Brockwell

What is tax liability insurance?

The global tax landscape is increasingly more uncertain and more complex. As attitudes and approaches towards revenue collection evolve, there are often grey areas and ambiguities left for taxpayers to negotiate. The purpose of tax liability insurance is to provide taxpayers with the certainty required for facilitate commercial activity.

A tax liability insurance policy protects a taxpayer (or another party, e.g. one that is secondarily liable) against loss arising from a particular tax event.

Example. A taxpayer may treat certain supplies as VAT exempt and, therefore, neither charge customers for VAT nor account for VAT to the tax authority. However, a third party adviser might identify a risk that the tax authority could challenge the supplies as standard-rated. In this scenario, a tax liability insurance policy could be sought to give the taxpayer comfort that, even where the tax authority does challenge the VAT treatment of supplies, it will not suffer a loss.

Tax liability insurance is distinct from its sister product, warranty and indemnity insurance (W&I), that covers unknown risks in respect of the warranties and tax covenants given in M&A sale documents. Crucially, identified risks are excluded from cover in a W&I policy (the principle generally being that unknown risks are covered), whereas tax liability insurance indemnifies the taxpayer/insured for an identified risk.

Premiums for tax liability insurance are typically between 3% and 10% of the limit insured.

What is covered?

The precise loss that is covered by a tax liability insurance policy is flexible, but typically comprises:

1. the tax payable,
2. penalties and interest payable to the tax authority,
3. the costs of dealing with a tax authority enquiry, dispute or litigation ('defence costs'), and
4. any tax suffered by the insured on the insurance proceeds received ('gross-up').

Another important feature of tax liability insurance is that cover can be provided for where a tax authority requires payment on account. This feature of tax liability insurance can prevent cashflow issues or the need for a taxpayer to provide for the assessment in its financial accounts.

Brockwell Capital

We have authority to insure tax risks up to a limit of **GBP 40m** (or its local equivalent) with **no minimum limit** in **any jurisdiction** other than the United States for a period of up to **seven years**.

Brockwell is able to cover **any tax** and to insure both **individuals** and **corporates**.

As our risk capital is provided by Lloyd's syndicates, the credit underpinning our policies is rated **A** by AM Best or **A+** by Standard and Poors and Fitch.

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Process

Once we have received a request for insurance, including an overview of the risk / factual background and a note from the taxpayer's tax adviser, if the risk is insurable we will offer indicative non-binding terms.

Our underwriting process commences with a review of all requested documentation together with an initial Q&A process. To the extent necessary, we will then circulate further Q&A based on our review to clarify any material outstanding items. Following this, we will finalise our policy.

As with W&I, depending on the complexity of the risk, tax liability insurance can be arranged in a relatively short period of time in order to meet the demands of commercial timelines. Depending on the nature of the risk, it is possible to complete underwriting and formalise a policy in five working days from the point at which the insurer is provided with all required documentation and responses to Q&A. However, for a straightforward risk the process will typically be completed within two weeks.

Insurability. Brockwell will assess whether:

- the position taken is defensible (i.e. taking into account the law and the fact pattern there should be defences available and appropriate documentation/evidence to support a defence),
- a challenge by a tax authority is likely (n.b. if a challenge is likely for a defensible position then this will be factored into pricing),
- the jurisdiction in question upholds the rule of law and has a stable court system that offers legal certainty, and
- insurance is being sought as an alternative to typical prudent behaviour (e.g. instead of maintaining a defence file).

Tax liability insurance is only available for genuine commercial arrangements. Cover is not available for intentional tax avoidance/evasion or marketed schemes.

When can insurance help?

The use of tax liability insurance is varied and the need for a solution is often identified when transactions or operations are scrutinised by third parties (e.g. in an transactional context or when advisory work is undertaken).

In a transactional context (e.g. acquisition of shares/ property, wind-up or reorganisation) insurance can:

- serve as an alternative to a price adjustment, escrow, indemnity or other contractual protection,
- used to enhance the protection available to a buyer (n.b. Brockwell's risk capital has a robust credit rating),
- act as a shield for the seller (e.g. by transferring the risk to insurance), or
- remove uncertainty from transaction steps.

From an advisory perspective, insurance can be broadly applied to:

- deal with an identified business tax risk or as part of ongoing risk management,
- reduce or remove uncertain provisions or expenses in financial accounts, or
- provide a quicker and confidential alternative to a tax authority clearance or provide the comfort of a clearance if one is otherwise not available.