

TAXREP 36/09

Finance Bill 2009

Committee stage briefing on Clause 92 and Schedule 46, Finance Bill 2009

Duties of senior accounting officers of large companies

Parliamentary Briefing submitted on 17 June 2009 by the Institute of Chartered Accountants in England and Wales setting out concerns on the proposed introduction of new duties and obligations on 'Senior Accounting Officers' of large companies to maintain appropriate tax accounting arrangements.

Contents	Paragraph
Introduction	1 – 3
Key issues of concern	4 – 15
Recommendations and proposed amendments	16 – 23
Senior Accounting Officer Implementation Oversight Forum	24 – 28

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Clause 92 and Schedule 46, Finance Bill 2009

Duties of senior accounting officers of large companies

Introduction

- 1 Schedule 46 imposes new requirements and a personal liability on the senior accounting officer (SAO) to verify that a company and its subsidiaries maintain 'appropriate tax accounting arrangements'. These requirements apply for all taxes and duties.
- 2 We are deeply concerned about this clause which appears to be a disproportionate response to any perceived problem in this area. We would expect that most large companies will already have appropriate tax accounting arrangements but this measure will nevertheless impose significantly increased admin burdens and associated costs on them, with no benefit to the companies concerned. We believe that this measure needs to be removed from the Bill and if it is not then it needs to be much better targeted.
- 3 Given the far-reaching nature of this measure we were very disappointed that there was no consultation about the measure before it was announced in the Budget. This is particularly disappointing as it appears to have arisen out of the ongoing work on the review of HMRC's powers and the 'Tax in the Boardroom' agenda. We have been very involved in the former project (usually contributing to the discussions and responding to consultations, often on a confidential basis) and are surprised that it was not discussed in that forum first.

Key issues of concern

A disproportionate response to the problem

- 4 Clause 92 makes the Senior Accounting Officer *personally* accountable and liable to a penalty for any failure to take reasonable steps to ensure that the company and each of its subsidiaries establishes and maintains appropriate tax accounting arrangements. Although this measure applies to all taxes and duties, we believe that the measure is aimed primarily at corporation tax returns.
- 5 We believe that this measure is a disproportionate response to the perceived problem. Whilst we understand that it is not the Government's intention to import US Sarbanes-Oxley style legislation into the UK, this is exactly what this provision will do.
- 6 Under current rules, a corporation tax return must be signed by an authorised officer who certifies that the return is correct and complete to the best of his or her knowledge and belief. If a company does not have appropriate tax accounting arrangements, then the corporation tax return is not likely to be correct and complete and the company will be exposed to penalties for submitting an incorrect return.

An increase in admin burdens and costs

- 7 As it stands the measure imposes potentially onerous personal liabilities on all SAOs in large companies. It is inevitable that even where their company's systems are already appropriate, all responsible SAOs will wish to protect their position. This protection is likely to take the form of engaging advisers to undertake detailed

reviews of tax accounting systems and providing documented third-party confirmation that the systems are appropriate.

- 8 The measure will therefore impose admin burdens and associated costs on all large companies regardless of whether they already have appropriate systems and there must be a danger that the costs to UK businesses will exceed any additional tax revenue raised. We therefore disagree with the statement on page 144 of the 2009 Budget Notes that 'these requirements will impose no significant additional burden on [responsible] companies or their officers'.
- 9 We have sought to obtain some international comparisons to clause 92. Our preliminary intelligence is that such provisions are not common and, where they exist, they require personal knowledge or involvement by the individual, together with understated tax liabilities.
- 10 This evidence confirms our view that this measure is likely to make the UK a much less competitive place to do business and that it will provide further encouragement to companies and groups to consider relocation.
- 11 In summary, we think that existing tax rules should be sufficient to address any problem in this area and, if not, then any measure needs to be properly targeted. Rather than introducing a blanket measure that applies to all large companies, this measure should be aimed more closely at those companies that do not maintain appropriate systems. We believe that any such measure should be the collective responsibility of the Board of Directors and that any fine should be levied only on the company.

An appropriate penalty

- 12 We do not consider it appropriate to levy a flat-rate penalty for a failure to maintain appropriate tax accounting arrangements where there has been no loss of tax. Further, it would be wrong in principle to levy a penalty if the company had paid too much tax as a result of poor systems.
- 13 We therefore think that any penalties imposed in paragraphs 5(2), 6(2), 7(2) and 9 should be capped by reference to the amount of tax lost in consequence of a company not taking reasonable steps to establish and maintain appropriate tax accounting arrangements.
- 14 The new penalty regime introduced by Sch 24, FA 2007 allows for penalties to be suspended for up to two years in cases of careless mistakes. In view of the personal nature of the penalties in paragraphs 5(2), 6(2) and 7(2), we think it would be appropriate to mirror the approach adopted in Sch 24. Penalties would be suspended where a company undertakes to repair the weakness in its tax accounting arrangements.
- 15 Paragraph 11, schedule 24, FA 2007 allows for penalties to be reduced in special circumstances. We believe that this Schedule should include similar provisions.

Recommendations and proposed amendments

- 16 As noted above, we think that this clause and Schedule will impose substantial burdens and costs on UK companies which will be disproportionate to any risks. We therefore think that this clause should be removed from the Bill.

17 If this approach is not accepted, then the Schedule needs to be amended to ensure that the provision is more closely targeted at the companies that may not be complying with their existing obligations.

18 We understand that the Government plans to table some amendments to the Bill which will:

- remove any reference to external audit requirements; and
- target the measure only at companies with a turnover of more than £200m or assets of £2bn.

19 At the time of writing we have not seen the amendments. We welcome in principle these proposed amendments but do not think they will go far enough to ensure that this measure is properly targeted. We set out below our proposed amendments (we have assumed for these purposes that paragraphs 2 and 6 of Schedule 46 will be deleted as a result of the amendment set out in the first bullet point above).

Proposed amendments: replace references to ‘Senior Accounting Officer’ with ‘the Board of directors’.

20 On page 338, lines 33 and 34, delete ‘senior accounting officer’ and insert ‘Board of Directors’.

On page 339, lines 1 and 17 delete ‘senior accounting officer’ and insert ‘Board of Directors’

On page 339, line 38, delete heading and the whole of sub-paragraph 4.

On page 340, line 8, delete ‘senior accounting officer’ and insert ‘Board of Directors’

On page 340, line 10, delete ‘senior accounting officer’ and insert ‘the company’.

On page 340, line 18 delete ‘a senior accounting officer’ and insert ‘the Board of Directors’

On page 340, line 22, delete ‘senior accounting officer’ and insert ‘the company’.

On page 340, line 24, delete ‘senior accounting officer’ and insert ‘Board of Directors’

On page 340, line 26, delete ‘senior accounting officer’ and insert ‘Board of Directors’

On page 340, line 30, delete heading and whole of paragraph 8

On page 341, line 10, delete heading and whole of paragraph 9.

On page 341, line 16, delete ‘senior accounting officer or’

On page 341, line 30, delete ‘a senior accounting officer or’

On page 341, line 33, delete ‘the officer or’.

On page 341, line 43, delete ‘person’ and insert ‘company’.

The Tax Faculty of the Institute of Chartered Accountants in England and Wales

TAXREP 36/09

The Finance Bill 2009: Clause 92 and Schedule 46, Duties of Senior Accounting Officers

On page 342, line 20, delete 'income tax' and insert 'corporation tax'.

On page 343, line 19, delete Heading and paragraph 18.

Proposed amendments: capping of penalty by reference to tax lost

- 21 On page 340, lines 10 and 22, after '£5,000' insert 'or, where the potential tax lost (calculated in accordance with Part 2 of Schedule 24 to the Finance Act 2007) is less than £5,000, a penalty equal to the potential tax lost.'

Proposed amendments: suspension of penalties

- 22 On page 340, line 30 insert the following heading and paragraph in place of paragraph 8 (which we have proposed should be removed above)

'Suspension of penalties

- 8 Any penalty arising out of the provisions set out above may be suspended in accordance with the provisions of paragraph 14 of Schedule 24, FA 2007.'

Proposed amendments: special circumstances

- 23 On page 341, line 10 insert the following heading and paragraph in place of paragraph 9 (which we have proposed should be removed above)

'Special reduction'

- 9 'If they think it right because of special circumstances, HMRC may reduce a penalty arising out of the provisions set out above in accordance with the provisions of paragraph 11 of Schedule 24, FA 2007.'

Senior Accounting Officer Implementation Oversight Forum

- 24 We believe that a Steering Group should be established to take forward the implementation of Clause 92.
- 25 The population of companies affected by these proposals is to be dealt with by two distinct sections of HMRC: the Large Business Service and the Large and Complex section of Local Compliance. Each of these departments has its own forum for discussing issues with taxpayers, their agents and the professional bodies.
- 26 In order to monitor the implementation of the current proposals and to provide a forum for raising problems and matters arising, a single Steering Group will be needed to ensure a consistent and appropriate solution is delivered.

Recommendation

- 27 A Senior Accounting Officer Implementation Oversight Forum should be established.
- 28 The remit of the forum would be to provide assurance to the Financial Secretary to the Treasury and the HMRC Chairman and Commissioners that the policy outcomes of the proposals are being delivered in line with the undertakings given to Parliament.

The forum will oversee the period of initial implementation including the post-implementation review and benefits realisation work. Forum members should be mainly external stakeholders plus relevant HMRC Directors.

AM/FH
17 June 2009