

Tax Liability Insurance: Providing Certainty

Companies are constantly forced to take a view on the many complex tax matters that affect their business or investment. If the view a company has taken is subsequently disputed by a tax authority, then the tax ultimately payable can be significant.

Tax Liability Insurance key features

- Insurance forms a legally binding transfer of the tax risk from insured to insurer.
- Cover extends to tax risks arising in countries with stable legal systems throughout the world.
- Typical premiums are in a range of 3-8% of potential exposure covered.
- Up to €180m capacity available from individual insurers for a single tax risk.
- €400m+ capacity available on a syndicated basis for a single tax risk.

Specific tax liability insurance cover can include:

- Defence or contest costs
- Additional tax deemed due to tax authorities
- Interest, fines and penalties (to the extent insurable by law)

Tax risks

Historic or structuring risks can be a barrier to new investment or M&A transactions. We frequently see enquiries relating to the following tax risks:

- Categorisation of an Asset Sale v Enterprise Sale, for transaction tax purposes
- Intragroup reorganisations
- Residency issues
- Real estate – Trading v Investment, options to tax
- Debt for equity swaps
- Secondary tax liabilities (including VAT groups)
- Group relief
- Availability of deferred tax assets
- Application of the substantial shareholding exemption
- Withholding tax on overseas dividend payments

How can Willis Towers Watson help?

Willis Towers Watson can arrange insurance solutions for complex tax risks (“**Tax Liability Insurance**”), allowing companies to free up capital for other purposes. Generally, the earlier we are brought into the process, the more likely we are to successfully source an insurance solution.

Tax Liability Insurance – Process

Step	Willis Towers Watson capability
Identification of Risk	Our team, with significant tax, corporate legal and broking experience, is able to work with clients to analyse tax liability risks to determine whether such risks are appropriate for the tax liability insurance market.
Indicative Pricing	We canvass insurers for appetite and seek indicative pricing and establish a strategy for effective placement of the risk. Initially insurers will rely heavily on the Willis Towers Watson team to describe the particular tax issue in detail and to identify its key sensitivities.
Selection of Insurers	The tax liability insurance market comprises a number of global insurance companies and syndicates operating in the Lloyd’s of London insurance market. We liaise with suitable insurers who have appetite for the particular type of tax risk in question.
Due Diligence	Assuming the risk is insurable in principle, insurers will offer non-binding indicative terms and, if acceptable, appoint lawyers (subject to entering into an underwriting expense agreement) to review the legal opinion obtained by the client in order to assess the quality of the risk; this advice will enable the insurer to determine whether or not to offer to finalise the provision of cover.
Policy Negotiation	We will work with the client’s legal advisers and the insurer’s legal advisers to discuss and negotiate the terms of the tax liability insurance policy wording.
Completion of Placement	A precise description of the facts and circumstances by reference to which the potential tax liability exposure may arise will form the basis of the legal opinion provided to the client. Accordingly, these same facts and circumstances will also form the basis of the insurance provided and will be appended to the bespoke policy in the form of a ‘Representations Letter’.

Willis Towers Watson has significant tax expertise and is able to source insurance cover for complex tax risks, providing our clients with certainty as to their financial position.

Risks for which Tax Liability Insurance is suitable

For a risk to qualify for Tax Liability Insurance it will usually need to satisfy the following criteria:

- **The tax liability risk to be insured must ideally relate to a single issue**

Cover will relate to interpretation of a specific area of tax legislation or to the successful outcome of a single claim/litigation. The insured must manage the specific enquiry in isolation, without regard to other tax matters which it may be discussing with the tax authority.

- **Legal opinion must generally be that the tax liability risk 'should not arise' or 'will not arise'**

There are three broad classifications of legal opinions on tax: The weakest level of opinion is one that states that the tax risk is '**more than likely not to arise**'; a strong level of opinion is one that states that the tax risk '**should not arise**'; and, a very strong level of opinion is one that states that the tax risk '**will not arise**'.

In practice tax insurance is generally placed where '**should level**' advice is available or where counsel for the buyer and seller have differing opinions.

- **The subject of the insurance must not already be fully determined**

A policy can be written concurrently with entering into a transaction, post transaction or even where the relevant tax authority has started preliminary investigations – provided the risk is still insurable, i.e. the matter has not yet been finally determined.

- **Insurers will cover interpretational risks but will be unlikely to cover pure "discovery" risks i.e. known breaches or non-compliance with applicable tax laws.**

Case studies

Multinational operator of data networks: insuring a €90m historic tax exposure in Germany

Need: Outside investors undertaking due diligence had made their willingness to proceed with investment contingent on capping an identified historic corporate tax exposure.

Outcomes: €90m potential exposure was covered by tax liability insurance. The investors proceeded with the transaction in the knowledge that a key financial risk had been addressed.

Our approach: Willis Towers Watson worked very closely with the client to gain a clear understanding of the arguments for and against the tax arising. This also involved Willis Towers Watson directly instructing external counsel. This allowed Willis Towers Watson to negotiate with insurers and their respective advisers from a position of authority. Willis Towers Watson also took primary responsibility for drafting the tax liability policy wording in order to control how the cover was expressed and to ensure it met the client's needs.

Our solution was successful because of our technical approach to analysing the risk and drafting the policy wording, together with a commercial awareness that allowed us to identify which points to concede to insurers and which to contest.

Spanish tax-free re-organisation

Need: Our client was in the process of selling its subsidiary to a third party. The purchaser had identified a tax liability risk associated with a historic "no gain"/ "no loss" intragroup reorganisation. The seller and buyer had differing opinions as to whether or not it was a 'real' risk or extremely remote.

Outcome: €80m of insurance was placed. The client was able to provide the buyer with an indemnity for the tax liability risk and the transaction completed successfully.

Our approach: We worked closely with the client and their local adviser to fully understand the historic transaction and the competing legal opinions. We produced a slide deck outlining the facts and the tax liability insurance being sought. This was the basis on which we obtained quotations from several insurers. We then worked closely with the client, including guiding them on the tax liability policy wording, to get the insurance executed without disrupting the wider deal timeline.

Asia Leadership

Alexander Keville

Practice Leader, M&A, Transactional Risks

Direct: +44 (0)20 3124 8187

Mobile: +44 (0)7768 099 840

Email: Alexander.Keville@WillisTowersWatson.com

Terence Montgomery

A-Pac Practice Leader, Transactional Risks

Direct: +852 2195 5889

Mobile: +852 9666 8589

Email: Terance.Montgomery@WillisTowersWatson.com

Namit Mahajan

Head - FINEX, Asia

Direct: +65 6591 7212

Mobile: +65 9176 2814

Email: Namit.Mahajan@WillisTowersWatson.com

India

Sagar B. Mehta

Practice Leader - M&A

Direct: +91 (0)22 6151 6723

Mobile: +91 98209 764 66

Email: Sagar.Mehta@WillisTowersWatson.com

China

Robin He

Associate Director

Direct: +86 21 5029 8110

Mobile: +86 1365 1919 654

Email: Robin.He@WillisTowersWatson.com

Liu Xing Yu (George)

Associate Director

Direct: +86 21 5029 8205

Mobile: +86 1381 7301 496

Email: George.Liu@WillisTowersWatson.com

Japan

Yasuhisa Kitashiro

Division Director

Direct: +81 (0)3 6833 4673

Mobile: +81 (0)70 3868 6527

Email: Yasuhisa.Kitashiro@WillisTowersWatson.com

Yoshika Nakamura

Senior Associate

Direct: +81 (0)3 6833 4686

Mobile: +81 (0)70 4506 7956

Email: Yoshika.Nakamura@WillisTowersWatson.com

Why Willis Towers Watson?

The Transactional Risks team at Willis Towers Watson is a market-leading, global and experienced team of M&A professionals with significant corporate legal, underwriting and broking insurance backgrounds that advises its clients, and their advisers, on entering into bespoke transactional insurance products. To provide our clients with the most flexible and competitive insurance solutions, we are able to access all major insurance markets worldwide for every transaction. We advise on the process, market trends and facilitate/negotiate the optimum insurance solution for the insured. On every deal we utilise our strategic relationships with the insurers or underwriters enabling us to deliver the best achievable results in a timely manner.

About Willis Towers Watson

Willis Towers Watson (NASDAQ: WLTW) is a leading global advisory, broking and solutions company that helps clients around the world turn risk into a path for growth. With roots dating to 1828, Willis Towers Watson has 40,000 employees in more than 140 countries. We design and deliver solutions that manage risk, optimize benefits, cultivate talent, and expand the power of capital to protect and strengthen institutions and individuals. Our unique perspective allows us to see the critical intersections between talent, assets and ideas – the dynamic formula that drives business performance. Together, we unlock potential. Learn more at: www.willistowerswatson.com.

Willis Towers Watson

51 Lime Street
London, EC3M 7DQ
United Kingdom
Tel: +44 (0)20 3124 6000

www.willistowerswatson.com

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Registered address: 51 Lime Street, London, EC3M 7DQ.
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