Managing Tax Risks in complex times – A Director's perspective

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Background – Changing times!

OECD – BEPS - MLI	CbCR / Master File	POEM
GAAR	Thin capitalization rules	Digital economy taxation
	Sharing of information amongst countries	

The above changing and dynamic environment makes it more important for companies to manage their tax risks in an effective and efficient manner

Managing Tax Risks

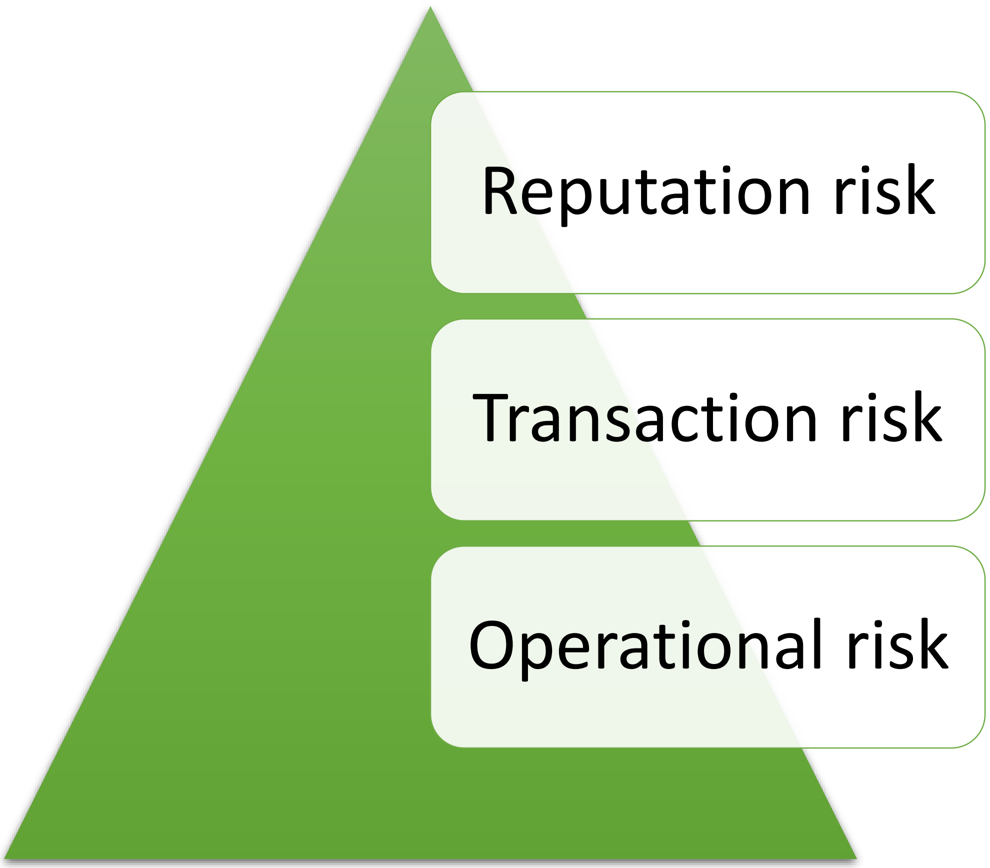
1
- Tax risk is one of the most important business risk

2
- Ambiguity in tax regime may lead to business being unviable

3
- Now, Directors are more cautious and concerned about tax policies / practices.
- Since, they may be held personally accountable for penalty and prosecution

4
- The Board of Directors have also become more cautious and concerned

Types of risks



Practical challenges

Operational risk

International transaction – corporate guarantee

Facts

- The parent company normally provides corporate guarantee to its overseas SPVs to avail loan / credit facility at better rates.
- As per transfer pricing regulations, the above is considered as an international transactions and accordingly should be at arms length.
- The TPO used to consider bank guarantee commission rate ranging from 0.5%-2.5%.

Managing risks

- To avoid litigation, the company has entered into an APA recently in respect of the corporate guarantee transactions.

Practical challenges

Operational risk

Section 276B – Prosecution of Director in case of delay in payment of TDS

Facts

- In one of our group companies, the Director of the company was issued prosecution notice for one-day delay in payment of TDS.
- This notice was issued after 4 years.

Managing risk

- In a company like ours, the volume of transactions are in lakhs.
- In that case, inspite of adequate safeguards it is practically difficult to track each and every TDS payment.
- Such draconian provisions really pose as a challenge for the company, specially when there is a *bonafide* mistake.
- To make payment a day before due date to avoid last minute rush.

Practical challenges

Operational risk

Cash receipts from customers in excess of INR 2 lakh (Penalty under section 271DA)

Facts

- As per section 269ST, receipt of any amount of INR 2 lakhs or more in cash:
  - In aggregate from a person in a day; or
  - In respect of a single transaction; or
  - In respect of transactions relating to one event or occasion from a person,

  Is prohibited.
- As per the law, if the above provision is contravened, the assessee shall be liable to pay 100% of the cash amount received as penalty.
- In many instances, that though we have intimated to concerned team at all collection centres, but we have observed that customers deposits cash in different collection centres around the city
- In such cases, even though company recovers its outstanding amounts, it is liable to pay penalty

Managing risks

- We have had multiple meetings with concerned departments and tried to plugin the loophole through system, however due to volume of transactions, we are still struggling and we still have to deal with 1-2 instances every year

Practical challenges

Transaction risk

Purchase of stressed assets / companies

Facts

- As per section 56(2)(viia), receipt of shares should be at fair market value- as computed under Rule 11U and 11UA.
- There is an exception provided under section 56 for companies which are a part of resolution plan under IBC; however, there is no such exception for stressed companies.
- Accordingly, in power sector today, there are many stressed companies whose book value may be positive but actual net worth is very less.
- In such cases, such tax provisions act as a barrier to reduce Bank's NPA.

Managing risks

- We have maintained sufficient documentary evidence like tender offer, bid documents, our acceptance, public advertisement documents, etc. to substantiate FMV.

Practical challenges

Transaction risk

Sale of land below stamp duty value

Facts

- As per section 56(2)(x) read with section 50C, transaction of sale of land should not be below stamp duty value.
- In one instance, the stamp duty value of a piece of land was 30 Crores, however the fair market value was only 20 Crores.

Managing risks

- In such cases, it is very important to maintain sufficient documentary evidence.
- We had published advertisement in local newspapers inviting for bids to sell the land
- A letter was also filed with the local circle officer inviting his attention to the fact that the stamp duty valuation is much higher than the prevailing market rates.

Practical challenges

Reputation risk

Payment of contractual obligations

Facts

- The Group had entered into an agreement with a Japanese company, wherein partial stake of a telecom company (‘Telco’) was sold to them at a pre-determined share price.
- As per the agreement, Telco was to meet certain performance criteria in 5 years, failing which the Group had guaranteed to re-purchase shares at 50% of the (pre-determined share price at which shares were initially sold to Japanese company) or at fair market value whichever is higher.
- Subsequently, Telco was unable to meet the performance criteria.
- Accordingly, the onus was on the Group to meet its contractual obligations and re-purchase the shares from Japanese company at 50% of the price at which it was acquired by them.
- However, since this price was much higher than the fair market value, it was leading to violation of FEMA and hence, RBI did not permit the same.

Managing risks

- In such cases, though the Group was ready to honour its contractual obligations, RBI /FEMA was acting as a barrier.
- There was a great reputation risk for the company and hence the Group provided support to Japanese company, who then approached the UK Abritration so that this transaction can be undertaken.
- Further, the company also assisted the Japanese company to approach the Delhi High Court, which then ruled that this transaction was arising out of a ‘contractual obligation’ as compensation payment and ‘not purchase of shares’ and hence did not fall within the purview of FEMA

Key practices adopted to mitigate tax risks

Tax Management compliance tool- provide status of tax litigation / compliance to management on regular basis

Strengthen internal tax team

Regular interaction between tax team and business teams to sensitize them about changing tax environment

Review of old process and practices on regular basis

Automation of routine compliances / processes to extract data for analysis

THANK YOU

Any Questions