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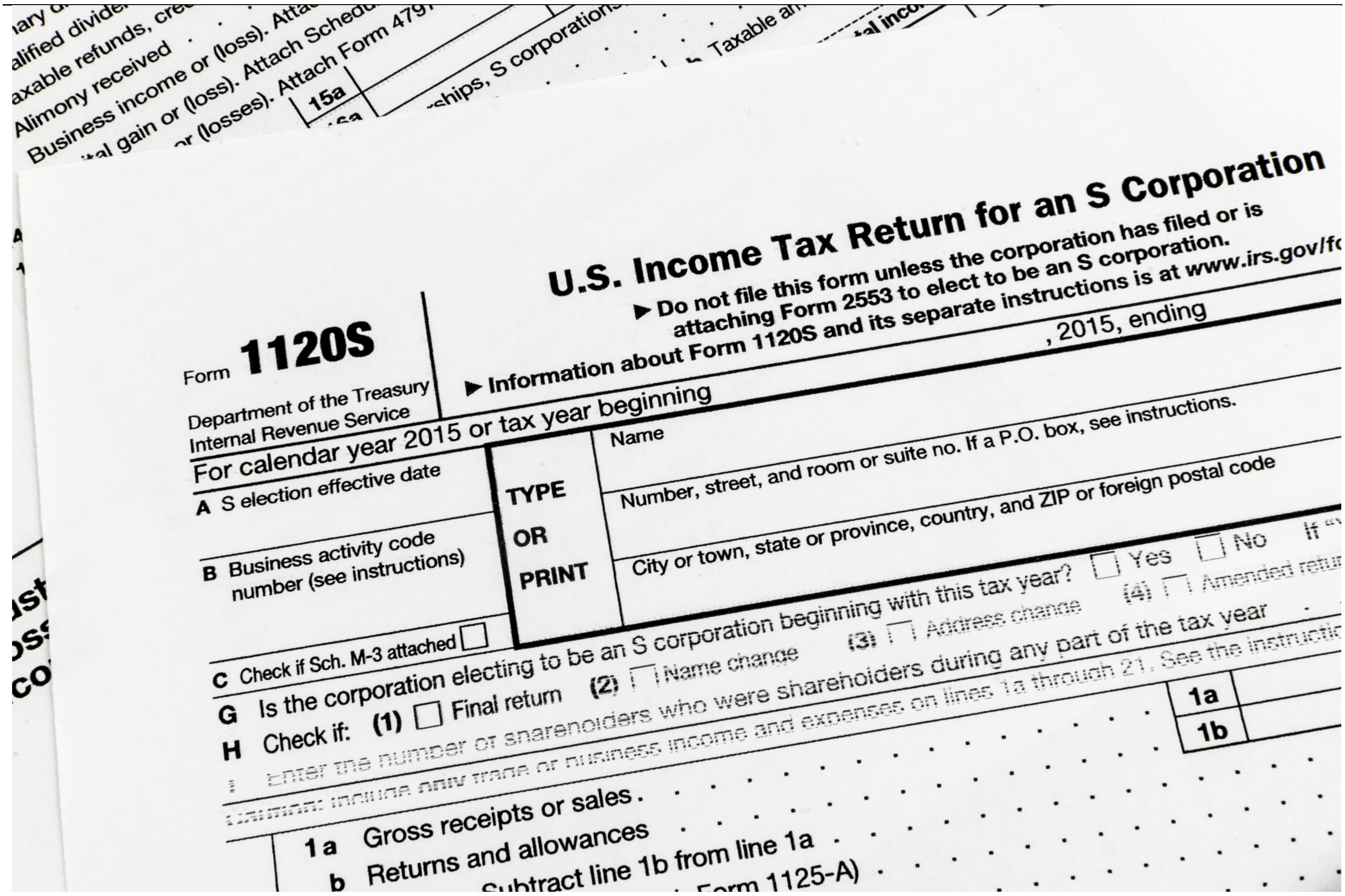
Corporate Taxes: The Lynchpin to ESG

Compliance and Ethics

Litigation and Dispute Resolution



The movement advocating for increasing environmental, social, and governance (ESG) disclosure and the discourse around multinationals paying their “fair share” of taxes have advanced in parallel. With renewed focus on global taxes and recent OECD/G20 member political approval of a two-pillar global tax reform, which includes profit allocation, nexus rules, and a proposed 15 percent global minimum tax rate on a country-by-country basis, the parallel streams are rapidly converging. Corporate tax is being increasingly viewed as a lynchpin and benchmark of a corporation’s commitment to ESG.

While tax has always been closely associated with environmental initiatives, by incentivizing behavior through credits and subsidies, it is also inextricably linked to social and governance aspects of ESG. Cumulative taxes paid by an organization acts as a gauge for a corporation’s contribution to society and evidence of its tax integrity. This is particularly so in recent years as multinationals are increasingly vilified as tax cheats involved in the “global race” to the bottom and enhancing tax efficiencies is equated with aggressive tax planning.

As tax remains front page news, tax strategies are no longer siloed in accounting or finance departments and are garnering a fixed space on the boardroom agenda. General counsel, as trusted advisors to the board, can better understand a corporation’s tax strategy and approach tax with an ESG lens by following four steps.

Step 1: Understand the tax story

GCs should create open channels of communication with internal tax, accounting, and treasury departments to obtain an overarching picture of the business and identify the global distribution of value and allocation of profit across various supply chains and centrally shared services. This, in turn, assists in understanding the business reasons for a presence in low-tax jurisdictions or so-called “tax havens,” and recognizing the purpose of tax arrangements that may, in certain circumstances, either intentionally or unintentionally, result in double non-taxation or misalignment of profits with economic substance.

A holistic tax story should consider not only cumulative corporate tax payments made in each jurisdiction, including total other taxes paid by businesses such as sales tax, payroll taxes, customs duties, and property or regulatory taxes, but also more qualitative factors including how internal departments identify tax risk, controls implemented to mitigate tax risks, and adequate staffing of the tax and financial reporting functions.

Step 2: Perform coordinated risk assessment

A web of regulations and laws mandate tax transparency and vary by jurisdiction. Tax and accounting professionals, either within the organization or through external service providers, are at the forefront of complying with complex mandated tax disclosure requirements. GCs can review mandatory disclosure requirements to conduct a comprehensive tax risk assessment. This includes country-by-country reports, transfer pricing reports that impose arm’s length standards, compliance with mandatory reporting rules, and non-tax legislative requirements and regulations that mandate transparency. Complexity of the tax laws depends on numerous factors including the size of the business, nature of the industry, and the extent of operations in foreign jurisdictions.

A risk assessment should consider accuracy of compliance efforts and effective tax rate in comparison to industry averages or comparable peer groups as well the company’s adherence to the spirit, intent, and purpose of the tax laws. In doing so, the assessment can assist in determining whether a company, despite technical compliance, is inadvertently relying on existing tax loopholes or outdated tax legislation. The risk assessment report should also highlight which tax positions, even if challenged by tax authorities, should ultimately prevail if litigation is pursued and a judgment is rendered by the courts as such tax positions are undertaken for legitimate business reasons and not tax-avoidance purposes despite attracting the disapproval of tax authorities. Ultimately, the conclusions of the risk assessment report should be disclosed to the board and involve oversight and involvement of the board to mitigate tax risks and implement changes as needed.

Step 3: Consider ESG reporting metrics

Although no standardized or centralized method of compliance with ESG currently exists, various reporting metrics incorporating tax standards have been developed to assist with ESG tracking. Although not an exact science, these standards are helpful. For instance, guidelines published by the World Economic Forum (WEF) as well as the Global Reporting Initiative (GRI), a non-governmental organization, have garnered widespread support. The WEF guidelines, developed with input from PWC, Deloitte, EY, and KPMG, consider an organization’s total tax contribution. The GRI considers public disclosure of tax strategy and governance processes as well as various factors including revenue from intercompany transactions, number of employees, and revenues, profits, and taxes reported. ESG metrics can also be incorporated into the due diligence and decision-making process for material acquisitions and investments. Tax benchmarks can include whether the target’s effective tax rate is reasonable or whether investments held by it are subject to minimum tax rates.

Step 4: Proactively create a tax strategy

Finally, armed with the company's tax story, a comprehensive risk assessment report, and an understanding of external ESG metrics, companies can begin to make informed decisions on the level of appropriate transparency and consider proactively sharing tax strategies with stakeholders. The publication of a tax strategy has been mandated in the United Kingdom and Poland where regulations require organizations to publish how tax risks are managed, attitudes towards tax planning, relationships with tax authorities, and governance frameworks used to manage existing tax risks. In addition to voluntarily publishing a tax strategy in other jurisdictions where no such mandated disclosure exists, companies can consider incorporating ESG disclosure into annual reports or sustainability reports.

Although companies are at different stages of the ESG journey, there is only one path moving forward — enhanced transparency. With increasing scrutiny, the corporate tax function has been disrupted and morphed into a representation of a corporation's moral compass and ultimately a statement of its brand integrity. Together with a team of tax, accounting, and finance professionals, GCs can successfully navigate the ESG initiative and control the tax narrative.

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