty in all other cases. Existing legislation provides both the right to, and mechanism for, the

repayment of overpaid import VAT in GB in the majority of cases. The provisions in this instrument address deficiencies to provide legal certainty in relation to repayment of overpaid import VAT in all cases in the UK.

- 7.5 An ongoing review of EU exit VAT legislation has identified a minor error which does not obscure the legislative intent but could confuse the reader. This instrument corrects the error to clarify the legislation.
- 7.6 There is the potential for two charges to import VAT to arise on goods sent in consignments valued above £135 (and consignments of any value containing excise and non-commercial goods) imported into NI from a place outside the UK via GB or IoM. Where goods are imported directly from a place outside the UK into NI, import VAT is chargeable when the goods are declared to Customs in NI. However, in some cases goods are declared in GB or IoM before they are transported to NI, which creates a charge to import VAT.
- 7.7 Under the terms of the NI Protocol goods moved from GB to NI are subject to import VAT on entering NI, so under current VAT legislation, a second charge to VAT occurs when the goods enter NI. In practice, in some circumstances, the charge might not be accounted for (because the goods have been subject to a declaration waiver or are treated as domestic goods). However, it is necessary to negate the effect of double taxation on these goods and this measure introduces a provision to offset any VAT paid in GB against the VAT due on the goods on entry to NI.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the United Kingdom from the European Union because the legislation it amends will ensure that the UK's e-commerce and wider VAT regime operates as required by the NI Protocol.
- 8.2 More broadly, it should be noted that the government is seeking to find a new balance in operating the NI Protocol in order to place it on a more sustainable footing. The government's July 2021 Command Paper (Northern Ireland Protocol: the way forward), set out these re-balancing proposals, which include arrangements covering trade in goods and the institutional framework.

9. Consolidation

- 9.1 This instrument makes changes to VATA, the VAT Regulations and secondary legislation made under TCTA. There are no plans to consolidate the legislation.

10. Consultation outcome

- 10.1 No consultation has been carried out. This instrument makes necessary amendments identified as a result of a review of VAT legislation. The amendments made by this instrument are generally consistent with the policy position set out in guidance.

11. Guidance

- 11.1 Guidance on the OSS and IOSS schemes can be found at www.gov.uk/government/publications/eu-e-commerce-package/eu-vat-e-commerce-package.

- 11.2 Guidance on EU exit in relation to NI can be found at www.gov.uk/government/publications/accounting-for-vat-on-goods-moving-between-great-britain-and-northern-ireland-from-1-january-2021.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A Tax Information and Impact Note covering this instrument will be published on the website at [Tax information and impact notes - GOV.UK \(www.gov.uk\)](http://www.gov.uk/government/publications/tax-information-and-impact-notes).

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The basis for the final decision on what action to take to assist small businesses is that no mitigating action is proposed as the rules are, of necessity, of general application.

14. Monitoring & review

- 14.1 That instrument will be kept under review through communications with key stakeholder groups, including the Joint VAT Consultative Committee (made up of a wide range of tax, legal and business representative bodies), to ensure that it meets the policy objectives set out in section 7 above.
- 14.2 The instrument does not include a statutory review clause because it relates to tax and therefore meets the requirements of the exemption set out in section 28(3)(a) of the Small Business, Enterprise and Employment Act 2015.

15. Contact

- 15.1 Shapi Masendu at HMRC Telephone: 03000 593074 or email: shapi.masendu@hmrc.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Eileen Patching, Deputy Director for VAT Principles and Risk, Indirect Tax Directorate, at HMRC can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon Lucy Frazer QC MP, Financial Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.