



HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ

Rt Hon Harriet Harman MP
Chair of the JCHR
House of Commons
London
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12th November 2021

Dear Harriet

MEMORANDUM ON THE FINANCE BILL PROVISIONS WITH RETROSPECTIVE EFFECT

In the Twentieth Report of the 2008-09 session, the JCHR recommended that in the future a memorandum be provided to the Committee identifying provisions in the Finance Bill which have retrospective effect.

I am pleased to attach a memorandum to meet that request with respect to the current Finance Bill.

Yours sincerely,

THE RT HON LUCY FRAZER QC MP



HM TREASURY



HM Revenue
& Customs

FINANCE BILL

Introduction

1. This memorandum highlights provisions in the Finance (No.2) Bill 2021-22 which have retrospective effect and sets out the justification for that retrospectivity.
2. The Government's view is that all provisions in the Finance (No.2) Bill 2021-22, including those with retrospective effect, are compatible with the rights protected under the European Convention on Human Rights ("ECHR"). The Chancellor of the Exchequer has, accordingly, made a statement of compatibility under section 19(1)(a) of the Human Rights Act 1998.
3. Finance Acts invariably contain measures which have retrospective effect. Background information on the different categories of retrospective provision typically found in a Finance Act can be found in the memorandum covering the Finance Bill 2009-2010.
4. The analysis of compatibility with the ECHR turns to a significant extent on the degree to which a person is deprived of legal certainty by being unable to predict the legal consequences of his or her actions. In this light, a distinction may sensibly be drawn between legislation which imposes a set of legal consequences of which a person cannot be aware because his or her action pre-dated any possible awareness of the legislation (unannounced retrospective effect), and legislation which imposes a set of legal consequences of which the person is aware because the proposal to legislate has been announced in sufficient detail, and the legislation is not to be made to apply from a time before the making of the announcement (announced retrospective effect).
5. This memorandum does not mention announced retrospective measures unless they were announced in year (i.e. not as part of the Budget, as it is well known that measures are commonly announced on Budget day to have retrospective effect from that day or later). Nor does it mention retrospective measures which have no charging effect on the taxpayer or which make a minor technical correction.
6. In this memorandum, Article 1 of the First Protocol to the ECHR is referred to as 'A1P1'.

'Unannounced' retrospective measures

Clause 10

7. This clause introduces an increase in the normal minimum pension age to 57 from 6 April 2028. It protects members of registered pension schemes who before or on 3 November 2021 already have, or are in the process of a transfer which will give them, a right to take their entitlement to benefit under those schemes before they reach normal minimum pension age ("NMPA"). Individuals who have a right to take their entitlement to benefit at NMPA will be affected by the measure. Though it is not formally retrospective, as the clause takes effect in 2028, it does have retrospective effect, in that it changes the predictable legal consequences of past decisions as individuals who have accrued rights under their schemes to-date have done so in the expectation that they will be able to draw down benefits at a particular date.
8. The Government considers that any potential interference with A1P1 rights falls within the state's wide margin of appreciation for tax. The measure is proportionate and justified for the following reasons: the measure was announced in 2014 and will take effect in 2028, giving plenty of time for affected individuals to set their affairs in order; it only extends NMPA by 2 years; and the measure is in the public interest given the increases in the state pension age (which encourages individuals to save for longer for retirement and also better reflects current expectations of when individuals retire). For these reasons the Government considered that this measure is compatible with Convention rights.

Clause 28

9. This clause ensures that HMRC cannot issue a corporation tax ("CT") closure notice until after the Diverted Profit Tax ("DPT") review period, as per HMRC's existing approach and guidance. This clause is introduced following a recent tribunal case (*Vitol Aviation UK Ltd v. Revenue & Customs*¹) that found for a taxpayer being able to force a CT closure notice whilst a DPT review is in progress, thereby forcing the repayment of DPT paid up-front and enabling the taxpayer to appeal and postpone CT payable. This substantially undermines the DPT regime. The clause remedies this by preventing HMRC from issuing a CT closure notice where a DPT charging notice has been issued.
10. The measure has retrospective effect with respect to closure notice applications made between 27 September 2021 (the date of the *Vitol* judgment) and the date of the Budget day announcement on 27 October 2021.
11. The Government considers that any potential interference with A1P1 rights falls within the state's wide margin of appreciation for tax. The retrospective aspects of the measure are likely to affect only a very small number of taxpayers who have entered into contrived arrangements to avoid tax and only in respect of those arrangements. It will not prevent the taxpayer from making an application, nor will it necessarily lead to delay for those affected. Additionally the unannounced retrospective effect will only apply to the reasonably short time period (one month) between the release of the *Vitol* decision and Budget Day. Retrospection is necessary to protect the exchequer from the effects of the DPT scheme being undermined in

¹ UKFTT 353 (TC)

this way. For these reasons the Government considers that any interference with A1P1 is proportionate, and achieves a legitimate aim and is therefore justified.

12. To the extent that the clause interferes with Article 6(1) of the ECHR, which protects the right to a fair trial, the Government considers any interference justified for the same reasons set out above. For these reasons the Government considers this clause to be compatible with Convention Rights.

Clause 52

13. This Finance Bill introduces a new Residential Property Developer Tax on profits derived from UK residential property development activity on annual profits over a threshold of £25m. Clause 52 includes anti-forestalling provisions which apply to arrangements entered into on or after 29 April 2021. This clause is formally retrospective. If profits stemming from these arrangements arise in an accounting period ending before 1 April 2022 which would otherwise arise in an accounting period after that date, and the primary purpose of the arrangements is to secure a tax advantage, then the forestalling rule will apply. The effect of the anti-forestalling provisions is that the arrangements may be counteracted to ensure that the tax will apply.
14. Both the clause as a whole and the specific retrospective anti-forestalling provisions engage A1P1. The Government considers both fall within the wide margin of appreciation in matters relating to taxation.
15. The Government considers that the retrospective anti-forestalling provisions are justified as serving the legitimate aim of enabling consultation on the technical details of the proposed new tax, without the risk that the underlying tax would be substantially eroded through avoidance. The Government considers that this measure is compatible with Convention rights.

Clause 95

16. This clause confirms the position that had previously been understood prior to the decision of the Upper Tribunal in *The Commissioners for HM Revenue and Customs v Jason Wilkes*² (“Wilkes”) that section 29(1)(a) of the Taxes Management Act 1970 permits HMRC to make a “discovery assessment” where it discovers new income that should have been, but has not been, assessed to income tax or capital gains tax.
17. In *Wilkes* the Upper Tribunal found that this power did not extend to discoveries relating to the High-Income Child Benefit Charge (“HICBC”) on the basis that HICBC is a standalone tax charge. The same reasoning would also apply where HMRC use the power to assess for certain unauthorised payments income tax charges (“UPC”) in pensions legislation and for income tax charges imposed following incorrect gift aid claims.
18. The Government considers that *Wilkes* produces an anomalous result under which some non-compliant taxpayers can avoid paying tax charged by statute, including for past years. The effect of this clause is to confirm that HMRC may use discovery assessments to assess standalone charges including the HICBC.

² [2021] UKUT 0150

19. This measure has retrospective effect such that the section 29 is treated as having always been in its amended form. There is an exception applied to any person who raised the *Wilkes* argument in an appeal prior to 30 June 2021 (the date of the *Wilkes* decision).
20. The Government considers that any potential interference with A1P1 rights is justified, proportionate and falls within the state's wide margin of appreciation in relation to taxation. Legislating retrospectively is justified as necessary here to ensure that those subject to standalone tax charges are required to pay it and that the burden does not fall disproportionately on those who have paid the tax. The clause does not result in unfairness for affected taxpayers because for those taxpayers there is no doubt that tax charge is due. As noted above, there is an exception within the clause for those who have raised the argument made in *Wilkes* prior to 30 June 2021 in order to ensure that the operation of the clause limits any potential unfairness.
21. To the extent that the clause interferes with Article 6(1) of the ECHR, which protects the right to a fair trial, the Government considers that there is a compelling public interest in ensuring that HMRC can apply the assessment power in order to collect tax due. Accordingly, it is considered that this clause is compatible with Convention rights.

Clause 99

22. This clause makes amendments to legislation on the taxable benefits arising from the provision of cars in Chapter 6 of Part 3 of the Income Tax (Earnings and Pensions) Act 2003. The amendments reflect a new UK scheme for vehicle CO2 emissions certificates, allowing for first registration of a car with the DVLA on or after 1 January 2021 on the basis of either a GB or UKNI Certificate of Conformity ("CoC"). The measure is formally retrospective as the substantive changes introduced will have effect from 1 January 2021, whilst the changes to various definitions (which will not have any substantive or procedural effect for taxpayers) will have effect from the tax year 2017/18 onwards.
23. The Government considers that potential interference with A1P1 rights is justified and falls within the large margin of appreciation afforded in matters relating to taxation. The proposed retrospection is necessary because it means that existing provisions of income tax legislation applying to "cars with a CO2 emissions figure" will still apply, as intended, to cars first registered on or after 1 January 2021 on the basis of the new GB or UKNI CoC. It is therefore necessary to correct the relevant legislation retrospectively so that taxpayers are charged to tax in the way that they would expect to be in relation to cars first registered on the basis of a CoC containing a CO2 emissions figure. The retrospection will affect a small cohort of taxpayers, taking effect in relation to relevant company cars first registered on or after 1 January 2021. As such the effect of the retrospective element of the clause will be limited, necessary and proportionate. The Government considers that this measure is compatible with Convention rights.