HWF

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SPECIFIC TAX INSURANCE

OUR CAPABILITIES

TAX INSURANCE

WHAT IS IT?

Tax insurance provides cover for specific identified tax risks, by transferring the risk of loss arising from a tax authority challenge to an insurer.

Tax insurance is commonly used to address known risks identified as part of M&A processes. However, it is increasingly being used to mitigate risks arising in the lifecycle of investment structures, release balance sheet provisions and provide operational certainty.

WHAT TYPES OF RISKS ARE COVERED?

An extensive range of risks can be covered, including:

- The application of withholding taxes
- The potential for a taxable gain to arise, including the application of participation exemptions
- Equity/debt classification
- Whether VAT is payable in respect of goods or services
- Employment related securities and share option concerns
- The applicability of transfer taxes
- The applicability of anti-avoidance tests
- The ongoing availability of losses and other tax reliefs

KEY BENEFITS

- Facilitates tax management by protecting against ordinary course and structural tax risks outside of an M&A context.
- Provides excellent covenant strength through an insurer for up to 10 years.
- Allows for dormant cash reserves to be unlocked and utilised throughout a business or repatriated to investors.
- Offers an alternative to tax clearance processes and provides greater certainty.
- Facilitates reorganisations and refinancings.
- Facilitates a clean exit without the need for indemnities, escrows or price adjustments, often unblocking transactions.
- Allows fund managers to maximise returns for investors and protect against material tax leakage.

TAX INSURANCE PLACEMENT PROCESS

1

FACT GATHERING & SUBMISSION

We evaluate the facts and legal framework underlying the relevant tax issues, drawing on the extensive experience of our market-leading tax team. We then analyze how best to structure a tax solution based on the dynamics of the risk in question and the current appetite of the different tax insurers, to ensure we receive the best possible responses from the market.

We present a detailed submission to the tax insurers which includes a clear summary of the risk, the coverage required and accompanied by supporting advice and documentation.

Once we identify interested insurers, we work closely with them to avoid surprises later in the process – our goal is to ensure that the insurer fully understands the tax risk and that we, in turn, fully understand their underwriting approach, timeline and appetite for the risk.

At the end of this phase of the process, the insurers prepare formal quotes (referred to as Non-Binding Indications “NBIs”).

2

RECOMMENDATION OF A TAX INSURER

Once NBIs have been received from insurers, we prepare a detailed written report recommending the optimal insurer based on a holistic analysis of coverage/exclusions, policy costs and insurer profile (including relative risk appetite, underwriting approach and overall reputation).

3

UNDERWRITING & POLICY NEGOTIATION

Once an insurer has been selected, the formal underwriting process commences.

During underwriting, the insurer and their advisors review all available tax analysis and conduct a fulsome review of all relevant documentation and facts.

There may also be an underwriting call so the insurer can discuss any outstanding questions with the client and their advisors.

In parallel with underwriting, we draw on our team’s experience in placing over 1,000 policies across virtually every jurisdiction globally to negotiate the terms and conditions of the tax insurance policy.

4

CLAIMS PROCESS

Finally, if a claim is filed, our team (which includes dedicated claims specialists) will review and input into any claims documentation and advocate for our clients during the entirety of the claim process to ensure full and expeditious recovery.

TAX POLICIES - KEY FEATURES

COST

Policy costs are made up of the premium (plus insurance premium tax) and an underwriting fee.

Premium is calculated as a percentage of the policy limit sought and will usually vary between 1% and 7% depending on the nature of the risk and jurisdiction. The underwriting fee is a fixed amount, usually between £10,000 and £60,000, depending on the complexity of the risk.

COVERAGE

The policy covers losses arising from the tax liability (including interest and penalties), defence costs incurred defending a tax authority challenge and any tax suffered on receipt of insurance proceeds (a “gross-up”).

Policies will also cover advance tax payments to enable an appeal to be made.

EXCESS

Generally there will be no excess in relation to the tax liability suffered. However, some policies may include an excess in respect of defence costs only.

LENGTH OF COVER

Cover is usually for a period of 7 to 10 years depending on the statute of limitations in the relevant jurisdiction.

EXCLUSIONS

Standard exclusions include:

- Change in law
- Fraud
- Material inaccurate representations or omissions
- Deliberate non-compliance with the policy (to the extent it increases the insurers loss)

CONDUCT

The insurer will not have the right to take over conduct of a tax authority claim. However, the insurer will have the right to: (i) be notified of all communications, (ii) input into how the matter is handled with the tax authority and (iii) review and comment on correspondence with the tax authority.

SOLUTIONS

Some of the recent tax policies that we have advised on and placed include:

Dividend withholding tax

BACKGROUND

A Dutch operating group was due be acquired. The Dutch target entity had paid dividends to a Singaporean parent.

A clearance had been obtained from the Dutch authorities that dividends could be paid gross, but it was subsequently discovered that the Singaporean recipient was tax resident in the UK.

The withholding tax exemption would still have applied to a Singaporean entity tax resident in the UK, but the clearance could not be relied upon and the buyer required the seller to stand behind the risk.

SOLUTION

HWF built a tax insurance tower for the seller with a limit of €302m. This policy allowed the seller to exit cleanly and distribute sale proceeds to investors.

Deemed release of impaired debt

BACKGROUND

As part of the acquisition of a target group, shareholder loan debt was to be acquired at fair market value, being less that the carrying value in the target group.

Pursuant to the UK loan relationship rules, there was a risk that a deemed release of the shareholder debt could occur (being the difference between the carrying value and fair market acquisition value), giving rise to a taxable credit in the target group, as the target group and the acquiring entity would be connected after the debt was acquired.

SOLUTION

An acquisition structure was put in place to minimise any risk that a deemed release would crystalise. The acquisition structure was underwritten and a policy with a limit of £20m was placed to protect against the risk of a taxable credit arising in the target group.

Non-resident capital gains

BACKGROUND

A Norwegian holding company with a Chilean subsidiary company holding real estate assets was to be acquired.

Non-resident capital gains tax can arise in Chile on the indirect acquisition of real estate assets if the market value of the relevant subsidiary holding real estate is at least 20% of the wider group.

Both buyer and seller agreed on the tax treatment of the acquisition, but disagreed over the market value of the shares in the Chilean subsidiary holding the real estate assets.

SOLUTION

The seller provided the buyer with a tax indemnity, including the right to be released if specific tax insurance was obtained in respect of the risk. HWF placed a policy covering the valuation delta with a limit of $150m, allowing the seller to be released from the indemnity.

ABOUT US

We are a specialist transactional risk insurance brokerage with extensive experience from providing advisory services on over 5,000 transactions and structuring over 1,300 bespoke transactional risk insurance policies. Recognised as a market leader, our expert team consists of former M&A lawyers, tax advisors, transactional risk underwriters and investment bankers.

With experience from premier law firms, accounting firms, insurance companies and financial institutions, our most senior brokers lead each transaction and remain closely involved throughout the insurance placement to ensure flawless execution and responsiveness at each stage.

With offices in London, New York, Dubai, Frankfurt, Milan, Munich, Paris and Warsaw, we leverage our international presence and over 200 years of combined experience in the transactional risk insurance marketplace to provide our clients with unparalleled insight and individualised attention on each transaction.

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