

## Transfer Pricing

# Insurance Tools Eyed to Handle Rising Transfer Pricing Risks

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- Tariffs, IRS wins add to uncertainty in intercompany deals
- Insurers growing more comfortable, one executive says

President Trump's new tariffs and an increasingly aggressive IRS with some big court wins under its belt are prompting more companies to explore transfer pricing insurance, something that wasn't on their radar just a few years ago.

The idea is that insurance could protect against government audits of intercompany transactions, even possibly replacing some of the advance pricing agreements that companies make with tax agencies.

"Probably three or four years ago is when the dots started to connect for a lot of these folks, saying 'Hey, I can take out an insurance policy. I can reduce or eliminate my uncertain tax position in reserves. I can get this done in a tenth of the time that it would take to do an a APA at a fraction of the cost,'" Chad Martin, Eide Bailly principal, said.

The IRS, previously not known for winning big transfer pricing cases, began to find success in the courts several years ago when the US Court of Appeals for the Ninth Circuit ruled in favor of the agency in an Altera Corp. case. The IRS then prevailed at the US Tax Court in cases involving 3M Co. and the Coca-Cola Co., both of which are appealing their losses—3M at the Eighth Circuit and Coca-Cola, at the Eleventh Circuit. Coca-Cola may have as much as \$18 billion at stake.

The agency has also begun issuing penalties in some audits, even when taxpayers provide documentation for their positions.

### Impact of Tariffs

The stakes have only risen lately.

Trump's tariffs threaten to upend companies' transfer pricing positions by shifting costs and supply chains, and savvy tax departments are looking into ways to structure intercompany arrangements to mitigate the new levies.

"All of these things are kind of converging together to make tax insurance more lucrative than it's ever been before as a solution or one of the tools in the toolkit for a practitioner in-house who is looking to cover exposures that they may not even know exist," Martin said.

At the same time, insurance companies have been getting more comfortable with the risk levels and dollar amounts involved in transfer pricing.

Data on the specifics of the still-fledgling sector is hard to come by, but Castle Harbour managing partner Jeffrey Lash said that transfer pricing submissions—inquiries from companies interested in taking out a policy—more than doubled from 2023 to 2024.

Lash didn't have data on how many queries became finalized policies, but he said that millions of dollars of limit of liability was placed last year and that the market has about \$800 million to \$1 billion of capacity for a single tax risk.

"I expect that to cause more companies to seriously consider tax insurance," he said.

The growth in the market has sent premiums down. Premiums on policies with run-of-the-mill risks have tumbled to about 3%-4% from around 4-6% in 2016, Justin Berutich, managing director and head of tax at underwriter Euclid Transactional LLC, said. Higher-risk policies will still demand a higher premium.

"I did the first controversy policy when they were under audit in 2019. That was the first one that ever got done, and that was like 10%," he said.

Mimi Song, chief operating officer at tax services firm Exactera, said the level of risk insurers are willing to insure has been interesting to see.

"Talking to some of those insurance underwriters, it's funny because they do actually say, 'We'll even insure you if you are under audit,'" Song said. "I found that interesting. I don't know exactly what they're looking at per se, but they said they'd insure the burning house, so ..."

She said she noticed a shift in interest two or three years ago.

"I don't know any companies yet that have subscribed to transfer pricing insurance, but it definitely seems as if there is a lot more interest around it," Song said.

## A Growing Space

Tax insurance is nothing new. Companies have insured tax risks in M&A deals for years, as well as tax credits and other positions.

But the 2022 tax bill sent the tax insurance market into overdrive when it introduced energy tax credits that could be sold to investors to finance renewable energy projects. That quickly became the bulk of the energy credits tax insurance market, said Berutich.

Transfer pricing, however, with its massive dollar numbers and sprawling complexity, wasn't a topic of coverage until fairly recently, he said. Agreements with one or more tax authorities involve specifics of transactions and pricing methods, and disputes frequently deal with billions of dollars in allegedly unpaid taxes, often hinging on highly technical transfer pricing rules and hard-to-value company assets.

Insurers are figuring whether they should invest in increasing their capacity to generate demand, or wait until demand comes to them.

"It's a little bit of chicken or the egg," Berutich said.

### **Extra Benefits**

In addition to providing coverage for risks, transfer pricing insurance can offer benefits such as freeing up company reserves or offering some certainty if a company can't or doesn't want to get an APA.

APAs are expensive to pursue and take a long time, Lash observed. IRS data shows they often take years to get done. Recent staff reductions at the agency aren't expected to help.

Additionally, Berutich said he's seen companies that have gotten insurance release reserves they had locked up to cover uncertain tax positions. That may not be doable in all circumstances, he said, and it may depend on who the company's auditor is.

"We have seen policies be written and then taxpayers release a reserve that they've officially posted," he said. "That's immediate earnings for the company, which is great."

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