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Air passenger duty: introduction

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Contents:

Contents

Summary

Air passenger duty (APD) is charged on all passenger flights from UK airports. The rate of duty varies according to passenger destination and the class of passenger travel.[1] APD is estimated to raise £3.7 billion in 2018/19.[2]

The tax was introduced in the November 1993 Budget and came into effect on 1 November 1994. Initially APD was charged at the rate of £5 on flights within the UK and to other countries in the European Economic Area (EEA), and £10 on flights elsewhere. These rates were increased to £10 and £20 respectively from 1 November 1997.

The structure of the tax was reformed in April 2001, with a lower rate of duty for economy fares. Initially economy fares were charged duty at £5 for flights within the EEA and £20 to other countries. First class and club class flights were charged £10 for EEA flights and £40 for flights elsewhere.[3] Duty rates remained frozen for over five years, despite concerns about the environmental impact of aviation, though in December 2006, the then Chancellor, Gordon Brown, announced that all duty rates would be doubled from 1 February 2007.[4] At the time there were some concerns about the retrospective nature of this announcement, though these duty rate changes went ahead as planned.

Some commentators have argued that APD should be charged on planes rather than passengers, to provide better incentives for passengers and airlines to cut carbon emissions from aviation. In January 2008 the Labour Government launched a consultation on just such a change, but in November that year the then Chancellor Alistair Darling announced that instead of a per-plane duty, APD would be restructured: the tax would be based on four geographical bands set at intervals of 2,000 miles, so that travellers flying farther would pay a higher rate of duty. There would be two rates of duty within each band: a standard rate, and a reduced rate to apply to the lowest class of travel.[5] The new structure took effect from 1 November 2009, despite concerns about the impact of the new system for passengers making long haul flights, particularly those making journeys to the Caribbean.

During the 2010 General Election campaign both the Conservatives and the Liberal Democrats argued for reforming APD. In its first Budget in June 2010 the new Coalition Government stated that it would "explore changes to the aviation tax system, including switching from a per-passenger to a per-plane duty."[6] In the 2011 Budget the Government stated it would not proceed with a per-plane duty "given concerns over the legality and feasibility of this approach"[7] but it would consult on options for simplifying the rate structure as well as proposals to extend the scope of the tax to flights on business jets.[8] In December 2011 the Government confirmed that a new higher rate of duty would apply to business flights from 1 April 2013, but the 4-band structure would be retained.[9] Over this period travel organisations and airlines campaigned consistently for APD to be scrapped, though Ministers opposed cutting duty rates or abolishing the tax on grounds of cost.[10]

1 HM Revenue & Customs, *Rates for air passenger duty: guidance*, May 2018
2 Office for Budget Responsibility, *Economic and Fiscal Outlook*, Cm 9713, October 2018 (Table 4.6)
3 HC Deb 21 March 2000 c869; HM Customs & Excise Budget press notice C&E4, 21 March 2000.
4 HC Deb 6 December 2006 c310
5 HC Deb 24 November 2008 c499; HMT Pre-Budget Report press notice PBR08/2, 24 November 2008
6 *Budget 2010*, HC 61, June 2010 p36
7 *Budget 2011*, HC 836, March 2011 para 1.152-3
8 HM Treasury, *Reform of Air Passenger Duty: a consultation*, March 2011 para 1.4
9 HM Treasury, *Reform of Air Passenger Duty: response to consultation*, December 2011
10 For example, see comments by Treasury Minister David Gauke in an Opposition day debate on APD in October 2013 (HC Deb 23 October 2013 c403).

In his 2014 Budget the then Chancellor, George Osborne, announced that from April 2015 the 4-band structure of the tax would be replaced with 2-bands: Band A for short haul flights, and Band B for all long haul flights. Mr Osborne also proposed that the higher rates of duty for flights on private jets would be substantially increased.[11] Subsequently in his Autumn Statement that year the Chancellor announced that APD on economy flights would be scrapped for children in two stages: first, from 1 May 2015 for children under 12, and then from 1 March 2016 for children under 16.[12] No further changes have been made to the structure of APD since then.

This briefing paper discusses the introduction of APD and the first years of its operation. Two companion papers discuss the Labour Government's reforms to APD over 2007-10, and the changes that have been made to this tax it since then.[13]

HM Revenue & Customs publish guidance on the operation of the tax, and statistical data on its receipts.[14]

11 HC Deb 19 March 2014 c787; *Budget 2014* HC 1104, March 2014 para 2.160-1
12 HC Deb 3 December 2014 c312
13 *Air passenger duty: the approach of the Labour Government (2007-10),* CBP6426, 14 February 2019; *Air passenger duty: recent debates and reform,* CBP5094, 14 February 2019.
14 *APD for plane operators*, & *Exemptions from APD,* January 2018; *Air Passenger Duty: statistical bulletin*, September 2018

1. The introduction of air passenger duty

In his November 1993 Budget speech the then Chancellor, Kenneth Clarke, said, "I need to raise revenue, but to do so in a way which does least damage to the economy." As a consequence, he announced a number of changes in the tax system: a number of anti-avoidance measures, some restrictions in the value of direct tax allowances (such as the married couple's allowance and mortgage interest relief), and the introduction of two new taxes: air passenger duty, and insurance premium tax (an ad valorem tax on insurance premiums). Mr Clarke pointed out that under European VAT law, the UK could not extend VAT on goods and services which all Member States have agreed to exempt from VAT completely. However, the UK was free, as other EU Member States, to introduce separate taxes.

As a consequence, Mr Clarke went on to propose a new levy on all air passengers using UK airports: a flat £5 charge on flights within the UK or elsewhere in the EU, and a £10 charge on all other flights:

> First, air travel is under-taxed compared to other sectors of the economy. It benefits not only from a zero rate of VAT; in addition, the fuel used in international air travel, and nearly all domestic flights, is entirely free of tax. A number of countries have already addressed this anomaly.[15] I propose to levy a small duty on all air passengers from United Kingdom airports. This will be set at £5 for departures to anywhere in the United Kingdom and the European Union; and £10 for departures to other destinations. The new duty will come into force next October and will raise some £330 million in a full year. There will be exemptions for transfer passengers and small planes. This means, for example, that most flights between the Scottish islands will not bear tax.[16]

In the event the implementation of APD was delayed by a month as many holiday companies had already issued brochures that ran up to the end of October 1994, with guarantees of "no surcharges" to customers.[17] Initially the tax was administered by HM Customs & Excise, which was one of the two revenue departments charged with collecting direct and indirect taxes. It was merged with the Inland Revenue to form HM Revenue & Customs in April 2005.

Initially the lower rate of APD was to cover flights within the European Union only. In October 1994 Customs announced that the lower rate would cover all countries within the European Economic Area (EEA), extending its scope to Austria, Finland, Iceland, Norway and Sweden.[18] This decision followed representation from the European Commission that restricting the lower rate to flights within the EU would breach the

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15 At this time an airport tax was charged in Germany, Greece, Austria, Spain, Belgium, Sweden, Portugal, the Netherlands, France, Luxembourg, Denmark and Ireland (HC Deb 13 March 1997 c479).

16 HC Deb 30 November 1993 c932. Statutory provision to introduce the tax was made by ss28-44 of the *Finance Act 1994*.

17 HM Customs & Excise press notice 7/94, 31 January 1994

18 Austria, Finland and Sweden joined the EU on 1 January 1995.

EEA Agreement, which requires the same rights and obligations as exist between Member States of the EU must exist as between Member States and countries included in the EEA.[19] In addition, certain dependent territories of EU Member States are included in the scope of the lower rate.[20]

At this time it was anticipated that about 200 airlines would register to pay APD, representing 50% of the airlines operating in the UK: in effect, all the major airlines and charter airlines, but not private or business organisations.[21] Exemptions from APD were made for passengers using UK airports in transferring flights only, for passengers on small aircraft (such as those used for Scottish inter-island services), and for children aged under two. In addition the tax was not charged on-duty and positioning air crew, passengers carried free of charge under a statutory obligation (eg, deportees and their escorts), visiting forces personnel on official business, and passengers on pleasure flights of no more than an hour that took off and landed at the same airport.[22]

When first announced, the Conservative Government argued that the new duty was most unlikely to have a big impact on the sales of flights. In a written answer the then Paymaster General, Sir John Cope, stated that "overall, the tax is expected to reduce demand for air travel by around 2.5 per cent."[23] One reason for this assessment was that the sector as a whole was relatively undertaxed, as passenger transport is zero-rated for VAT, and because aviation fuel is generally not charged excise duty. In a written answer in July 2003 it was noted, "APD was introduced in 1994 as a measure whose *principal purpose was to raise revenue* from the aviation industry but with the anticipation that there would be environmental benefits through its effect on air traffic volumes."[24] A second PQ in April 2005 stated, "HM Customs and Excise analysis indicates that the price elasticity of demand for changes in APD duty rates is low, and air travel has proven relatively unresponsive to changes in price."[25]

Indeed, the initial response of both airlines and the travel industry to the new tax was a resigned pessimism.[26] Though both groups stated that the tourist industry would be affected by the new duty, many had been expecting some form of additional taxation, most likely in the abolition of zero-rating for passenger transport. One commentator in the trade journal, *Trade Travel Gazette*, wrote at the time, "In the event [the Chancellor] has brought in an entirely new [tax] but not at a level that is

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19 HM Customs & Excise press notice 42/94, 20 October 1994. Initially the change was made by extra statutory concession; the legislation was amended, with retrospective effect, by s15 of the *Finance Act 1995*.

20 specifically, the Azores, the Balearic Islands, the Canary Islands, Corsica, the Faroe Islands, Madeira, Sardinia, Sicily, the Channel Islands and Gibraltar

21 HM Customs & Excise, *Compliance cost assessment: APD*, 30 November 1993

22 Provision for this last exemption was made under an extra statutory concession initially, before being put on a statutory basis by s13 of the *Finance Act 1996*.

23 HC Deb 19 January 1994 c643W

24 HC Deb 15 July 2003 cc206-7W (*emphasis added*)

25 HC Deb 5 April 2005 c1311W

26 "Travel industry fears package holiday blow", *Financial Times*, 1 December 1993

really going to cripple the industry. Rather than bemoan the imposition, it behoves the trade to thank its lucky stars that it avoided VAT."[27]

In the November 1996 Budget the then Chancellor Kenneth Clarke announced an increase in the rates of APD - to £10 for flights within the EEA and £20 to flights elsewhere:

> Air travel has … been undertaxed, because it has proved difficult - still proves difficult - to get international agreement to tax its fuel. The rates of air passenger duty are to be increased [to £10 and £20] … those increases will not come into effect until 1 November 1997 … the very good reason for delaying until November 1997 is to give tour operators who have already sold their packages time to reflect the new rates in the prices they publish in their holiday brochures.[28]

When this was debated at the Committee stage of the Finance Bill Treasury Minister Philip Oppenheim mentioned several countries with similar departure taxes:

> Air transport has been relatively undertaxed in the past, first because there is no VAT on most journeys and, secondly, because of international agreement, there is no excise duty on fuel used by aircraft, unlike many other forms of public transport which carry excise duties and other taxes on their fuel. Almost all other European countries charge VAT-type tax on domestic flights and they also have specific flight taxes …
>
> In Germany the tax on a domestic flight costing £120 is £27.61, in Mexico £26.70, in Greece £25.78, in Austria £20.92, in Finland £20.70, in Spain £20.69, in Norway £19.65 … Italy £18.12, Belgium £17.75, Canada £16.20, Sweden £15.36, Australia £15.35, New Zealand £15, Switzerland £14.94, USA £14.84, Portugal £12.65, the Netherlands £10.93 and good old Blighty comes in at £10, below all that lot even after the rise. Below us, but only just, are eight other countries.
>
> Britain will not be over-taxing its flights, especially in view of tax rates in other countries and the fact that there is no excise duty on fuel … It is also worth noting that less than one third of all holidays taken by United Kingdom residents involved air travel. The overall level of taxation as a proportion of total holiday costs will remain very low.[29]

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27 "The travel trade must unite to avoid the imposition of VAT", *Travel Trade Gazette*, 8 December 1993

28 HC Deb 26 November 1996 c166. Provision for this was made by s9 of the *Finance Act 1997*.

29 Standing Committee B, 30 January 1997 c98

2. The scope of the tax: children & charities, Scottish flights, refunds

Children & charities

When introduced, APD was not charged on children under two. This followed general airline industry practice in not charging for tickets for children below the age of two when accompanied by an adult.[30] As HMCE's guidance explained, "children below the age of two who are not allocated a separate seat before boarding the aircraft are not liable to APD. If a seat is purchased for the infant then APD is chargeable."[31] Other than this exemption, APD was charged irrespective of the age of the person who enjoys that flight, or more precisely, their seat on that flight. In this respect, APD is no different to other excise duties or VAT. Children and charities are not covered by any blanket exemption from indirect taxes, though both may enjoy the benefit of selected reliefs.

Some commentators made the case that charities should be exempt from the tax, and in particular, that children – brought to the UK under the auspices of the Chernobyl Children Lifeline – should not pay duty on their homeward flight. The Labour Government's position was set out in a written answer in December 1997:

> **Mr. Vaz:** To ask the Chancellor of the Exchequer what representations he has received from the Chernobyl Children Lifeline in respect of the waiving of airport tax for charitable purposes; and what response he has made.
>
> **Dawn Primarolo:** The Government has received numerous written representations from the Chernobyl Children Lifeline requesting that the children they help be exempt from air passenger duty when they leave the United Kingdom.
>
> UK registered charities already benefit from a range of tax reliefs such as gift aid and the payroll scheme. These encourage charitable donation by focusing on what people give rather than what charities spend. Additionally, in his last Budget the Chancellor announced a review of the taxation of charities and invited contributions from interested parties. Although the main focus of the review will be the current VAT arrangements, all aspects of the tax system will be taken into consideration.[32]

Generally tax relief for charities has been targeted on the donations charities receive - allowing individuals to choose freely between those organisations they think should be funded, without being affected by the workings of any tax incentive in the question of their choice. This approach has the advantage that the Government has not been required to dictate which items of expenditure by charities are more deserving of relief than others, or forced to pick between individual charities, to reward just a happy selection.

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[30] HM Customs & Excise, *Air Passenger Duty*, November 1993 p4
[31] *Notice 550: Air passenger duty*, September 2010 para 3.2
[32] HC Deb 5 December 1997 c 367W

It would be difficult to argue that a charity, and only that one, deserved relief from APD – and extending relief to a wider group would quickly erode the tax base, forcing the Government to increase the rate of tax to compensate for the loss of revenue. This is true of all indirect taxes and some would consider that it is fairest to keep the number of exemptions from tax relatively low, so that the widest number of people and organisations may all contribute.

The Labour Government's review of charity taxation, mentioned in the PQ cited above, was announced at the time of the July 1997 Budget, when interested parties were invited to contribute views on how the system for taxing charities could be made simpler, more coherent, and "more receptive to the needs of today's charities."[33] Over 3,000 responses were received, and a consultation paper was issued, alongside the 1999 Budget, proposing a number of changes to charity taxation, while *ruling out* any changes in APD:

> As well as direct tax, VAT and business rates, charities are affected by a number of other indirect taxes, such as Insurance Premium Tax, Air Passenger Duty and Excise Duty on road fuel. There are no general reliefs from these taxes for charities. Many charities affected by these taxes asked for specific reliefs or exemptions from these taxes. However, having given these ideas careful consideration, we have concluded that they would further complicate the tax system and, in some cases, could be unfair to businesses with whom charities may compete.[34]

Following responses to this document, in his March 2000 Budget the then Chancellor Gordon Brown announced a series of measures to charity taxation, to boost the level of charitable donations.[35] Subsequently the Labour Government confirmed its position, in the context of the increases to APD rate made in 2007: "Given the level of support already extended to charities through the tax system and the administrative structure of air passenger duty the Government does not currently believe that an air passenger duty exemption would be appropriate."[36]

Flights to the Scottish isles

A second important exemption from APD was for passengers using aircraft below a certain size - those that seated less than twenty passengers, or had a maximum take-off weight of less than ten tonnes. The criteria for a small aircraft were adapted from EU rules specifying minimum safety standards for all air carriers using aircraft above a certain size.[37] As a consequence when APD was introduced it was estimated that about one quarter of flights to Scottish islands from the mainland, and about three quarters of inter-island flights, would not be

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33 HM Treasury press notice, *Charity taxation reviewed*, 2 July 1997
34 HMT, *Review of Charity Taxation - a consultation document*, March 1999 p28
35 For details see, *Taxation of charities*, Library Research paper 01/46, 12 April 2001.
36 HC Deb 14 March 2007 cc419-20W
37 Under Article 5(7) of Council Regulation (EEC) No 2407/92 of 23 July 1992.

charged duty.[38] Generally all other services from the mainland or between islands have been taxable.[39]

The impact of APD on flights to the Scottish isles and to Northern Ireland has been debated ever since its introduction, and some have argued that since these communities rely more on air travel than anywhere else in the UK, all such flights should be made exempt from tax. Jim Wallace MP made the case for this exemption during the Committee stage of the Finance Bill in January 1994:

> Airlines are crucial to livelihoods and island living ... passengers who travel through the highlands and islands airports are more likely to pay their own fares ... they often comprise families who are travelling to visit relatives or to conduct their own family business. There is also much price sensitivity in respect of businesses in the highlands and islands. The very nature of business in the islands involves narrow profit margins. Those businesses cannot readily stand extra impositions. In addition, flights are very expensive for people who wish to visit the islands as tourists. The duty will be an added imposition.[40]

Clearly exemption for some areas of Scotland or Northern Ireland, would result in calls for exemptions for other parts of the UK. Even if an exemption were made for only a small section of the country, it is debatable whether one should ignore the principle of charging an excise duty in a universal fashion, on all those who purchase a particular good. From one perspective, this would subsidise - through the tax system - someone's decision to live in a given place, without attention to the circumstances in which they do so. Arguably compensation for residents and businesses in remote areas might be better targeted through the benefits system, or by the provision of regional aid.

Certainly this was the position taken by the Conservative Government when APD was first introduced. In the debate on the tax in January 1994, the then Paymaster General, Sir John Cope conceded that there was a great deal of concern about the impact of APD on some services to the Scottish islands.[41] Indeed, in March of that year the Scottish Office announced that additional funding would be made available to Western Islands Council to enable it to increase its subsidy on fares for the inter-island air service.[42]

The issue arose a second time during the Report Stage of the Finance Bill in March 1997, when the increase in duty rates announced in the November 1996 Budget was discussed. On this occasion the Conservative Government resisted pressure to provide exemption for flights to both the Scottish islands and Northern Ireland, for reasons set out at the time by Treasury Minister, Philip Oppenheim:

> On the generalities, everyone accepts that aviation is an area in which taxation is relatively low. International treaty provisions mean that there can be no tax on aviation fuel, unlike fuel used in

38 HC Deb 6 December 1993 cc19-20W
39 HC Deb 17 December 1993 c975W
40 HC Deb 31 January 1994 c 645
41 HC Deb 31 January 1994 c 641
42 Scottish Office press notice, *Subsidy to offset duty on inter-island air passengers*, 28 March 1994

> many other forms of transport, so airlines have a significant fiscal advantage in that respect. Regarding the Scottish islands in particular, the small plane exemption means that 50 per cent. Of departures from the Scottish islands are exempt. I know that the proportion of passengers is smaller than 50 per cent., but the exemption helps a little. The other general point is that 40 per cent. of the tax is paid by foreigners visiting the UK, in the same way as British tourists and travellers abroad have to pay taxes in other countries. There is no sign that it damages our tourism industry, which is still growing strongly, although I accept that any indirect tax increase will have a marginal impact …
>
> I believe that all hon. Members on both sides of the House accept that there are specific problems relating to the UK regions, but the way to tackle those is not to create piecemeal anomalies and exemptions, which logically could be extended to many other areas. The way to tackle those problems is, if necessary, in some instances to give subsidies … In principle, we have always said that, where there are social needs for subsidies for transport--be it trains, buses or some air routes--that is a legitimate reason for subsidies. We do not believe in subsidising lame-duck industries, but there are cases where there should be social subsidies in sectors such as transport … Those problems are genuine--I do not duck away from them--but the way to tackle them is not to create anomalies or piecemeal exemptions, but to use regional aid and another more general policies.[43]

Refunds on cancelled or missed flights

After the introduction of APD, the strong growth in 'no frills' budget airlines meant that for many passengers booking an economy ticket, the various taxes and dues often added up to more than the ticket price. In turn this raised the issue of when a flight was cancelled or someone missed it, whether the passenger could claim a refund of the APD they were charged.

The issue has been raised on a few occasions in the House, when Ministers have underlined that any potential refund would be a commercial matter between the airline and the passenger – for example, in answer to a PQ in October 2003 …

> **Richard Ottaway:** To ask the Chancellor of the Exchequer what procedures are in place for refunding taxes on unused airline tickets; and if he will make a statement.
>
> **John Healey:** Air passenger duty (APD) is payable by aircraft operators. Nearly all airlines pass on the duty charge to their passengers via fares, though whether or not they do so is a decision for the airlines, and it is normal commercial practice for them to charge their customers at the time of ticket sale. No liability to APD arises if a flight is cancelled, or a passenger is unable to travel on a pre-booked flight. Whether the airline makes a refund to the passenger in such circumstances is a commercial matter between them. If passengers consider that they have been misled, they can contact their Local Trading Standards Office, who can investigate and prosecute traders in such circumstances.[44]

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[43] HC Deb 11 March 1997 cc227-229

[44] HC Deb 22 October 2003 c620W. At this time the consumer affairs magazine *Which?* reported that Ryanair's refusal to refund APD to 'no show' passengers was garnering the airline £5m a year ("Millions pocketed in flight tax scandal", *Which?*, December 2003 p7).

… and more recently in an answer given in November 2017:

> **Asked by Ian Murray** : To ask Mr Chancellor of the Exchequer, what assessment his Department has made of the level of awareness among air passengers of the entitlement of a refund of air passenger taxes to the consumer when a passenger does not travel; and if he will make a statement.
>
> **Answered by: Andrew Jones :** Airlines are liable for air passenger duty with respect to all passengers they carry, when departing from a UK airport. If a passenger does not fly, no tax is due. If the airline has specified the cost of the tax within its pricing, any refunds will be covered by the terms and conditions attached to the sale. Questions about refunds for air passenger duty are a commercial matter between the customer and the airline.
>
> We expect all airlines operating in the UK to comply with consumer protection legislation and make their terms and conditions, including their refund policy, clear at point of booking so that passengers are aware of their entitlements.[45]

The Civil Aviation Authority notes, in its current guidance for passengers on charges and prices, that, "there is no legal authority obliging airlines to refund taxes, fees and charges when passengers cancel their tickets. Many airlines do offer a refund, although some charge an administration fee for processing the refund and this can sometimes exceed the amount being claimed."[46]

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45 PQ111355, 13 November 2017

46 CAA, *Comparing prices and charges*, ret'd February 2019

3. Budget 2000

When APD was introduced, passengers making a return journey on a return ticket within the UK were exempt from the tax, although duty was charged on the return leg for flights to other EU states. In June 1998 the European Commission ruled that this was legally defective because it did not provide the same effective tax treatment for all EU flights. Specific provision to this effect was made in the EU Treaty that "no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products."[47]

In his Pre-Budget statement in November 1999, the then Chancellor Gordon Brown explained that HM Customs & Excise would consult on replacing this exemption with a new lower rate for lower fares, to be introduced in the 2000 Budget.[48] Given the importance of air transport to the most remote areas of the UK, Customs would also consult on introducing an exemption for flights from airports in the Scottish Highlands and Islands as part of the restructuring of APD.[49] Initially it was envisaged that these changes would be made on a revenue-neutral basis.[50] Mr Brown announced the outcome of this consultation in his Budget speech in March 2000:

> Now that the return-leg exemption for air fares has been found in breach of single market law, I am taking the opportunity to introduce a new, fairer and lower air passenger duty - at an overall cost to the Exchequer of £80 million a year. The tax on economy flights within the UK will be the same or lower. For economy flights outside Europe the rate will remain at £20 and there will be a new business-class rate of £40. Thirty million economy passengers travelling to Europe will have air passenger duty cut in half - from £10 to £5 - and on flights from the Scottish Highlands and Islands, I will abolish air passenger duty altogether.[51]

Further details were given in a press notice issued at the time:

> A new fairer structure for Air Passenger Duty was announced by the Chancellor today, at a revenue cost to the Exchequer of £80 million in 2001/02. Duty on economy flights within the European Economic Area (EEA) will be halved from £10 to £5 from April next year. On top of this, there will no longer be any duty to pay on flights from airports in the Scottish Highlands and Islands. Part of the cost of these changes will be met by removing the duty exemption for return flights within the UK in order to comply with European law.
>
> After all these changes, duty on all economy flights from the UK to other parts of the EEA will be halved to £5. Duty on single flights within the UK will be halved to £5. There will be no change

[47] The Commission challenged the current exemption covering the return leg of a return journey within the UK by issuing a Reasoned Opinion on this matter on 23 June 1998 (HC Deb 26 May 1999 c183W).

[48] HC Deb 9 November 1999 c890

[49] HM Customs & Excise issued two short papers on these proposals, inviting responses by 14 January 2000.

[50] HM Customs & Excise Pre-Budget press notice 3, 9 November 1999

[51] HC Deb 21 March 2000 c 869

> in duty on return flights within the UK, and even lower rates on flights from the Scottish Highlands and Islands. The standard rates for those travelling first or club class will remain at the current £10 for destinations in the EEA and will rise to £40 to other destinations. These changes will make the duty fairer by bringing the rate of duty more in line with the cost of travel. The changes will come into effect from 1 April 2001, to allow airlines and tour operators plenty of time to adjust their marketing and pricing strategies to the new structure.
>
> The changes announced today will:
>
> - introduce new reduced rates of duty for economy fares of £5 for flights to EEA countries and £20 to other countries. The standard rates will be £10 for flights to EEA countries and £40 to other countries. This structure will make the duty fairer;
> - exempt from duty flights from airports in the Scottish Highlands and Islands. This exemption has been introduced in recognition of the remoteness of this region and its dependence on air travel as part of everyday life; and
> - remove the exemption from duty for the return leg of a flight within the UK. This exemption, introduced under the last Government, must be removed to ensure compliance with European Treaty obligations.[52]

It was estimated that these changes would cost £80 million in 2001/02.[53] In general this reform was widely welcomed, especially by budget airlines.[54]

Legislation to this effect was included in the *Finance Act 2000*.[55] Section 18 of the Act introduced the new duty structure, with lower rates of duty on economy flights (£5 for flights within the EEA, and £20 for flights ending elsewhere). The lower rate applied to tickets for a "standard class of travel". This was defined as meaning the lowest class of travel available on a plane; where there is only one class of travel on a plane then this would be taken to be 'standard class'.

Section 19 of the Act provided for the abolition of the domestic return leg exemption as well as the exemption for flights from the Scottish Highlands & Islands. In the latter case, section 19(3) allowed for the Treasury to designate by Order specific areas in the UK where the population density is "not more than 12.5 persons per square kilometre", to qualify for this exemption.[56] As a written answer explained, the Scottish Highlands & Islands were the only place in the UK where this was the case:

> **Lord Laird** asked Her Majesty's Government: Further to the debate on Northern Ireland on 22 March (HL Deb c 358), whether

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52 HM Customs & Excise Budget press notice C&E4, 21 March 2000

53 *Budget 2000*, HC 346 March 2000 p151

54 For example, "Tonic for passengers flying economy", *Financial Times*, 22 March 2000 & "Islanders welcome cost cuts on lifeline flights", *Times*, 22 March 2000.

55 The relevant clauses to the *Finance Bill 2000* were debated at the Committee stage of the Bill on 11 & 16 May 2000: SC Deb (H) cc131-150.

56 These areas were specified by the *Air Passenger Duty (Designated Region of the United Kingdom) Order* SI 2001/808, which came into force on 1 April 2001.

> they will extend the air passenger levies waiver announced in the Budget for the Highland and Islands to Northern Ireland.
>
> **Lord McIntosh of Haringey:** No. The exemption from Air Passenger Duty for flights from airports in the Scottish Highlands and Islands is being introduced in recognition of the reliance on air transport by many people in this remote region. It is the only UK region with population density less than 12.5 people per square kilometre. The people of Northern Ireland do not depend on air transport for aspects of everyday life to the same degree.[57]

The Government resisted calls to extend this relief to flights from Northern Ireland; as part of a written answer given in April 2001, Lord McIntosh observed, "the exemption from Air Passenger Duty given for flights from airports in the Scottish Highlands and Islands was introduced in recognition of the importance of air transport given the low density of population in the region. Population density in Northern Ireland is greater.[58]

Following this reform, two changes to the scope of APD were made in 2002.

First, in April 2002 Customs clarified its policy on the circumstances in which an airline could offer upgrades to its passengers without changing the liability to APD.[59] Second, and more important, on 1 November 2002 the range of countries covered by the lower rates of APD was substantially extended. Treasury Minister John Healey explained this change when legislation to effect this change was scrutinised at the Committee stage of the Finance Bill in June 2002:

> Clause 118 introduces duty reductions for nearly 4 million air travellers a year by extending the areas in which airlines pay air passenger duty, APD, at the lower rate of £5 or £10, depending on which class of air travel passengers choose to use. The change will come into effect on 1 November 2002 to coincide with the start of the winter season.
>
> At present, the lower rates of APD apply to passengers flying to European countries that are signatories to the 1992 agreement on the European Economic Area—the 15 European Union states plus Iceland and Norway—and to certain European Union member states' dependent territories. The clause's effect will be to extend the area to include Switzerland and countries that are applying to join the European Union. Therein lies the rationale for the power that the hon. Gentleman questioned. It will allow for expansion of the EU and an ability to make the provisions of the clause fit any future extension without resorting to primary legislation.
>
> Passengers flying to Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, the Slovak Republic, Slovenia and Turkey will pay £15 or £30—depending on the class of flight—less per flight than at present. I shall return to Switzerland in a moment, which is the additional country under the provisions. We are introducing those changes in anticipation of EU enlargement, which was not catered for when the original air passenger duty legislation was drawn up under the Conservative Government in 1994.

[57] HL Deb 19 April 2000 c 106WA
[58] HL Deb 24 April 2001 c 219WA
[59] HM Customs & Excise Business brief 10/02, 15 April 2002

> We are also taking the opportunity to standardise the duty treatment of passengers flying to Switzerland. Currently, there are two Swiss airports where passengers can exit in both Switzerland and France. Those airports are considered to be inside the European Economic Area for the purposes of APD, whereas other Swiss airports are not. The two airports that come within the APD provisions are Basel and Geneva, and the three airports that do not are Lugano, Zurich and Bern. The change means that a passenger flying to any Swiss airport will pay APD at the lower rates. The changes have been widely welcomed … Passengers flying to destinations in northern Cyprus or the rest of the island will pay the new lower rates of either £5 or £10 depending on their class of air travel. The revenue effect of the measures will be a loss to the Exchequer of about £25 million in the current financial year, which will rise to about £70 million in a full year.[60]

[60] SC Deb (F) 20 June 2002 cc 489-90. This provision formed s121 of *Finance Act 2002*. This change was confirmed in a subsequent written answer: HC Deb 6 May 2003 cc618-9W.

4. Budget 2006: freezing duty rates

In the 2006 Budget the Labour Government announced that the rates of APD would be frozen, arguing "decisions on APD rates need to be considered in the context of wider social and economic factors, particularly the volatile oil market."[61] In addition the scope of the tax was amended, applying the lower rates of APD to Croatia, recognising its status as an EU application country.[62]

The Treasury Committee were strongly critical of this decision, arguing that the rationale for this duty rate freeze was "incoherent and unconvincing":

> Between 2000 and 2004, the annual number of passengers liable to pay APD rose by some 25 million, or 35%. Treasury officials appeared to argue that, although air passenger numbers had admittedly increased, they would have increased more, were it not for the increases in oil prices, and that increasing APD would result in a decrease in passenger numbers. The United Kingdom is currently lagging behind on its domestic CO2 targets—CO2 emissions in fact increased in 2004, the most recent year for which data is available; furthermore, according to European Commission figures, greenhouse gas emissions in the EU from international aviation rose 73% between 1990 and 2003…
>
> We recommend that the Government give serious consideration to increasing rates of APD. In the context of the wider problem of climate change, we consider it entirely inappropriate that, between 2000 and 2004, tax receipts from APD should have fallen by 8% whilst passenger numbers have risen by 35%. If this trend continues, the Government risks allowing APD to become an ineffective policy instrument which does nothing to recognise or address the contribution made by aviation to greenhouse gas emissions.[63]

(In 2000/01 total receipts from APD were £915 million, expressed in 2002/03 prices. In 2005-06 receipts were £984 million, again expressed in 2002/03 prices.[64])

The Committee went on to argue that the potential inclusion of aviation within the EU's Emissions Trading Scheme (ETS) was, at best, a "partial response."[65] However, the Government was non-committal in its response, noting that it was aware, "economic instruments, including APD, may also provide a route through which improved environmental performance in the aviation sector can be incentivised and so will continue to explore options for developing further such measures."[66]

The freeze of APD rates was also discussed in the report on transport emissions by the Environmental Audit Committee published in August

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61 *Budget 2006*, HC 968 March 2006 para 7.83
62 HM Revenue & Customs Budget Note BN37, 22 March 2006. The change took effect on 1 November 2006.
63 Treasury Committee, *Fourth report*, 24 April 2006 HC 994 2005-06 paras 100-1
64 *Air passenger duty factsheet*, December 2006 p 1
65 HC 994 2005-06 para 102
66 Treasury Committee, *Fourth special report*, 13 July 2006 HC 1472 2005-06 p12

2006. The Committee quoted Richard Dyer, Aviation Campaigner at Friends of the Earth, on possible amendments to its scope:

> It makes sense because it would hopefully encourage airlines to fill the planes better, whereas very often they have up to a quarter of empty seats. […] The other thing I would hope it would do would be to encompass freight flights as well, which are entirely untaxed at the moment. Obviously they pay no air passenger duty and they benefit from tax-free fuel, which is somewhat unfortunate when they burn magnitudes more fuel and carbon compared to surface transport for a lot of freight which does not need to go by air.[67]

The Committee suggested that APD could be levied per flight rather than per passenger, and that, "whether reformed or not or not, APD should be raised so as to slow the growth of aviation and stabilise its absolute level of emissions."[68] In addition it recommended that the Government explore the option of "differential landing fees … to complement a reformed and increased APD."[69]

When it responded to the Committee's report, the Government simply stated, "recent Air Passenger Duty decisions have been taken in the light of oil price volatility." It went on to note that "the Civil Aviation Bill [which was then before the House] includes provisions that will enable licensed aerodromes to fix their landing charges by reference to aircraft emissions" though "we currently have no intention to apply such charges to CO2 emissions. The Committee may be aware that the concept of greenhouse gas related charges is opposed by the majority of states in the International Civil Aviation Organisation, while the ICAO Assembly has specifically endorsed emissions trading."[70]

In June 2006 the polling company Ipsos MORI published research commissioned by the Airfields Environment Trust (AET), on public views regarding travel and its impact on the environment. This found evidence that, "on balance the public support doubling the air passenger duty — including among those who fly frequently":

> The public support higher tax on flying to reflect environmental damage by about three to one; and overall there is slightly more than two to one support for a doubling of the air passenger duty, a surprising result as people do not normally support tax increases. Those most likely to support a doubling of the air passenger duty are the older age groups (45+), ABs and broadsheet readers. [71]

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67 Environmental Audit Committee, *Ninth Report: Reducing Carbon Emissions from Transport*, 7 August 2006, HC 981 of 2005-06 para 127

68 *op.cit.* para 130

69 *op.cit.* para 131

70 *Twelfth Report*, 4 December 2006, HC 1718 of 2005-06 p 38. This provision is now set out in section 1 of the *Civil Aviation Act 2006*. For more details on this provision see the Library Research paper prepared for the Bill's second reading in the Commons (Research paper 05/51 23 June 2005 pp 16-21).

71 Ipsos/MORI, *Climate Change and Taxing Air Travel*, June 2006 p6. The report is available on the site of the Aviation Environment Federation. The work was cited in an EDM laid by Dr Rudi Vis in October 2006 (EDM 2711 of 2005-06, 11 October 2006)

5. Pre-Budget Report 2006: doubling duty rates

In his statement on the Pre-Budget Report on 6 December 2006, the then Chancellor, Gordon Brown, announced that the rates of APD would be doubled from 1 February 2007:

> I turn to the framework for transport, which is responsible for 30 per cent. of all carbon emissions, the aviation sector accounting for a fifth of those. Currently, aircraft emissions are not part of the EU emissions trading scheme, and nor is aviation fuel taxed. While we continue to work internationally to seek a global agreement on reducing aircraft emissions, each country must take action domestically. From 1 February, we will double air passenger duty. For most journeys—over 75 per cent. of them—duty will rise from £5 to £10, securing extra resources in the coming spending round for our priorities, such as public transport and the environment.[72]

It was also announced that the scope of the economy rate would be extended to include a number of eastern European states, signatories to a new "European Common Aviation Area Agreement" agreed in June 2006, which provides for common standards on safety, security and other matters.[73]

At the time of Budget 2007, it was estimated that doubling the rates of APD would raise £1bn in 2007-08, rising to £1.1bn in 2008/09.[74] It was also estimated the new rates would raise £165m over the last two months of the 2006/07 tax year.[75]

The increase in APD rates was criticised both for being too high, and for not being high enough. The *Financial Times* reported on reactions to the announcement as follows:

> Airlines and travel groups yesterday attacked the doubling of air passenger duty as a "punitive windfall tax" and an ineffective way of tackling global warming … British Airways called the increases "highly regrettable" … [and said APD] was "an extremely blunt instrument that provides the Treasury with extra funds for general public expenditure without any benefit to the environment whatsoever" … EasyJet said it was "a complete U-turn" … [and] the Federation of Tour Operators called it "a punitive windfall tax" … Friends of the Earth said the increase was not enough. Jeff Gazzard, spokesman for the GreenSkies Alliance, said the "alarming" growth in emissions would continue unless the government "raises the duty again and again to reach an environmental target to either stabilise or reduce greenhouse gases from air transport".[76]

72 HC Deb 6 December 2006 c310
73 Albania, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, Kosovo under the Interim Administration of the United Nations, Montenegro and Serbia (see, European Commission press notice IP/06/764, *EU & South East Europe: first steps towards an extended Single Aviation Market*, 9 June 2006)'
74 HC 342 March 2007 p210. These estimates assumed duty rates would rise in line with inflation each year from 1 April 2008.
75 Cm 6984 December 2006 p226
76 "'Punitive' increase in cost of air travel", *Financial Times*, 7 December 2006

Other commentators argued that the increase in duty rates would not affect travel patterns:

> Aviation experts said the increase in duty will not have a significant impact on the number of passengers travelling to and from UK airports, a figure which reached 230 million last year. Chris Tarry, of aviation consultancy CTAIRA, said the increase would not curb the accelerating growth of British air travel, which is expected to rise by up to 6% by 2011. "An increase of a fiver will have no impact on short-haul travel and people will not notice the increase for long-haul," he said.[77]

In this context it is worth noting a report from the Civil Aviation Authority in December 2005, on how the demand for leisure air travel is affected by changes in factors such as income, wealth, and air fares. As part of this, travellers at Stansted were asked whether they would change their plans, given a fixed increase in their ticket price; for respondents, the average ticket price paid was £73 return, inclusive of taxes, fees and surcharges:

> In response to a £10 increase in the cost of travel (equivalent to a 14% increase in the average round trip fare):
>
> - 19 (7%) passengers stated that they would not travel,
> - 31 (11%) stated that they would go somewhere cheaper and
> - 244 (83%) stated that they would still go to their preferred destination.
>
> When asked about how they would react to a £20 increase in the cost of travel (a 28% increase in the average fare),
>
> - 49 (17%) stated that they would not travel,
> - 61 (21%) stated that they would go somewhere cheaper while
> - 184 (63%) stated that they would still go to their preferred destination.
>
> Finally, when asked what would be the effect of a £40 (55%) fare increase,
>
> - 129 (44%) said that they would not travel,
> - 73 (25%) would go somewhere cheaper and
> - 92 (31%) would still go to their preferred destination.[78]

In their report on the PBR, the Environmental Audit Committee suggested that the timing of the rate increases might provoke "more opposition to environmental tax rises." It also argued that the increase in APD rates was insufficient response to aviation emissions:

> While we welcome the Treasury's decision to double Air Passenger Duty rates, we do not feel this goes nearly far enough. Notably, over 75% of tickets sold each year are for short-haul economy-class flights, on which the APD was previously halved in April 2001, from £10 to £5; thus the doubling of APD rates

77 "Tax on short haul-flights raised from £5 to £10", *Guardian*, 7 December 2006

78 CAA, *Demand for Outbound Leisure Air Travel and its Key Drivers*, December 2005 pp 44-5; CAA press notice, *CAA Publishes Report On Drivers Of Demand For Leisure Air Travel*, 13 December 2005

> announced in this PBR is, for the majority of flights, only a restoration of the tax rates of five years ago - and in real terms, of course, it still represents a cut.
>
> This rise will do nothing to stabilise aviation emissions, merely slow their growth slightly. Moreover, it does nothing to impose an environmental charge on air freight, which lies outside the APD regime. While the Treasury projects that this rise in APD will save around 1.1 million tonnes of CO2, it is important to realise that this is an estimated reduction from projections of "Business As Usual" growth; in other words, emissions from aviation are not forecast to come down, in absolute terms, by 1.1MtCO2, but rather the rise in emissions to 2010-11 is expected to be 1.1MtCO2 less than it otherwise would have been, in the absence of this tax rise …
>
> The Treasury should once more look at reforming Air Passenger Duty, possibly levying it per flight rather than per passenger, a reform which would capture air freight (and empty flights), and might also incentivise airlines to increase the efficiency of their passenger loading further. Equally, the Treasury should look at varying APD rates according to the emissions of each flight; if this is not to be adopted, the Treasury should give a clear reason why not. Above all, however, the Treasury should increase APD so that it becomes more effective in curbing the demand for flights.[79]

The then Chancellor, Gordon Brown, gave evidence to the Treasury Committee on 13 December 2006. John Thurso asked about reforming the basis of the tax: "why not charge something on aircraft which encourages people to have more fuel-efficient aircraft and which would capture all the freight aircraft which currently pay nothing whatsoever?" In response Mr Brown said:

> This is a big issue which has to be dealt with internationally and, in the absence of an international agreement, you have got to do what you can domestically … [APD] does not obviously pay for the full cost to the environment of the effect of flying and it still means that air travel is taxed less than cars by a very substantial amount, but you have to balance off the needs of the consumer and the industry with the need to make advances in the environmental areas that we are talking about.
>
> I do think this will spur greater fuel efficiency on the part of the airlines and, as I said earlier, I have had some talks with the airlines about some of the things that they could do actually to reduce the usage of fuel and the waste of fuel that often happens as a result of some of the decisions that are made … you cannot judge the effectiveness of a policy for reducing emissions simply by one of the instruments that is available to you to use and, whether it is in cars where of course the rise in the price of oil itself has had a more powerful effect over recent years than any tax change, you have to look at the range of measures that is available to you and I think people will come to a balanced view of this environmental agenda.[80]

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[79] *Pre-Budget 2006 and the Stern Review*, 19 March 2007, HC 227 of 2006-07 p51, paras 68-9

[80] *The 2006 Pre-Budget Report*, 25 January 2006 HC 115 of 2006-07 Ev 42

5.1 The question of retrospection

In their report on the Pre-Budget Report the Treasury Committee noted that the changes to APD rates could "be viewed as retrospective in two senses":

> The first element of retrospection is that airlines will be liable to pay the tax for departures on or after 1 February 2007 regardless of whether tickets were purchased before the new rates were announced.
>
> The second element of retrospection is that the liability to pay Air Passenger Duty at the new higher rates will effectively be incurred before the House of Commons has authorised the increase; such authorisation will take place only after the Budget.
>
> Treasury officials initially asserted that the announcement of changes in the rates of duties which would come into force before the Budget and the ensuing parliamentary approval was a "perfectly standard procedure" and offered to "come back" to us with "specific instances" when such changes had been announced in a Pre-Budget Report which would then come into force before the Budget.[81]

When he appeared before the Committee the Chancellor had been confident that the Government had legal sanction to charge the new rates before it had been authorised by Parliament.[82] Following this, the Treasury sent the Committee a memorandum which noted, "a number of tax and duty rates changes, including alcohol and tobacco duties, are routinely announced before the start of a new financial year and come into effect before the start of that financial year."[83] This would appear to be a reference to the standard practice for increases in duty rates announced in the Budget in March, which often take effect either from 6pm on Budget day or a few days after, prior to the start of the new tax year on 6 April – a procedure established under the *Provisional Collection of Taxes Act 1968*.[84] In brief, this allows a tax change to be effective, prior to the annual Finance Act giving it permanent legislative authority, if covered by one of the series of Ways and Means Resolutions, approved by the House at the end of the Budget debates.

In its response to the Committee's report, the Government cited a second instance: the introduction of a supplementary charge on North Sea oil, announced in the 2005 PBR, and introduced with effect for accounting periods from 1 January 2006.[85] The new charge was covered by one of the Ways and Means Resolutions passed by the House following the 2006 Budget,[86] and legislated for by s152 of the *Finance Act 2006*. Finally, in a debate on APD in February 2007, the then Financial Secretary, John Healey cited a third example; that "the

81 HC 115 2006-07 para 99
82 HC 115 2006-07 Ev 43 Qs341-2
83 HM Treasury, "Material requested at the evidence session on 12 December", HC 115 2006-07 Ev 81
84 For details see, *The Budget and the annual Finance Bill*, Commons Briefing paper CBP813, 5 November 2019, which notes the reform to this timetable in 2017, that has moved the Budget to the Autumn.
85 Treasury Committee, *Third special report*, 29 March 2007 HC 423 2006-07 p15
86 Cm 6701 December 2005 paras 5.129-130; Resolution No.52, Votes & Proceedings 28 March 2006 pp 825-6

pre-Budget report 2006 increased fuel duty in line with inflation from midnight on PBR day."[87]

Nevertheless the Committee were strongly critical of this approach:

> Pre-Budget Reports share many of the characteristics of a Budget, but they remain different in terms of the procedure of the House of Commons. A Budget is followed directly by the passage of financial resolutions which provide initial and provisional parliamentary authority for the collection of taxes and duties at higher rates pending the passage of the Finance Bill. The Pre-Budget Report does not give rise to any such formal decisions of the House of Commons.
>
> Where tax changes carry a significant risk of forestalling activity or could distort market behaviour, it is often appropriate for those changes to come into effect immediately upon their announcement, even if formal parliamentary approval cannot be granted for some time thereafter. However, we have received no evidence to suggest that such considerations apply to the changes to the rates of Air Passenger Duty announced in the 2006 Pre-Budget Report.
>
> As a general rule, we consider that, where increases in rates of duties or taxes are proposed in the Pre-Budget Report, those increases should not come into force until after the House of Commons has had an opportunity to come to a formal decision on the proposed increase following the Budget. We draw the attention of the House of Commons to the unusual timing of the implementation of the increases in Air Passenger Duty, for which the Treasury has not cited any relevant precedents.[88]

Certainly, all three examples involve a degree of retrospection – when one compares the date at which the measure came into effect, and the House giving formal approval for that measure. That said, it is arguable that none of them capture *all* the aspects of the rise in APD rates: for example, the amount of time between the implementation date, and the date the House formally approved the measure (ie, that it was a matter of weeks, not days); the nature of the tax change (that it was an increase in tax rates, not just a tax continuation); and, the fact that projected receipts from the change would not have been significantly affected by a delay in the implementation date (either from taxpayers taking account of the announcement, or external factors affecting the yield from the levy). In addition, it is worth noting that in the case of APD, the delay between the announcement and the House's formal approval was not caused by an interruption of the normal procedures of the House (say, by the timing of a General Election).

5.2 The question of a legal challenge

On 1 February 2007 the Conservatives published a legal opinion by a commercial barrister, Adrian Jack, in which he argued that "in the absence of any Commons resolution or any other legislative step to

[87] HC Deb 20 February 2007 c55WH. In this case the Government introduced secondary legislation (SI 2006/3235) to 'reinstate' section 7 of the *Finance Act 2006*. This had provided for duty rates to rise by inflation from 1 September 2006, but had been suspended before it could take effect (by SI 2006/1979, laid in July that year).

[88] HC 115 2006-07 para 100

change the rate of air passenger duty, there would seem to be no lawful basis at present for the demanding of additional monies."[89] Of course, the House passed a resolution to this effect, along with the other 2007 Budget Ways and Means Resolutions, on 27 March.[90] In addition, as a written answer noted, airlines were not required to account for these additional sums before then:

> **Baroness Noakes asked Her Majesty's Government:** When they expect airlines to pay the increased air passenger duty in respect of flights in (a) February, and (b) March 2007; and what assumptions they made about the way in which increased air passenger duty would be paid to HM Revenue and Customs in arriving at the £165 million for 2006-07 shown in table B4 of the December 2006 Pre-Budget Report (Cm 6984).
>
> **Lord Evans of Temple Guiting:** Air passenger duty liability is normally payable to HMRC for each calendar month on the 22nd of the month following. However, Ministers have confirmed that payment of the extra APD for February will be deferred by one month. This means that for the February return, due to be rendered in March, airlines are to declare and pay the duty at the old rate. The balance of the payment for February, covering the increase, will be payable alongside the March return. Further information on this can be found in paragraph 9.1 of Public Notice 550, Air Passenger Duty, a copy of which is available on the HMRC website. The March return is to be completed with the new increased rates and rendered with full payment, to include the February adjustment, in April.
>
> The PBR announced an increase in APD rates with effect from 1 February 2007. The £165 million represents the additional revenue owing to this increase, which is accounted for in 2006/07, as with all scorecard costings, on a national accounts basis. This means revenues for APD received up to and including 22 April 2007 are included in the £165 million score for 2006/07. An explanation of the national accounts can be found on page 288, Chapter C, of Budget 2006, a copy of which is available on the HM Treasury website.[91]

On the question of whether charging passengers the higher rates of APD was legal, there are two separate, if linked, issues. First, the ability of airlines to demand extra charges - including this one - from passengers after they have first purchased their ticket would be part of the terms and conditions set out in the ticket they purchased. This point was made by the Financial Secretary, John Healey, in the debate on APD in Westminster Hall on 20 February, cited above:

> I could cite any number of airlines' conditions of carriage, but I will refer to those of Ryanair: "Taxes, fees and charges imposed on air travel are constantly changing and can be imposed after the date that your reservation has been made. If any such tax, fee or charge is introduced or increased after your reservation has been made you will be obliged to pay it (or any increase) prior to departure." That shows that the issue is not unpredicted and changes are incorporated into the terms of the contract between the passenger and the airline rather than being contrary to them.

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89 Conservative Party press notice, *Brown's APD increase isn't legal*, 1 February 2007
90 specifically resolution no.13 (HC Deb 27 March 2007 c1441)
91 HL Deb 8 February 2007 c148WA. Provision to this effect is made in clause 12(5) of the *Finance Bill 2007*.

The Minister went on to note that some airlines were charging passengers, and others were absorbing the cost:

> Some airlines are emailing passengers, some are posting news on their websites, some are debiting cards automatically and some are allowing payment at the airport. The large majority of air passengers are not paying more anyway because most airline tickets are not booked that far in advance. Industry data suggests that just 30 per cent. of passengers book their tickets two or more months in advance of their flight date. In any case, this tax is not unprecedented or unpredicted.[92]

Second, while it was true that the House had not passed the relevant Ways and Means Resolution by 1 February, the *Provisional Collection of Taxes Act 1968* does not preclude a resolution imposing a tax charge retrospective to the motion itself: hence the ability of the Government to use this procedure in March 2006 for the supplementary charge on North Sea oil.[93] If airlines had withheld any 'extra' duty, HMRC would, one imagines, have been quite within the law to insist on back payments once the Ways and Means Resolution was passed. Similarly, HMRC would be forced to pay back any 'extra' tax if the relevant resolution was not - in due process - supplanted by an appropriate provision in the Finance Act.

Clearly as airlines would have wished to pass on this tax charge to passengers, as has been common practice since the tax was introduced, it was not in their interest to delay an increase in their ticket prices until the Budget - whether or not they recovered the higher tax from passengers who had *already* paid for their tickets before the PBR. It would have also highlighted the Government's decision to impose the higher rates by accounting for the extra tax from "day 1", as it were.

One additional aspect of the duty rise was the position faced by tour operators. Speaking in a short debate on 30 January, Lord Faulkner of Worcester noted, "while the airlines are able to impose a surcharge to meet the increased duty, tour operators are bound by the European Union package travel directive and effectively prevented from doing so"[94] Responding for the Government, Lord Davies of Oldham said, "we recognise that there are some difficulties for the tourist industry as a consequence of the tax. British Airways, for example, is absorbing the tax and thus putting itself in the same position as tour operators. For most travel within Europe, which constitutes the vast bulk of travel affected by the tax, the sums involved will not be massive."[95] In the debate on Westminster Hall debate on 20 February cited above, the then Financial Secretary Mr Healey said:

> I recognise that that is an issue for tour operators because the regulations limit their ability to pass on extra costs. Those

[92] HC Deb 20 February 2007 c 54WH. See also, "Airlines e-mail customers to seek extra tax", *Financial Times*, 11 January 2007

[93] In the latter case the wording of the resolution made it quite clear that the implementation date was 1 January 2006 (Resolution No.52, Votes and Proceedings for 28 March 2006).

[94] HL Deb 30 January 2007 c130. See also, "Holiday operators challenge increase in air tax", *Financial Times*, 27 February 2007.

[95] *op.cit.* c130

> regulations were framed in the early 1990s and since then, consumer preferences, the pattern of holidays and the degree of economic and price stability has changed. The Department of Trade and Industry will review whether or not those regulations remain appropriate and effective as part of the wider review that we have urged the European Commission to carry out because those regulations derive from a European directive.[96]

Following this, the Federation of Tour Operators attempted to challenge the legality of the new APD rates in the Courts, but were unsuccessful, losing their appeal in the High Court and then in the Court of Appeal.[97]

5.3 Further debate on retrospection

At the report stage of the Finance Bill 2007, the Conservative Opposition tabled a new clause, in the light of these criticisms of the Labour Government's approach. Paul Goodman MP made the case for creating a deterrent for Ministers in introducing measures that, to his mind, were retrospective but were not justified by the need to protect public revenue:

> It is reasonable to tax retrospectively in order to tackle a new tax avoidance scheme that threatens a significant loss of tax revenue, for example, or to restore the law in relation to some particular aspect of taxation to what it was believed to be until a court decided otherwise.
>
> That view was set out by my right hon. Friend the Member for Charnwood (Mr. Dorrell) as a Minister in the last Conservative Government. He said:
>
> "Where it is discovered that the tax law does not have the effect that the Government and taxpayers generally thought it had, there are circumstances in which it is right to introduce legislation to restore the position retrospectively to what it was thought to be. This is done only in exceptional circumstances and where the Government consider such action is necessary to protect the interests of the general body of taxpayers."—[Official Report, 29 June 1992; Vol. 210, c. 378-79W.]
>
> The conventions that govern the use of retrospection in relation to tax avoidance were set out in the so-called Rees rule[98] … In 2004, the Paymaster General made a statement of the Government's view that is broadly similar to what I shall name, after my right hon. Friend the Member for Charnwood, the Dorrell doctrine. At present, the Government are entitled to collect new taxes prior to receiving full legislative authority from the passage of a Finance Act under the Provisional Collection of Taxes Act 1968. The trigger, so to speak, for the retrospective APD rise—the cause of this debate—was the passing of the Budget resolutions announced on Budget day.
>
> Under new clause 2, any Minister introducing a Bill that contains retrospective taxation, such as the Finance Bill before us, would be obliged by law to state that such retrospective taxation was, in

96 HC Deb 20 February 2007 c56WH. The Association of British Travel Agents also raised this issue with the Environmental Audit Committee (HC 227 2006-07 para 67).

97 *Regina (Federation of Tour Operators and Others) v. HM Treasury and Others*, *Times Law Reports*, 28 August 2008

98 [An approach attributed to Peter Rees MP who set out a number of conditions that should apply to any retrospective taxation, speaking on this issue during the proceedings of the Finance Bill in June 1978.]

> effect, consistent with the Dorrell doctrine set out under the previous Conservative Government and echoed in the Paymaster General's 2004 statement.
>
> If the new clause were on the statute book now, the Financial Secretary would have been compelled during the debate on 1 May to concede that the retrospective elements of the APD rise contained in this year's Finance Bill were utterly inconsistent with the Dorrell doctrine and bad practice, since even the Government have not attempted to claim that the APD rise was necessary to prevent tax avoidance by passengers or airlines or to restore the law to what it was previously believed to be. I believe that the Financial Secretary would not have endured the embarrassment and difficulty of so doing, and that the new clause is a strong deterrent to bad retrospective legislation.[99]

In response the then Financial Secretary, John Healey, argued that there was, in fact, clear precedent for the way the Government had implemented the rise in APD rates:

> I have given a number of precedents to explain the proposals and to demonstrate that there is nothing novel about the decisions on air passenger duty taken in the pre-Budget report. Those precedents match precisely what has happened with that duty: in each case, measures were introduced that had an effect on duty tax points before they were considered by Parliament—but after the Government had made a clear announcement to Parliament of their intention to introduce them.[100]

He went on to argue that the existing limitations placed on governments by the need to comply with human rights legislation, and the undertaking to maintain a 'Rees-rules' approach to anti-avoidance legislation, were sufficient to prevent any abuse in this area:

> Let me stress that the Government take the use of any retrospective tax law extremely seriously. Before introducing the Finance Bill to the House of Commons, the Chancellor is required to certify that it is compatible with the European convention on human rights, which he does only after he has sought advice from Her Majesty's Revenue and Customs and other departmental lawyers. That ensures that every provision in the Bill is scrutinised carefully and an assessment is made as to whether it complies with the rights conferred by the convention.
>
> As Members will be aware, the main constitutional conventions on retrospective tax law are known as the Rees rules, which require a Minister to make a full announcement to the House when introducing fiscal changes that have effect on a date before the enabling legislation will be enacted. Over the past 10 years, the Government have used and followed those rules, just as previous Governments did on many occasions.
>
> The hon. Member for Wycombe [Mr Goodman] referred to the statement made by my right hon. Friend the Paymaster General in 2004 when she set out an approach to tax avoidance schemes—tough but necessary arrangements—that were subsequently supported on both sides of the House. I think that all hon. Members might concede that tax decisions often have to recognise a wide range of economic, social or environmental factors, and sometimes we face factors that change rapidly and

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[99] HC Deb 25 June 2007 cc48-49
[100] *op.cit.* c57

> constantly. Of course, those factors have to be balanced with the need for certainty and the need to respect the rights of taxpayers to understand their position—including compliance with the provisions of the Human Rights Act 1998. We are satisfied that the balance that we have built into the current parliamentary framework is sufficient to deal with the situations we face.[101]

In the event the Opposition's new clause was defeated by 281 votes to 209.

[101] *op.cit.* c59

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