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Tax Risk Control: Insurance as Valuable Alternative to Rulings

Frank Kuilboer (Norton Rose Fulbright LLP) · Tuesday, November 20th, 2018

By now, [warranty & indemnity \(W&I\) insurance](#) is more or less a transaction solution commodity. As such, it clearly has entered its next product life-cycle phase. Expectations are that [stand-alone tax insurance](#) will quickly follow suit.

As W&I insurance has grown in popularity, tax insurance has been most often used as an add-on to W&I insurance to provide cover for tax exposures identified during due diligence. Such exposures are excluded from cover under W&I. Otherwise, it has also been used commonly for certain straightforward tax risks, for instance those related to real estate transactions and in some cases for more esoteric risks. However, as the product is gradually gaining awareness, taxpayers will soon start to realise there's no reason to limit taking out tax insurance to transaction related risks.

Obvious reasons for this are [ever more challenging tax rules](#) and a [reluctance amongst tax payers and tax authorities](#) alike to agree on a certain tax treatment in binding tax rulings. The overall consensus amongst tax practitioners seems to be that these developments inevitably will result in more tax litigation.

In Europe, that poses challenges for taxpayers. As from January 1, 2019, the anti-abuse measures introduced by the [Anti-Tax Avoidance Directive](#) (commonly referred to as ATAD 1) take effect. This means that the European Court of Justice (ECJ) and domestic courts will have additional opportunities to further strengthen its grip on the tax systems of the various Member States – to most taxpayers, that poses risks as the ECJ is not necessarily known for its clear-cut case law, so that inevitably there will be increased uncertainty which will take many years to resolve as the cases go through the court systems.

With their [tax product](#), insurance companies could offer taxpayers a way out from this maze. In principle, tax insurance policies have the potential to be much more flexible in terms of outcome than rulings or court cases would ever be as these policies are nothing more than contractual arrangements between two market parties. Not only is this revolutionary to the whole concept of

paying taxes – which in its very essence establishes a relationship between a market party and a state and not between two market parties –, it also opens the way to a multitude of creative solutions for tax risk control. Insurance can be used as a way to de-risk the issue as far as the taxpayer is concerned.

Therefore, I welcome tax directors, CFOs, tax practitioners and other tax-minded people to join in on this discussion and/or to share particular concerns or examples to stimulate the thought process on the possibilities tax risk insurance may have to offer by commenting on this post.

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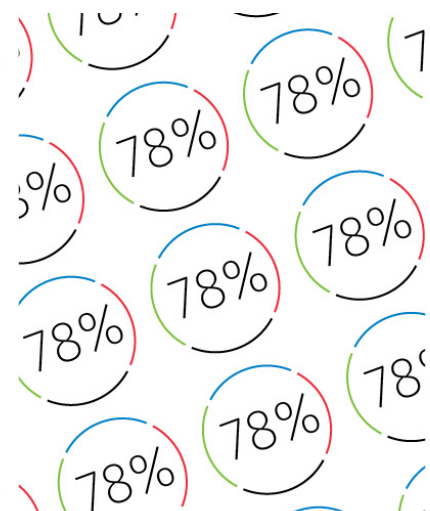
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