



W&I Tax Plus: Icen's underwriting framework



Icen is committed to providing **predictable** and **clear** tax coverage within its W&I offering. We set out below our framework for achieving this.

Icen recognises the challenges that tax coverage presents within a W&I offering, given the inherently subjective nature of tax advice in a due diligence report and the various approaches adopted by insurance markets in covering risks within such a report.

As shared with us by brokers, advisors, and our clients, this lack of clarity and inconsistency generally presents in one of four ways:

- the client is unsure as to whether specific points referenced in tax due diligence reports are insured, for example, a risk is identified, but listed as “low” risk and is excluded as a “disclosed” or “known” matter;
- there is uncertainty as to the coverage position for a matter contained in a tax return within the data room;
- the underwriter is unwilling to give affirmative coverage on an identified risk; and/or
- the underwriter may exclude all “medium” and “high” risks, and often some of the “low” risks as well, without conducting a full analysis of the risks in-house.

Icen prides itself in understanding these tax issues and providing valuable coverage solutions.

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At Icen, we have one of the largest teams of tax underwriters, globally. We are highly experienced tax professionals with backgrounds from territories in the UK, EU and beyond (many of whom are former partners from leading international law firms) and who are familiar and comfortable with analysing, and pricing, tax risk.

Icen's commitment to you is to undertake a 3-step approach in the course of our in-house review of the tax diligence within 2 business days of receipt to confirm our view on:

1 Which tax risks may be covered affirmatively within the W&I;

2 Which tax risks may be covered for additional premium; and

3 Which tax risks are likely to be excluded from cover.

Furthermore, Icen commits as follows:



on excluded risks, we will (so far as is within our control) avoid any late “surprises”;



we will include affirmative coverage for all “low” risk items, where we agree that the risk is well diligenced and indeed a “low” risk. Additional premium varies depending on the quantum and nature of the risks;



we will **NOT** automatically exclude all “medium” or “high” risks;



where within appetite and where the client is interested in exploring the option, we will offer terms for specific cover, either within the W&I policy or in a separate tax policy for any “medium” or “high” risks; and



we will give full explanations for why coverage may be specifically excluded: our experienced tax underwriters will always be able to discuss this with you.



We do not take the approach that any items referenced in a tax due diligence report are automatically excluded: we do not penalise good diligence by professional advisors.

Equally, if diligence is very limited or the seller has not been forthcoming, the insurance does not exist to plug diligence gaps.



It may be possible to give cover promptly for known risks within the W&I policy or through a tax-specific policy. A specific tax policy is often the best approach if the quantum of the tax risks are material in the context of the W&I limit (so as not to erode the W&I limit within known tax matters). Your broker can guide you on this and we are always happy to discuss this.



We are willing to provide a synthetic tax covenant on deals for an additional premium of 10% of the W&I premium; we have included this on many deals and clients have appreciated the clarity of our cover and drafting.

Examples of tax cover within W&I policies

Below are some recent examples of tax risks we have underwritten through our review of tax risks in W&I deals.

- Synthetic tax asset coverage for post-completion deductions insured under the W&I policy, including transfer pricing coverage (12% additional premium);
- Bespoke tax policy to cover future use of losses subject to group relief, including any losses denied due to transfer pricing adjustments (1% of the limit taken);
- Affirmative cover for a 'medium' rated Transactions in UK Land risk within the W&I policy (2% of the sub-limit taken within W&I);
- Affirmative coverage for all 'low' risk items listed in the Tax DD report (10% additional premium);
- Removing the Tax DD report from the list of disclosed documents, so all tax was covered other than one high-risk issue specifically listed as an exclusion (20% additional premium);
- Separate tax policy covering tax for 4 specific identified tax issues, where the client was dissatisfied with the tax coverage provided in a W&I policy by a different insurer (risks priced separately from 2% to 3% of the limit, with W&I cover for 0.8%);
- 'GAAR' coverage on a withholding tax risk in relation to historic dividends paid, given under the W&I policy. Sub-limited but with no additional premium given the quantum was low in the context of the overall W&I limit;
- Coverage for tax liabilities arising out of a pre-Completion reorganisation (10% additional premium); and
- Coverage for identified employment related securities risks (10% additional premium).

We want our clients to have fair and certain tax cover and do not want disputes in the event of a claim. Please contact any of our team to discuss any points in this note or on deals.

The team



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