



House of Commons
Select Committee on
Statutory Instruments

**First Report
of Session 2009–10**

Drawing special attention to:

Stamp Duty and Stamp Duty Reserve Tax (Investment Exchanges and Clearing Houses) Regulations (No. 12) 2009 (S.I. 2009/2954)

*Ordered by The House of Commons
to be printed 9 December 2009*

HC 4-i

Published on 15 December 2009
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

Current membership

David Maclean MP (*Conservative, Penrith and The Border*) (Chairman)

Dr Roberta Blackman-Woods MP (*Labour, City of Durham*)

Mr Peter Bone MP (*Conservative, Wellingborough*)

Mr Nigel Dodds MP (*Democratic Unionist, Belfast North*)

Jeff Ennis MP (*Labour, Barnsley East and Mexborough*)

Judy Mallaber MP (*Labour, Amber Valley*)

Chris Ruane MP (*Labour, Vale of Clwyd*)

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 www.parliament.uk/scsi.

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 by The Stationery Office 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 John Whatley (*Commons Clerk*) and Jennifer Steele (*Committee Secretary*). Advisory Counsel: Peter Davis, Peter Brooksbank and Christine Cogger.

Contacts

All correspondence should be addressed to the Clerk of the Select Committee on Statutory Instruments, Delegated Legislation Office, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2830; the Committee's email address is: jcsi@parliament.uk.

Contents

Report	<i>Page</i>
Instruments reported	3
1 S.I. 2009/2954: Reported for doubtful <i>vires</i> and defective drafting	3
Instruments not reported	5
Annex	5
Appendix	7
S.I. 2009/2954: memorandum from HM Revenue & Customs	7

Instruments reported

At the Committee's meeting on 9 December 2009 it scrutinised a number of instruments. It was agreed that the special attention of both Houses should be drawn to one of those considered in accordance with Standing Orders. The Instrument and the ground for reporting it is given below. The relevant Departmental memorandum is published as an appendix to this report.

1 S.I. 2009/2954: Reported for doubtful *vires* and defective drafting

Stamp Duty and Stamp Duty Reserve Tax (Investment Exchanges and Clearing Houses) Regulations (No. 12) 2009 (S.I. 2009/2954)

1.1 The Committee draws the special attention of the House to these Regulations on the grounds that there appears to be a doubt whether they are *intra vires* and that, in one respect, they are defectively drafted.

1.2 These Regulations are made under sections 116 and 117 of the Finance Act 1991. Those sections permit the Treasury to make regulations providing that a charge to stamp duty (section 116) or to stamp duty reserve tax (section 117) which would otherwise arise in relation to prescribed circumstances shall be treated as not arising or as reduced. Subsection (1)(b) of each section requires the circumstances in question to involve "a prescribed recognised investment exchange or a prescribed recognised clearing house, or a member or nominee (or member or nominee of a prescribed description) of such an exchange, or a nominee (or nominee of a prescribed description) of such a clearing house, or a nominee (or nominee of a prescribed description) of a member of such an exchange". It contains no mention of circumstances involving a member of a recognised clearing house.

1.3 Paragraph (1) of regulation 4 of this instrument provides that a charge to stamp duty or stamp duty reserve tax shall be treated as not arising in the circumstances prescribed in that regulation. Paragraph (2) states that the circumstances prescribed are where, in connection with a transaction made on the [Irish Stock] Exchange, conditions A and B are met. Condition A (set out in paragraph (3)) is that traded securities of a particular kind are transferred, or agreed to be transferred, from specified descriptions of people to specified descriptions of people. Among the specified descriptions is a "clearing participant", which expression is defined in regulation 2(1) as meaning a member of Eurex Clearing AG who as such is permitted by the rules of Eurex Clearing AG to clear transactions made on the Exchange for a traded security and who may or may not also be a participant in the Exchange.

1.4 Eurex Clearing AG is prescribed by regulation 3 for the purposes of sections 116 and 117 as a recognised clearing house.

1.5 In a memorandum printed at Appendix 1, Her Majesty's Revenue and Customs acknowledges, in effect, that sections 116 and 117 do not provide for relief to be granted to transactions involving a "member" of a clearing house, but argues that a "member"

operates in the same way as a “nominee” and should be read as one and the same. Its practice (shown in other regulations to similar effect) and interpretation have been that those individual members of a clearing house act effectively as nominees of the clearing house .

1.6 The Committee accepts, as a starting assumption, that the terminology used is not the sole matter for consideration. In a case where regulations are expressed in wording not expressly included in enabling powers, the question for consideration, in terms of security of *vires*, is whether it has been sufficiently demonstrated that the substance is clearly within the powers in question. As the memorandum, in paragraph 4, refers to members themselves taking on financial risk exposure to which would otherwise be assumed by the clearing house, that demonstration has not been sufficiently made and the terminology accordingly appears likely to be decisive. The 1991 Act makes a clear distinction between recognised investment exchanges (where transactions involving their members or nominees may be exempt) and recognised clearing houses (where transactions involving their nominees may be exempt). **To the extent that these Regulations ignore that distinction and purport to apply to transactions involving persons not contemplated by the enabling Act there appears to be a doubt as to whether they are *intra vires*, and the Committee reports accordingly.**

1.7 Regulation 5, which is headed “Consequential provision”, states that traded securities which are the subject of an agreement specified in regulation 4(3) shall be “dealt with” by a clearing participant who is a party to the agreement in a separate designated account, and not otherwise. There is nothing in the instrument to indicate what are the consequences of a failure to comply with this requirement.

1.8 The Department claims that regulation 5 sets out the minimum qualifying standard that needs to be achieved in order for the transactions in regulation 4(3) to be “eligible for relief”. If the standard is not met the relief under regulation 4(3) will not be available to them. It states that “the purpose of regulation 4(3) is to set out the circumstances in which relief will be applied. ... This is different to the purpose of regulation 5 Regulation 5 does not give relief and is not directly connected to regulation 4(3). It operates separately and for this reason ... has not been incorporated in condition A in regulation 4(3)”.

1.9 The Department’s answer appears to the Committee to be based on failure to understand the structure of the instrument as drafted. Regulation 4(1) and (2) states clearly that a charge to stamp duty or stamp duty reserve tax will be treated as not arising where, in relation to a transaction, conditions A and B are met. There is no question of “eligibility for relief” or of “relief” being “applied”. Regulation 4 does not say that a charge will be treated as not arising only if the requirement in regulation 5 is complied with. Nor does regulation 5 or any other provision say this. While the Committee recognises that, at the time of the transaction itself, “dealing” with it in an account (presumably involving recording) may not yet have taken place, a link could straightforwardly have been made (for example by adding, as full-out words at the end of regulation 4(3), something to the effect of the transaction being carried out under arrangements providing for regulation 5 to be complied with). **The failure to link what is intended to be an essential requirement for exemption from a charge to tax to the exemption itself is a significant one, and the Committee accordingly reports these Regulations for defective drafting in that respect.**

Instruments not reported

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

Annex

Instruments to which the Committee does not draw the special attention of both Houses.

- *denotes that the written evidence submitted in connection with the instrument is printed with this Report*
- *denotes written evidence has been submitted but not printed*

Draft Instruments requiring affirmative approval

Draft S.I.	Real Estate Investment Trusts (Prescribed Arrangements) Regulations 2009
Draft S.I.	Enactment of Extra-Statutory Concessions (No. 2) Order 2009
Draft S.I.	Double Taxation Relief and International Tax Enforcement (Libya) Order 2009
Draft S.I.	Double Taxation Relief and International Tax Enforcement (Luxembourg) Order 2009
Draft S.I.	Double Taxation Relief and International Tax Enforcement (Qatar) Order 2009
Draft S.I.	Asian Development Bank (Further Payments to Capital Stock) Order 2009
Draft S.I.	Consumer Credit Act 1974 (Fees) Order 2010

Instruments subject to annulment

S.I. 2009/2886	Employer-Financed Retirement Benefits (Excluded Benefits for Tax Purposes) (Amendment) Regulations 2009
S.I. 2009/2887	Tax Credits (Miscellaneous Amendments) (No. 2) Regulations 2009
S.I. 2009/2888	Income Tax (Qualifying Child Care) (No. 2) Regulations 2009
○ S.I. 2009/2889	Lloyd's Underwriters (Tax) (Amendment) Regulations 2009
S.I. 2009/2971	Mutual Societies (Transfers of Business) (Tax) Regulations 2009
S.I. 2009/2972	Value Added Tax (Drugs and Medicines) Order 2009
S.I. 2009/2975	Stamp Duty and Stamp Duty Reserve Tax (Investment Exchanges and Clearing Houses) Regulations (No. 13) 2009
S.I. 2009/2976	Stamp Duty and Stamp Duty Reserve Tax (Investment Exchanges and Clearing Houses) Regulations (No. 14) 2009
S.I. 2009/2977	Stamp Duty and Stamp Duty Reserve Tax (Investment Exchanges and Clearing Houses) Regulations (No. 15) 2009
S.I. 2009/3054	Finance Act 2009, Section 96 and Schedule 48 (Appointed Day, Savings and Consequential Amendments) Order 2009

S.I. 2009/3055 Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2009

Appendix

S.I. 2009/2954: memorandum from HM Revenue & Customs

Stamp Duty and Stamp Duty Reserve Tax (Investment Exchanges and Clearing Houses) Regulations (No. 12) 2009 (S.I. 2009/2954)

1. The Select Committee has requested a memorandum to be submitted on the following points—
 1. *“Sections 116(1)(b) and 117(1)(b) of the Finance Act 1991 refer to circumstances involving a prescribed recognised investment exchange or a prescribed recognised clearing house, or a member or nominee (or member or nominee of a prescribed description) of such an exchange, or a nominee (or nominee of a prescribed description) of such a clearing house, or a nominee (or nominee of a prescribed description) of a member of such an exchange. Given that they do not refer to circumstances involving a member of a recognised clearing house, explain the power under which these Regulations apply to transactions involving members of Eurex Clearing AG.”*
 2. *“What are intended to be the consequences of a failure to comply with regulation 5? If it is intended that a transaction will not be exempt from stamp duty or stamp duty reserve tax, why are requirements reflecting regulation 5 not incorporated in condition A in regulation 4(3)?”*
2. Regulation 2(1) of the Stamp Duty and Stamp Duty Reserve Tax (Investment Exchanges and Clearing Houses) Regulations (No. 12) 2009 defines a “clearing participant” as a “member” of Eurex Clearing AG. Whilst HMRC acknowledges that a “member” is not prescribed within sections 116(1)(b) or 117(1)(b) Finance Act 1991 as coming within the relief available to a clearing house, HMRC’s consistent interpretation has been that a “member” operates in the same manner as a nominee and should be read as one and the same.
3. The purpose of these regulations is to give a clearing house relief from a charge to stamp duty or SDRT. Transactions which are cleared through a clearing house produce a chain upon which a charge would otherwise arise on each link in that chain. Accordingly, the purpose of the regulations is to prevent multiple stamp duty and SDRT charges arising on transfers of UK shares to a clearing member or to a nominee acting for any party in that chain. The regulations ensure that stamp duty or SDRT is only paid, as intended, by the ultimate purchaser and that multiple charges do not arise in respect of a single trade.
4. To reduce its risk of exposure, the clearing house utilises the services of its “members” who take on this financial risk. It has been HMRC’s practice and interpretation that those individual members act effectively as “nominees” of the clearing house and member or the description “member” is covered by the vires within section 116(1)(b) and 117(1)(b) of Finance Act 1991. In essence a member is a nominee in these circumstances.

5. This has been HMRC's consistent practice over a number of years and is evidenced by examples of earlier statutory instruments undertaken for other clearing houses.¹
6. Regulation 5 of the statutory instrument sets out the minimum qualifying standard that needs to be achieved in order for the transactions in regulation 4(3) to be eligible for relief. The standard is a fundamental requirement of a clearing house to operate a separate designated account. If this standard is not met the relief under regulation 4(3) will not be available to them.
7. The purpose of regulation 4(3) is to set out the circumstances in which relief will be applied. The regulations remove the stamp duty or SDRT charges that would otherwise arise when shares/securities are transferred in the circumstances outlined in regulation 4(3)(a) to (e), leaving a single charge on the purchaser as intended. This is different to the purpose of regulation 5, set out above. Regulation 5 does not give relief and is not directly connected to regulation 4(3). It operates separately and for this reason, regulation 5 has not been incorporated in condition A in regulation 4(3).

HM Revenue & Customs
1st December 2009

¹ As an example see S.I. 1997/2429 Stamp Duty and Stamp Duty Reserve Tax (Investment Exchanges and Clearing Houses) Regulations 1997, S.I. 1999/3262 Stamp Duty and Stamp Duty Reserve Tax (Investment Exchanges and Clearing Houses) (OM London Exchange Limited) Regulations 1999, S.I. 2004/3218 Stamp Duty and Stamp Duty Reserve Tax (Investment Exchanges and Clearing Houses) Regulations 2004 and S.I. 2007/1097 Stamp Duty and Stamp Duty Reserve Tax (Investment Exchanges and Clearing Houses) (Eurex Clearing AG) Regulations 2007.