

## THE SENIOR ACCOUNTING OFFICER

by David Goldberg Q.C.

When a while ago now, I was asked to talk about the role of Senior Accounting Officer and the difficulties inherent in it, I, of course, said that I should be more than happy to do that, even though, before then, nobody had asked me anything at all about the role of the Senior Accounting Officer.

I was, I think, vaguely aware that such a post existed, but I had certainly not studied the legislation and I was not aware of the practical problems which are being encountered.

Accordingly, I came to the topic as something of a novice, and I find that, in FA 2009 Schedule 46, there are four or so pages of legislation, which is then supplemented by what, in my printed version, is 104 pages of guidance.

It is worth noting the word “supplemented”.

When I started in practice we discovered what the law was by reading the legislation.

What was said outside the legislation was more or less irrelevant, and, had the law remained like that, it would have been completely wrong for me to make the statement which I have just made – that the legislation was supplemented by the guidance.

But these days we take account of all sorts of things in interpreting legislation, and this is one of the things that has made the law less certain than it used to be and less certain than I think it ought to be.

I have no doubt whatever that, if a judge finds in the guidance something which supports the view he wishes to take, even though that view might not be reflected by the legislative wording, he can say that he is bound to come to that view because he must take the guidance into account in interpreting the legislation.

However, if the judge doesn't like what the guidance says, he can more or less always find an excuse for ignoring it.

For my own part, I regret this laxity in the law: it is undesirable; at best it creates a degree of uncertainty, and, at worst, it gives an unchecked legislative power to unelected administrators. I also think that good legislation should not need explanation and certainly not by guidance 10 or 20 times its own length.

I mention all this because I think the explanatory role of the guidance is important in the context of the role of the Senior Accounting Officer: I have, as I shall explain, a concern that the guidance does not accurately reflect but, rather, expands the statutory wording.

Now I am sure that everybody here will be familiar with the statutory provisions and, indeed, with the guidance.

As you will know, this legislation only applies to qualifying companies and qualifying companies are limited to UK incorporated companies of a certain size.

And there are rules about what the size must be and about how you determine the size.

It is interesting in this connection that the rules about when a company is big enough to fall into the SAO regime are, essentially, concerned only with UK incorporated companies – in a time of increasing globalisation, surely that is odd – and that size is determined by Companies Act tests rather than tax tests.

Why the mixing of regimes?

The answer, of course, is that, nowadays, we increasingly link our tax law to accounting and that is, no doubt, why the SAO regime contains a requirement about accounting records and why it refers to the Companies Acts, because that is where the requirements which accounts must satisfy are laid down..

The mixing of law and accounting has not been an unqualified success, but, as this regime shows, we continue to do it.

Although the legislation raises questions of the kind I have

just mentioned, and a lot of the guidance is taken up with examples of when a company is a qualifying company and when it is not, I do not think that this part of the legislation or of the guidance raises any question of particular difficulty, and so I shall not dwell on it.

Once the legislation applies, three duties are imposed by it.

Although it is, sequentially, the third duty imposed by the legislation, logically the first duty must be that of the qualifying company itself, to identify, to HMRC, who the Senior Accounting Officer is at any time during the financial year; and there are rules about identifying him which turn on the reasonable opinion of the Company itself.

I doubt if any real difficulty is going to be created by the need to identify a SAO.

The second duty imposed by the legislation is the duty of the Senior Accounting Officer to give a certificate of compliance with the primary duty or to identify failures to comply with the primary duty, and it is the primary duty which, as it seems to me, raises some interesting and difficult questions.

It is perhaps worth noting that the statutory obligation is to give a certificate which states that the Company had appropriate tax accounting arrangements or that it did not.

Neither the legislation nor the guidance allows a certificate to say that there were appropriate arrangements except for certain lapses.

If the SAO thinks there are lapses, he must issue a certificate which says the Company's accounting arrangements were not appropriate, and he must list the way or ways in which they were inappropriate.

However, this duty of the SAO to provide a certificate arises only in the context of the primary duty, so that before the SAO can know what certificate he is to issue he must understand what the primary duty is.

The primary duty is that of the Senior Accounting Officer

and obliges him “to take reasonable steps to ensure that the company establishes and maintains appropriate tax accounting arrangements”; and accounting arrangements are then defined, in FA 2009 Schedule 46, paragraph 14, as “accounting arrangements that enable the company’s relevant liabilities to be calculated accurately in all material respects”.

Now the first question which comes to mind is whether there is really a need for the imposition of the primary duty?

Note that it applies to nearly all types of tax, and not just C.T: for example, it applies to PAYE and to tax liabilities arising from issues of employment related shares, each of which have their own code about disclosure.

I am astonished that companies have allowed this kind of burden to be imposed on their officers without any real objection. I appreciate that the times are not good for claiming that duties in relation to tax are too onerous, but it seems to me that the burden here might be quite heavy.

The second point to note is that the obligation is to have records which enable companies’ tax liabilities to be calculated: it is not, expressly, an obligation correctly to compute a tax liability.

However, the guidance contains examples (for example a calculation of the debits in respect of loan relationships) which suggest that HMRC think the obligation is to maintain records which accurately calculate the liabilities.

And the example about VAT is to similar effect: HMRC seem to expect the records not only to record the item in respect of which VAT was or was not charged, but whether the item is standard or zero rated.

The distinction between a duty to maintain accurate records which enable a computation and a duty correctly to compute is obviously considerable.

For example, in the VAT context, I think that records which accurately record the item being sold enable correct

computation, while records which go further and allocate a VAT rate to the goods sold do more than just enable computation but actually make the computation.

For my own part, I would have thought that the obligation was only to maintain records which made clear how the computations were carried out, rather than records which make the computation, and I believe that, so far as the guidance asks for more than that, it asks for too much.

However, suppose HMRC's guidance is right, and the obligation is to make, rather than just to enable, correct computation, how do you deal with areas of difficulty – allocation of profit to a taxing jurisdiction (fashionable today politically and with the OECD) or with matters which fall within the GAAR?

Happily for advisers, HMRC seem to hold the view that taking all possible advice ensures that reasonable steps have been taken.

The third point to note is that the legislation contains many references to reasonableness, and, in relation to penalties for failure to comply with the primary duty, there is a double reasonableness test: the SAO's obligation is to take reasonable steps to establish and maintain appropriate tax accounting arrangements (paragraph 1(1)), but he can avoid a penalty for failing to do that if he has a reasonable excuse for failing to comply with the Schedule (paragraph 8).

These days a requirement of double reasonableness has, apparently, become quite popular and is, no doubt, intended to be reassuring.

However, I am not sure how reassuring it really should be.

As it is up to the penalised person to appeal against a penalty, it seems to me that the burden of establishing reasonableness is, as a matter of domestic law, on the SAO.

And if he has not taken reasonable steps to ensure that there were appropriate accounting arrangements, can he have a reasonable excuse for there not being such arrangements?

I suppose it is possible to imagine situations where there might be a reasonable excuse when reasonable steps were not taken – for example, where there have been changes of the SAO during the year.

But our tax legislation seems to put an increasing amount of weight on a requirement of reasonableness at the same time as our administrative law is recognising that a test based on reasonableness is rather uncertain and unsatisfactory, although I do not believe that it has yet gone so far as to substitute some other more solid test.

Nonetheless, I cannot help feeling that a test based on reasonableness is not satisfactorily certain and, in my view, there are two other unsatisfactory aspects of the legislation.

First, it seems to me that the attempt is to plant into every large UK company someone who might be regarded as an HMRC spy, whose job it is to make sure that the company is aligning its tax reporting with HMRC's views.

How onerous that obligation is – how much the SAO is like a government spy – must depend, of course, on exactly what the obligation to establish and to maintain appropriate tax accounting arrangements involves.

If HMRC are right in suggesting – as it seems to me that they do in the guidance – that it involves an obligation to produce a tax result with which HMRC would agree, if they themselves made the computation, it is, indeed an onerous obligation.

I very much doubt if the legislation, read literally, does impose an obligation on the company or the SAO to be right, but the guidance is worrying, and I cannot rule out the possibility of a tribunal holding that it does impose that obligation.

Secondly, I should come back to the point that there are penalties for failure to comply with the reporting obligations imposed by the SAO legislation.

The penalties are, in context, relatively modest, but they make the legislation coercive.

As a matter of psychology, this seems to be the wrong approach.

Might it not be better to give a reward for compliance – say a reduction in the tax bill equal to a guess at the costs of testing compliance?

I think people might feel encouraged by legislation in that form rather than, as I suspect they now feel, oppressed by it.