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United Kingdom
Tax

Senior Accounting Officers for Large Companies
Technical Update 3 July 2009

The Senior Accounting Officer legislation has now been published in what is expected to be its final form. Draft HMRC guidance has also been released. Thus affected companies now have a better basis for assessing the effect of the new legislation, in particular what reasonable steps will be required by a Senior Accounting Officer (SAO) to ensure that appropriate tax accounting arrangements exist. However, it is unlikely that we will see definitive standards or benchmarks against which processes can be assessed.

1. Introduction

Government-approved amendments to the Senior Accounting Officer legislation were all agreed to in the Public Bill Committee debate on 23 June 2009. We do not now expect there to be any substantive changes to this revised legislation. It is not, however, yet substantively enacted – this is expected on 7 or 8 July 2009, with Royal Assent expected to follow on 21 July 2009.

Over the last few weeks there have been a number of discussions between HMRC, business and professional advisors resulting in the draft guidance which was published this week. The guidance provides a high level base for interpreting what is required by SAOs and the systems over which they have responsibility. However, the guidance is not prescriptive and there are therefore no hard and fast rules as to what would be considered appropriate, and any interpretation is likely to be subjective.

In summary the provisions:

- Require compliance with the 'main duty' for an SAO to take reasonable steps to ensure that a company establishes and maintains appropriate accounting arrangements;
- Are expected to ensure that tax is on the boardroom agenda and is given appropriate attention;
- Are not expected by HMRC to introduce a costly and complex bureaucracy for large companies but to link tax governance to HMRC's co-operative approach to working;
- Contain the ability to impose personal penalties on SAOs who fail the main duty or who provide a late or incorrect certificate;
- Are not SOX for tax

A number of "technical" uncertainties in the initial legislation have now largely disappeared. However it will remain a difficult for many companies to apply the legislation to their own particular facts and circumstances.

2. Main changes to the provisions

(1) Further to Stephen Timms' announcement in the Commons on 13 May 2009, the scope of the SAO legislation has been limited, broadly to companies with a Customer Relationship Manager (CRM). This has been achieved by moving away from the Companies Act definition of "large company" and instead using a turnover or balance sheet total test with much higher thresholds of £200m and £2bn respectively. Broadly, the tests are considered by aggregating the corresponding figures for all UK companies within a world-wide 51% group. This means that either all the UK companies in a group will be "qualifying companies" or none will.

(2) In the original Finance Bill, a large company was not a 'large company' in its own right if it was in a group or

sub-group headed by another ‘large company’. No such rules remain within the revised legislation so the legislation applies to each qualifying company in a group. However, one certificate may relate to a number of qualifying companies in the same group.

(3) It is now clear that the legislation can only apply to UK incorporated companies. In particular it cannot apply to foreign companies with UK branches, UK resident (but not UK incorporated) companies or LLPs.

(4) “Appropriate tax accounting arrangements” now means accounting arrangements that enable the company’s relevant liabilities to be calculated accurately *in all material respects*.

(5) The original Finance Bill required the SAO to be a director or officer of the UK company heading a group or sub-group. Under the revised legislation the SAO may still be at this level. However, the SAO may now be a director of officer of a non-UK resident company, e.g. the foreign parent.

(6) The original Finance Bill required the SAO to provide an explanation to the company’s auditors if the company did not have appropriate tax accounting arrangements. This requirement has now been removed.

(7) The taxes to which the legislation applies are now much more precisely defined. In particular Income Tax, Capital Gains Tax and Inheritance Tax are now generally outside the scope of the legislation. However the legislation does apply to amounts for which the company is accountable under PAYE regulations.

(8) Environmental taxes are now outside of the rules except for Air Passenger Duty which is an Excise Duty.

3. Summary of the detailed rules (per draft legislation and guidance)

3.1. Commencement

The legislation has effect for financial years beginning on or after Royal Assent for Finance Act 2009 (expected to be 21 July 2009). Taking a company with a calendar year end of 31 December, its first year within scope would be the year ended 31 December 2010. The tax accounting arrangements in scope for that year would include any of the 2010 tax accounting arrangements that:

- produce any numbers that feed into the accounts for the year ended 31 December 2010;
- have an impact on the calculation of the tax liabilities for 2009 or earlier years; and
- have an impact on any claims or elections made in earlier years.

It is the tax accounting arrangements in place and used within the financial year which are covered by the certificate for that financial year.

3.2. Main duty

The “main duty” of the SAO of a ‘qualifying company’ is to take reasonable steps to ensure that the company establishes and maintains appropriate accounting arrangements throughout the financial year. The SAO must, in particular, take reasonable steps to monitor the accounting arrangements of the company and to identify any respects in which those arrangements are not appropriate tax accounting arrangements.

HMRC will publish, before the end of July 2009, the final guidance which contains examples of what appropriate accounting arrangements might be and guidance as to what could constitute reasonable steps. A draft of this guidance is currently available.

Accounting arrangements cover the end to end process from record to report and need to enable the accurate calculation of relevant tax liabilities *in all material respects*. This is not intended to import a concept of accounting materiality but reflects HMRC’s focus on the significance of a transaction, system or tax and the relative size of these items in terms of the business. HMRC recognise that certain common sense decisions are taken regarding the level of accuracy required in order to sign off a tax return. When coupled with words such as “appropriate” and “reasonable” it is clear that no higher standard is being required than is already required when preparing returns. The use of these words is to reflect HMRC’s desire to focus on significant matters. While the legislation applies to a long list of taxes, it is clear that HMRC will be focusing on significant areas, which, of course may differ from company to company.

3.3. Which taxes and duties are covered?

Appropriate tax accounting arrangements “enable the company’s relevant liabilities to be calculated

accurately in all material respects", with relevant liabilities being in respect of the following:

- Corporation Tax
- Value Added Tax
- Amounts for which the company is accountable under PAYE regulations
- Insurance premium tax
- Stamp Duty Land Tax
- Stamp Duty Reserve Tax
- Petroleum Revenue Tax
- Customs Duties
- Excise Duties

3.4. What constitutes a 'qualifying company'?

A qualifying company is a UK registered company that in the preceding financial year, either alone or when its results are aggregated with other UK registered companies in the same group (see below), has turnover of more than £200m and/ or has gross assets of more than £2bn. There are specific rules to deal with aggregation if members of the group do not have coterminous year ends.

In determining which UK companies to aggregate, a relevant body (a company or other body corporate, but not an LLP) is a member of a group if:

- another relevant body is its 51% subsidiary, or
- it is a 51% subsidiary of another relevant body; and

Two relevant bodies are members of the same group if:

- one is a 51% subsidiary of the other, or
- both are 51% subsidiaries of a third relevant body.

51% subsidiary is determined by reference to s838 ICTA 1988 as if references to body corporate were to a relevant body.

3.5. Who is the Senior Accounting Officer?

For a company which is not in a group, this is the director or officer who, in the company's reasonable opinion, has overall responsibility for the company's financial accounting arrangements.

For companies which are in a group, the SAO is the 'group director or officer' who in the company's reasonable opinion has overall responsibility for the company's financial accounting arrangements. For these purposes a 'group director or officer' is a director or officer of the company or a relevant body that is a member of the same group.

This means a group might have only one SAO for all UK companies in the group, one SAO for each company or somewhere in between. If a group has more than one SAO then each can incur a penalty for not complying with the main duty or filing an inaccurate or late certificate.

In reality, the director or officer referred to above will be the CFO. While, the draft guidance refers to "as appropriately delegated", it would only be possible to delegate responsibility where this truly reflect the facts i.e. the CFO does not have overall responsibility for the financial accounting systems in which case it could be the Financial Controller, but not the Tax Director.

There are specific rules governing responsibilities where there has been more than one SAO in respect of a financial year.

3.6. What are the reporting requirements and potential penalties?

Certificate for HMRC

The SAO must provide the HMRC with a certificate for each financial year of the company stating whether the company had appropriate tax accounting arrangements throughout the financial year, and if it did not to provide an explanation. Normally, the certificate must be filed by the filing date for the company's accounts i.e. 6 or 9 months after the year end.

A certificate may relate to more than one qualifying company.

The penalty for a late or carelessly or deliberately inaccurate certificate is £5,000 assessed on the SAO. An SAO cannot be assessed to more than one such penalty for companies in the same group for the same financial year.

Notification of names of Senior Accounting Officer

For each financial year, a qualifying company must ensure HMRC are notified of the name of each person who was its SAO at any time during the year. The notification must be provided by the filing deadline for the company's accounts.

Failure by the company to make such a notification will result in a £5,000 penalty being assessed on the company. A penalty cannot be assessed on a company, if another qualifying company in the same group has been assessed to a penalty in respect of the same financial year.

Penalty for failure to comply with main duty

If an SAO fails to take reasonable steps to ensure that the qualifying company establishes and maintains appropriate accounting arrangements, then the SAO is personally liable to a penalty of £5,000. An SAO cannot be assessed to more than one such penalty for companies in the same group for the same financial year. If an individual is the SAO for companies in two or more different groups, it is possible to incur a penalty in respect of each of those groups should a failure to comply occur.

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