House of Commons

Select Committee on Statutory Instruments

Twenty-Eighth Report of Session 2019–21

Drawing special attention to:

Income Tax (Exemption of Minor Benefits) (Coronavirus) Regulations 2020 (**S.I. 2020/1293**)

Ordered by the House of Commons to be printed 16 December 2020

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Select Committee on Statutory Instruments

Current membership

Jessica Morden MP *(Labour, Newport East) (Chair)*

Dr James Davies MP *(Conservative, Vale of Clwyd)*

Paul Holmes MP *(Conservative, Eastleigh)*

John Lamont MP *(Conservative, Berwickshire, Roxburgh and Selkirk)*

Sir Robert Syms MP *(Conservative, Poole)*

Owen Thompson MP *(Scottish National Party, Midlothian)*

Liz Twist MP *(Labour, Blaydon)*

Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151, available on the Internet via https://www.parliament.uk/business/publications/commons/standing-orders-public11/.

The Select Committee on Statutory Instruments (SCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. It carries out the same duties as the Joint Committee on Statutory Instruments in respect of those instruments laid before and subject to proceedings in the House of Commons only.

The role of the SCSI, whose membership is drawn from the House of Commons, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of the House to any instrument on one or more of the following grounds:

i that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;

ii that its parent legislation says that it cannot be challenged in the courts;

iii that it appears to have retrospective effect without the express authority of the parent legislation;

iv that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;

v that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;

vi that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;

vii that its form or meaning needs to be explained;

viii that its drafting appears to be defective;

ix or on any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

The reports of the Committee are published in print by Order of the House.
All publications of the Committee are available on the Internet from www.parliament.uk/scsi.

Committee staff

The current staff of the Committee are Sue Beeby (Committee Operations Officer), Apostolos Kostoulas (Committee Operations Officer) and Luanne Middleton (Clerk). Advisory Counsel: Sarita Arthur-Crow, Klara Banaszak, Daniel Greenberg, and Vanessa MacNair.

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, House of Commons, London SW1A 0AA. The telephone number for general inquiries is: 020 7219 7599; the Committee's email address is: jcsi@parliament.uk.

Contents

Instruments reported

At the Committee's meeting on 16 December 2020 it scrutinised a number of instruments. It was agreed that the special attention of the House of Commons should be drawn to one of those considered in accordance with Standing Orders. The instrument and the grounds for reporting it are given below. The relevant departmental memorandum is published as an appendix to this report.

1 S.I. 2020/1293: Reported to draw attention to the Explanatory Memorandum

Income Tax (Exemption of Minor Benefits) (Coronavirus) Regulations 2020

1.1 **The Committee draws the special attention of the House of Commons to paragraph 3.1 of the Explanatory Memorandum to these Regulations**.

1.2 These Regulations, which are subject to the negative resolution procedure, exempt the provision of coronavirus antigen tests to employees from charge to income tax as a benefit. The exemption applies from 8 December 2020 to 5 April 2021. The Explanatory Memorandum explains that for the period 6 April 2020 to 8 December 2020, "HMRC will exercise its collection and management discretion, and will refrain from collecting any income tax and National Insurance contributions (NICs) due" (para. 3.1). The Committee asked the Department to justify the proposals for non-collection of tax by reference to the parameters identified by the House of Lords in *R. (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30 (which limited the previous practice of granting informal extra-statutory concessions). In a memorandum printed as an Appendix, the Department distils principles from *Wilkinson*, and asserts that they permit the exercise of a "managerial discretion" not to collect tax owed for "a temporary period pending the exemption now provided by this instrument". The Committee broadly accepts the Department's formulation of the principles distilled from *Wilkinson*, and in particular agrees that *Wilkinson* preserved HMRC's discretion not to undertake uneconomic or otherwise impracticable collection of tax. But the Committee does not accept that this is such a case. If the exemption requires prospective legislation as provided by this instrument, then the retrospective exemption requires legislation too, which could be provided easily enough by way of a short provision in the next Finance Act, backdated to the date of the announcement of the exemption in the normal way. The Committee reported in its First Report of Session 2019 in relation to S.I. 2019/1237 to the effect that if legislation requires tax to be paid, HMRC cannot lawfully avoid collecting it simply on policy grounds: this case too is in essence a policy decision to grant exemption from a tax, rather than a decision that collecting it would be uneconomic or otherwise impracticable, and it should be implemented by legislation. **The Committee accordingly draws the special attention of this House to paragraph 3.1 of the Explanatory Memorandum**.

Instruments not reported

The Committee has considered the instruments set out in the Annex to this Report, none of which was required to be reported.

Annex

Instruments subject to annulment

S.I. 2020/1383	Double Taxation Dispute Resolution (EU) (Revocation) (EU Exit) Regulations 2020

Appendix

S.I. 2020/1293

Income Tax (Exemption of Minor Benefits) (Coronavirus) Regulations 2020

1. In its letter to HM Treasury of 2 December 2020, the Select Committee requested a memorandum on the following point:

> *Justify, by reference to the discretionary parameters identified by the House of Lords in Wilkinson [2005] UKHL 30, the proposals for non-collection of tax expressed in paragraph 3.1 of the Explanatory Memorandum.*

2. This memorandum has been prepared by Her Majesty's Revenue and Customs (HMRC) on behalf of HM Treasury.

3. Under the provisions of a number of pieces of legislation (including section 5 of the Commissioners for Revenue and Customs Act 2005, which transferred collection and management functions already contained in other existing legislation, and other later legislation giving the Commissioners for HMRC additional collection and management functions) HMRC have responsibility for the collection and management of revenue, including taxes, duties and National Insurance contributions.

4. The House of Lords decision in Wilkinson forms part of a broader body of case law in this area. That case built on principles identified in a number of earlier cases, notably *Vestey v IRC (Nos 1 and 2)* [1980] AC 1148 and *R v IRC Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

5. The following principles can be derived from this line of cases. Collection and management amounts to a wide managerial discretion as to the best means of obtaining for the exchequer from the taxes committed to HMRC's charge, the highest net return that is practicable having regard to the staff available and the cost of collection. The discretion extends to the formulation of policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of parliamentary time.

6. The exercise of the discretion referred to in the Explanatory Memorandum is founded on these principles—covering a temporary period pending the exemption now provided by this instrument.

Her Majesty's Revenue and Customs

8 December 2020

Formal Minutes

Wednesday 16 December 2020

Virtual Meeting

Members present:

Jessica Morden (*in the Chair*)

Dr James Davies	John Lamont
Paul Holmes	Liz Twist

Draft Report, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.2 agreed to.

Annex agreed to.

A Paper was appended to the Report as an Appendix.

Resolved, That the Report be the Twenty-Eighth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

[Adjourned to a day and time to be fixed by the Chair.