Dear Harriet,

MEMORANDUM ON THE FINANCE BILL PROVISIONS WITH RETROLECTIVE 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 ever,

RT HON MEL STRIDE MP
Introduction

1. This memorandum highlights provisions in the Finance (No. 3) Bill 2018 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. 3) Bill 2018, 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 first Finance Bill of 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 34 Qualifying expenditure: buildings, structures and land
7. This clause amends legislation in the Capital Allowances Act 2001 ss 21 and 22 to clarify which expenditure on altering land may qualify for capital allowances for the purposes of installing plant or machinery. Allowances are intended to relieve the cost of altering land necessary to install only plant or machinery eligible for capital allowances. They are not intended to relieve the cost of altering land to install assets (most buildings and structures) that are ineligible for capital allowances.

8. It was assumed by both HMRC and taxpayers until recently that the term ‘plant’ used in s 23 necessarily would not include the buildings and structures defined in ss 21-22 (which do not qualify for capital allowance), as the purpose of the legislation was to delineate between these different categories. However, the recent First-tier Tribunal decision in SSE Generations v HMRC [2018] UKFTT 416 cast doubt on this position.

9. This measure has a degree of retrospective effect as it restricts claims for capital allowance on land alteration from being made after Autumn Budget 2018, even if the expenditure occurred prior to then. It clarifies the position which SSE Generations cast doubt upon.

10. The Government considers that the balance of the public interest is in favour of retrospection because this measure restores the law to the state that HMRC and the taxpayers believed it to be prior to this decision. The Government considers that no Convention rights are interfered with by this provision. If there is any interference with A1P1, it is justified on the grounds that the interference serves a legitimate aim of clarifying Parliament’s intention as to the scope of capital allowances and is proportionate in the method of fulfilling that aim.

Clause 86 Voluntary returns

11. Clause 86 concerns ‘voluntary’ tax returns, i.e. purported tax returns not delivered pursuant to a statutory notice requiring a return. HMRC has a long-standing practice of accepting voluntary returns and treating them as valid. This practice was put into doubt by a recent decision of the First-tier Tribunal (Shiva v Ushma Patel [2018] UKFTT 186). This measure therefore amends the provisions concerning tax returns for income tax, capital gains tax and corporation tax to ensure that voluntary returns constitute valid returns for all purposes. The measure is fully retrospective and will apply to all voluntary returns whenever received.

12. The government considers that the measure is clearly compatible with human rights and does not infringe A1P1 or Article 6 of the ECHR. Even if this is incorrect, any interference is justified because the effect of the legislation is to make it clear that the law is as it has always generally been regarded, by both taxpayers and HMRC. The measure therefore protects legal certainty. It also serves a legitimate aim in the public interest, in that it safeguards the integrity of the tax administration framework, protects
the exchequer against potential claims seeking an unmerited windfall and protects the position of taxpayers who have made payments pursuant to voluntary returns. Finally, any interference is proportionate. Taxpayers who have submitted voluntary returns have, by that fact, acknowledged that they have incurred certain income or gains and expect to be taxed on them. To absolve such taxpayers from this obligation on the basis of a technicality would be contrary to Parliament’s evident intention. The government considers that this measure would in any event fall within the wide margin of appreciation given to states in tax matters.

13. This measure does not apply to the returns whose validity was challenged by appellants in the Patel case, or to any other returns whose validity was challenged before the announcement at the Autumn Budget 2018.

Clause 87 Interest under section 178 of FA 1989 and section 101 of FA 2009

14. This measure provides retrospective legal authority for HMRC to charge interest on certain late payments absent an appointed day order or specific rate under Finance Act 1989 s 178 and interest on certain penalties absent an appointed day order under Finance Act 2009 s 101. Due to an administrative oversight certain interest rates under the Taxes (Interest Rate) Regulations 1989 and the Taxes and Duties etc. (Interest Rate) Regulations 2011 were not commenced by the appropriate legal procedure (either because an appointed day order was not made or an appropriate rate was not set). This affects interest charged by HMRC on unpaid taxes and interest paid by HMRC on overpaid taxes. This measure retrospectively approves the charging and payment of interest under these regulations.

15. The government considers that the measure is clearly compatible with human rights. On balance, the government considers that A1P1 is not engaged. Even if this is incorrect, any interference is justified because the effect of the legislation is to make it clear that the law is as it has always generally been regarded, by both taxpayers and HMRC. Parliament clearly determined that interest should be charged. The charging of interest was in keeping with common practice, fair commercial compensation and taxpayers’ expectations. Regulations setting the rates were subject to all necessary Parliamentary scrutiny. Although this is a case of retrospective charging legislation, because the charges do no more than reinstate the position that all parties have assumed to be correct for a long period of time – that interest was legally payable – the legislation upholds legal certainty and serves the public interest.

‘Announced’ retrospective measures

Clause 13 Disposals by non-UK residents etc

16. Clause 13 introduces from 6 April 2019 a charge on chargeable gains accruing to non-UK residents who hold, directly or indirectly, UK land. It
also rewrites Part 1 of the Taxation of Chargeable Gains Act 1992 in order to clarify the basic capital gains tax provisions, particularly the extent of the charge on non-residents following enactment of the measure.

17. This measure is prospective, applying from 6 April 2019 to disposals of UK land held directly or indirectly. However, in order to prevent forestalling between the original announcement on 22 November 2017 of the intention to legislate and the enactment of the relevant provisions, a targeted anti-avoidance provision is included which is effective from 22 November 2017.

18. The government considers that this measure is clearly compatible with human rights. The provision is limited in scope as it applies only to avoidance activity in ‘a treaty shopping case’. It is directed toward preventing the legislation from being forestalled by taxpayers. As such, in this case retrospection is in the public interest, it is proportionate to the legitimate aim of ensuring that tax legislation operates effectively and falls within the state’s wide margin of appreciation. There is a clear public interest to protect the public finances and ensure those who were in contemplation of the charge cannot escape it by resorting to treaty shopping. On balance, to the extent it engages A1P1 the provision is within the state’s margin of appreciation in relation to the imposition and enforcement of an effective tax regime.