



**TAX AND  
ENERGY  
COUNTRY  
GUIDE 2024**



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# INTRODUCTION

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Energy has never been more important than it is today, particularly as the world races to decarbonize in response to climate change. The expenditures made in this sector are enormous, and are often supported by tax incentives regimes and/or will be impacted by the tax treatment of such capital intensive projects. As a result, energy policy and tax policy are intertwined as never before, and understanding the taxation of energy and the energy sector is critical to achieving the desired outcomes for investors, developers and governments.

The Taxand Tax and Energy Country Guide 2024 brings together the knowledge and experience of energy taxation specialists from around the world, to create a single resource useful to anyone interested in energy projects.

With this guide, businesses and investors can quickly gain an understanding of the key elements of the tax regimes impacting projects in many of the most important countries participating in the energy sector, including:

- ❖ principal forms of energy produced and used;
- ❖ how energy development, production and consumption are taxed;
- ❖ what key tax issues most affect energy-sector acquisitions and project development; and
- ❖ what foreign investors in energy projects should know about local taxation.

As the race to net zero emissions accelerates and the types of energy projects evolve, the various global tax regimes are also expected to change. Reach out to any of the specialists listed in this guide as key contacts for their respective countries to ask questions or learn more about how Taxand can help you navigate the complex energy tax environment and achieve success for your energy-sector project.





## Energy Overview

Australia is a significant producer of many valuable natural resources including:

- ❖ Coal
- ❖ Iron ore
- ❖ Natural gas, including liquified natural gas (LNG)
- ❖ Uranium
- ❖ Critical minerals and rare earths

Australia exports more than three quarters of its coal and natural gas.

Australia's own energy production is currently weighted towards fossil fuels (eg coal and LNG). In 2023, 39.4% of Australia's total electricity generation was comprised of renewable energy, with the balance provided by fossil fuels.

Recently, Australia has set increasingly ambitious climate goals with an intention to reduce carbon emissions and become a renewable energy export superpower in the future. Australia aims to cut greenhouse gas emissions by 43% from 2005 levels by 2030 and reach net zero emissions by 2050. This goal followed the ambitious pledges made by other countries with similarly advanced economies.

The International Energy Association forecasts that Australia's renewable energy capacity will expand by 85% by 2027 due to ambitious targets, increased clean energy funding at both Federal and State levels and new projects in the renewable energy space. The Australian Government is also aiming to reach 82% renewable energy in the national electricity mix by 2030.

In November 2023, the Australian Government expanded the Capacity Investment Scheme. This scheme encourages investment in energy projects by incentivising States and Territories to provide a favourable environment for investment in renewables, and to agree to underwrite successful energy projects.

The Australian Government has also implemented a Renewable Energy Target Scheme. The scheme incentivises investment in renewable electricity generation by providing Large Scale Generation Certificates in respect of power stations (such as wind and solar farms) for eligible renewable electricity they produce. These certificates can be sold to companies wishing to demonstrate their renewable energy use.

Recent announcements by the Australian Government designed to incentivise investment in green energy projects and the production of critical minerals as a contribution to the clean energy supply chain are summarised below.

The above demonstrates that there is expected to be significant investment in energy projects in the Australian market, particularly as part of the transition to renewable energy.

## Tax Overview

Australia levies a Federal income tax on the world-wide taxable income of Australian residents, including on net capital gains. This tax also applies to non-residents earning income from sources in Australia and capital gains from the sale of certain Australian assets, including real property, resource interests and business assets.

In determining taxable income, a taxpayer's assessable income is reduced by allowable deductions. In some instances, there is also an opportunity to carry forward tax losses from prior years (ie where allowable deductions exceed assessable income) indefinitely to offset against future assessable income (depending on the type of entity and satisfaction of loss carry forward tests).

Australia also imposes a series of other taxes, including a goods and services tax (VAT equivalent) and withholding taxes on payments (including interest, dividends and royalties) made by Australian residents to non-residents, subject to any limitations outlined in Australia's double tax agreements. Australia also has employment related taxes and withholdings, including the Fringe Benefit Tax levied on an employer in respect of non-cash benefits provided to employees, and the superannuation guarantee.

In addition, Australia's States and Territories also impose taxes including payroll tax, land tax and stamp duty. These taxes have varying liabilities and thresholds depending on the relevant State or Territory. Local Governments can also impose council rates on land located in their municipality.

Australia's taxation of companies involves an imputation system. Under this system, the payment of income tax gives rise to credits in the company's "franking" account which can subsequently be attached to dividends paid by the company to shareholders. Australian shareholders can generally claim an offset in respect of the franking credits against their own income tax liabilities. Non-resident shareholders are not entitled to an offset but dividends to such shareholders will not be subject to Australian dividend withholding tax to the extent that the dividends are "franked" (ie paid out of taxed profits).

The Australian income tax system is self-assessed. Each taxpayer must lodge an income tax return. In respect of corporate taxpayers, the Commissioner of Taxation is generally deemed to have issued an assessment in respect of the income tax payable disclosed in the return. Other types of entities, such as trusts and partnerships, may be afforded tax flow-through treatment (but must still lodge a return).



## Taxation of Energy Projects

Although Australia is heavily invested in the green energy transition and the drive to net zero emissions, unlike some other jurisdictions, Australia has not typically implemented specific taxation rules (eg tax incentives) that apply to energy projects. However, there are some important tax issues that should be considered.

**Structure** - Australian energy projects can be undertaken through a variety of structures, including companies, trusts and partnerships. The choice of structure will depend on numerous factors, including whether there are non-resident investors. A company will be taxed on a stand-alone basis, unless it is part of a tax consolidated group in which case the head company of that group and all of its wholly-owned subsidiaries will be treated as single taxpayer. A trust or partnership may generally be expected to result in the net income being subject to tax in the hands of the beneficiaries or partners respectively.

**Tax losses** - Energy projects, including renewable energy projects, are capital intensive, particularly in the development phase. As a result, many energy projects will experience tax losses in their infancy, which may be able to be carried forward indefinitely to offset against future income. A corporation can carry forward their tax losses if they have maintained the same majority ownership and control since the loss or if it satisfies business continuity tests. There are different and often more complex rules impacting the carry forward and use of tax losses incurred by a trust. A partnership gives each partner a proportionate share of the loss and may then allow individual partners to offset against their income.

**Financing** - The high capital requirements of energy projects will also necessarily give rise to funding considerations (ie debt and/or equity). Generally, interest incurred on debt may be tax deductible whereas returns on equity would not be. However, the Australian thin capitalisation rules, debt deduction creation rules and transfer pricing rules must be considered in detail to determine whether any such deductions may be denied (even in part).

**Deductions** - With respect to expenditure incurred in relation to energy projects generally, the tax treatment will depend on the nature of that expenditure. For example, the cost of acquiring land would not be tax deductible but periodic expenditure in relation to accessing land (eg rent or licence fees) may be deductible. Expenditure incurred in relation to certain capital assets such as plant and equipment may qualify as deductible over the effective life of those assets.

**Withholding tax** - For non-resident investors in Australian energy projects, receipt of any interest, dividends or royalties will be subject to Australian withholding tax. The withholding tax rate is generally 30% for dividends, except where a franked dividend is paid to a non-resident and no withholding tax applies, 10% for interest and 30% for royalties. A lower withholding tax rate may apply in accordance with Australia's double tax agreements or if another exemption applies.

If the project vehicle is a unit trust, payments to non-resident investors can be subject to withholding tax of either 30% or the top marginal tax rate (with different rates applicable to payments comprised of interest, dividends or royalties).

Certain trusts that qualify as "managed investment trusts" may result in a concessional withholding rate of 15% if the investor is a resident in an information exchange country.

**R&D tax incentive** - A general tax incentive exists to encourage research and development in Australia. Companies engaged in eligible projects and incurring R&D expenditure may be entitled to a refundable tax offset (ie subject to certain limits based on the aggregated turnover of the entity and any connected or affiliated entities). There are also non-refundable R&D tax offsets that may be used to reduce the tax liability of a company. Other types of entities would not be eligible for the incentive.

Companies in the renewable energy space who have developed new products, processes, materials or technology may be eligible for tax offsets under this scheme.

### Specific regimes

**PRRT** - More specifically, a 40% Petroleum Resource Rent Tax (PRRT) is imposed on profits generated from selling "marketable petrol commodities" above a specified rate of return. This is assessed on the extracted value of offshore petroleum less costs involved in exploration and extraction. The Australian Government has proposed changes to this regime. These include capping deductible expenditure which can be used to offset assessable PRRT income for LNG producers.

**Royalties** - States and Territories also collect royalties on the extraction of onshore petroleum and other resources like coal and iron ore. The royalties rate varies between jurisdictions.

### Other Tax Issues To Be Considered

The Australian Government released the 2024-25 Federal Budget on 14 May 2024. In support of Australia's commitments to the transition to net zero emissions, the Budget included announcements to introduce the following:

**Critical Minerals Production Tax Incentive** - this incentive is intended to support downstream refining and processing of Australia's 31 critical minerals to improve supply chain resilience. The types of minerals expected to fall within the scope of these measures include lithium, cobalt, nickel and rare earths. This incentive will be provided at 10% of relevant processing and refining costs.

**Hydrogen Production Tax Incentive** - the incentive will apply to producers of renewable hydrogen to support the growth of a competitive hydrogen industry and decarbonisation. The incentive will be provided at a rate of \$2 per kilogram of renewable hydrogen that is produced.



# AUSTRALIA

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It is proposed that these production tax incentives will apply from the 2027-28 tax year to the 2040-41 tax year. The details of these measures, including eligibility, are yet to be released.

Although not a tax issue, it is also worth noting that the Australian Government has announced a proposal to fast-track investment approvals for foreign investors with the Foreign Investment Review Board (FIRB). This would mean that repeat foreign investors from recognised countries would receive accelerated approvals through a passport or concierge style system.

A business which co-invests alongside governments or in national priority projects (which includes green energy) would be given high priority assistance in navigating approval processes under this regime.

## Relevant Experience

Corrs (Taxand Australia) has advised on the tax aspects of significant energy projects in Australia, including:

- ❖ ACE Energy (Acciona, Cobra, Endeavour Energy and Capella), on its bid to develop the transmission network for the Central West Orana Renewable Energy Zone in New South Wales, set to become the first REZ in Australia.
- ❖ Mineral Resources Limited (ASX: MIN) on its acquisition from Alita Resources Ltd of Tawana Resources Ltd (Tawana) and Lithco No 2 Pty Ltd (Lithco) which own the Bald Hill Lithium mine in Western Australia.
- ❖ Powin, LLC, the global energy storage platform provider, on its entry into the Australian market and the development of the battery energy storage system (BESS) as part of the delivery of the Waratah Super Battery in New South Wales which will have a power capacity of at least 700 MW.
- ❖ Albemarle Corporation (NYSE: ALB), one of the world's leading global developers, manufacturers and marketers of highly-engineered specialty chemicals, on the acquisition of Liontown Resources Limited, an ASX-listed emerging battery minerals exploration and development company with two major lithium deposits in Western Australia. The larger of Liontown's two deposits, Kathleen Valley, is one of the largest and highest-grade hard rock lithium deposits in the world.
- ❖ AGL Energy on the sale of its 50% participating interest in the Macarthur Wind Farm to AMP Capital. The wind farm is located in south west Victoria and the largest of its kind in the southern hemisphere, generating 420 MW.
- ❖ Energy Development Limited on its acquisition of the Wonthaggi Wind Farm located in south east Victoria with generating capacity of 12 MW.

- ❖ YTL Power on its disposal of its interest in ElectraNet which operates the high voltage electricity transmission system throughout South Australia under a 200-year exclusive lease granted by the State government.
- ❖ Hancock Energy (PB) Pty Ltd (Hancock), part of the Hancock Prospecting group (one of Australia's largest iron-ore mining companies), on its competitive off-market takeover bid for Warrego Energy Limited (Warrego) (ASX:WGO). Warrego is focused on the development of an onshore gas project in Western Australia.
- ❖ A syndicate of lenders on Australian tax issues associated with the project financing of the Bald Hills Wind Farm in Gippsland, Victoria.

Corrs also has a market leading specialist Energy & Natural Resources practice.



## KEY CONTACT

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## Energy Overview

Canada is fortunate to be a large country with many natural resources, making it a major producer of various forms of energy. In particular, the [Natural Resources Canada 2023-24 Energy Fact Book](#) identifies Canada as a top-5 global producer of:

- ❖ Crude oil
- ❖ Natural gas
- ❖ Uranium; and
- ❖ Hydroelectricity

Canada has developed a strong “green energy” initiative to reduce carbon emissions by moving away from fossil fuels and expanding renewable energy production. The [International Energy Association](#) notes Canada’s ambitious targets to cut greenhouse gas emissions by 2030, observing that energy production and use accounts for over 80% of Canada’s emissions. In addition to nuclear energy and hydroelectricity, hydrogen, bioenergy, wind, and solar are all important parts of [Canada’s energy future](#).

The exceptional levels of [U.S. government support](#) for the clean energy sector provided in the 2022 Inflation Reduction Act has forced Canada to take comparable steps. Most notably, the federal government has [provided Cdn. \\$28 billion in subsidies](#) to support the construction of two electric vehicle (EV) battery manufacturing plants in Canada. The government has also directed the [Canada Infrastructure Bank](#) to allocate Cdn. \$20 billion for lending into qualified green energy projects.

Canada’s tax policy has generally followed the country’s move away from fossil fuels and towards a low-carbon energy strategy. This can be seen in both the removal of some existing tax incentives for fossil fuel exploration, development and extraction, as well as the creation of new incentives to support the development of clean energy technologies and manufacturing. The imposition of carbon pricing/tax regimes (federally and provincially) and tax incentives for carbon capture, utilization and storage (CCUS) also evidence the role of tax policy within a broader strategy of reshaping Canada’s economy towards a [2050 net-zero objective](#).

## Tax Overview

Canada levies a federal income tax on the world-wide income of persons (including corporations) that are resident in Canada. Federal income tax also applies to persons (including non-residents) earning income from carrying on business in Canada.

Canada’s provinces and territories impose analogous income taxes computed as an addition to the federal income tax, as well as taxes and royalties on natural resources produced or extracted within their territory (e.g., oil & gas, coal, uranium).

Canada also imposes a European VAT-style goods and services tax (GST), as well as withholding tax on various payments of a passive nature (e.g., interest, dividends, rents,

royalties) made by Canadian residents to non-residents of Canada. See [here](#) for further detail on various aspects of Canada’s tax system.

## Taxation of Energy Projects

Canadian energy projects are typically carried out either within a corporation or a partnership, both of which offer some degree of limited liability for investors. A corporation is a taxpayer that computes its income or loss and pays taxes accordingly, while partnerships are fiscally transparent for Canadian tax purposes: a partnership computes its income or loss as if it were a taxpayer, but that income or loss is imputed to (and taxed in the hands of) the partners of the partnership, not the partnership itself. No group or consolidated filing regime exists in Canada.

Because energy projects are so capital-intensive, financing is typically an issue of major importance – in particular the mixture of debt and equity. In general terms, interest on debt incurred by the project entity to invest in the project will be deductible in computing income for tax purposes, while equity distributions (e.g., dividends on shares of a project corporation) are non-deductible by the payer. Interest deductibility is constrained by “thin capitalization” limits applicable to debt owing by a Canadian payer to non-residents who are (or do not deal at arm’s length with) significant (25%+) investors, as well as a new regime applicable to all debt essentially limiting deductible interest expense to no more than 30% of the debtor’s income before interest, taxes, depreciation and amortization.

Special rules may apply to debt where the creditor’s recourse against the debtor is limited. Interest paid to non-resident creditors does not bear withholding tax unless either the creditor does not deal at arm’s length with the debtor, or the interest is “participating” (i.e., computed by reference to profits, revenues, etc.). Dividends paid to non-residents are subject to withholding tax.

The tax treatment of significant expenditures on energy projects depends on which of various tax categories those expenditures fall into. Buildings, equipment and machinery are generally “depreciable property”, expenditures on which are pooled into different classes depending on the type and use of the property in question.

Taxpayers may claim a deduction from income (capital cost allowance or “CCA”) each year, computed as a percentage of the “undepreciated capital cost” (UCC) of that particular class for the year (i.e., cost of property acquired, less CCA claimed in previous years and proceeds of property sold). In this manner, the cost of such depreciable property is deducted from income for tax purposes over a period of years. Accelerated CCA is permitted on certain forms of renewable energy depreciable property, to encourage investment in such property. For example, various forms of clean energy generation and energy conservation equipment fall within Class 43.1 (30% CCA rate) or Class 43.2 (50% CCA rate).





Land is not depreciable property, and so its cost generally cannot be depreciated and thereby deducted against income. However, in the resource sector (i.e., mining or oil & gas), significant expenditures on property that is not depreciable property (including land) generally fall into one of three categories (Canadian Exploration Expense (CEE); Canadian Development Expense (CDE); and Canadian Oil & Gas Property Expense (COGPE)) that are deductible as a percentage of the cumulative total of each such class of expenses (again, less deductions taken in prior years). Similar to CCA on depreciable property, such capital expenditures are deductible for tax purposes over time.

### Other Tax Issues To Be Considered

Canadian energy projects are complex and tax-intensive, and often include a variety of tax issues. These include the following:

- ❖ various restrictive rules applicable to partners and partnerships, generally designed to prevent partners with limited liability from using partnership losses against other income. Managing these rules can prove particularly onerous where limited-recourse debt financing is being used, as is often the case;
- ❖ the tax treatment of various forms of “government assistance” (e.g., grants, incentives, etc.), which has been the subject of considerable controversy;
- ❖ managing the issues associated with the involvement of tax-exempt entities (e.g., pension funds and Indigenous Canadian communities (“First Nations”) often participating in Canadian energy projects, including GST considerations for joint ventures not qualifying for the current joint venture GST election;
- ❖ optimizing the tax treatment of costs incurred on site remediation and project end-of-life activity; and
- ❖ with respect to asset sales, the GST and provincial sales tax (PST) treatment of assets used in the energy project.

In addition, clean energy projects (as well as carbon capture initiatives) will invariably want to investigate the potential to claim one or more of the new investment tax credits (ITCs) which [the government has offered](#) to support its “clean energy” strategy. These ITCs are particularly valuable, because (1) they are tax credits, rather than deductions in computing tax (i.e., \$1 of ITC is \$1 of taxes saved), and (2) they are refundable, meaning that if the taxpayer does not have positive taxable income in the year the ITC is claimed (a common occurrence) the government will pay the ITC amount to the taxpayer. For this reason, “green economy” ITCs frequently constitute a significant source of project funding for eligible expenditures.

A number of factors go into the structuring of energy projects in a manner that maximizes the ability of project participants to claim ITCs. Because they are new (and in some cases have not yet been fully enacted into law), there is little or no supporting guidance from tax authorities on them, making it that much more important to work with advisors who have practical experience working with them on actual projects. In general (and with some exceptions), they are limited to claimants who are taxable Canadian corporations (either directly or as members of a fiscally-transparent project partnership), and are computed as a percentage of the cost of qualifying expenditures.

### Relevant Experience

BLG has worked on many of Canada’s largest and most innovative energy projects. Set out below is a representative sample of some of our work in this sector.

- ❖ EPCOR Utilities Inc. an on-site solar generating plant and battery storage at one of its water treatment plants in the Edmonton River Valley.
- ❖ Northland Power Inc. and its affiliates on the acquisition, development, construction, debt and equity financing of the \$750 million, 250 MW Oneida battery storage project.
- ❖ BC Hydro, in respect of various procurement, contract development, negotiation and administration and other commercial matters, real estate and other aspects associated with the \$10B Site C clean energy hydroelectric project.
- ❖ Berkshire Hathaway Energy Company, in its indirect share purchase acquisition of the Montana Alberta Tie-Line from Enbridge Inc., a 215 mile, 230-kV merchant transmission line running from Great Falls, Montana to Lethbridge, Alberta.
- ❖ Spirit Pine Energy Corporation in its reorganization and sale to Enel Green Power Canada Inc., facilitating the co-ownership of a 185 MW wind project with First Nation’s, Spirit Pine and Enel.
- ❖ Manitoba Hydro on various procurement and commercial matters in relation to the development of the 695 MW Keeyask hydroelectric project in Northern Manitoba.
- ❖ Alterra Power Corp. in its \$1.1 billion sale to Innergex Renewable Energy Inc. by way of an arrangement agreement.
- ❖ The Government of Canada in its \$4.5 billion acquisition of the Trans Mountain and Puget Sound Pipelines, and related terminals from Kinder Morgan.
- ❖ Petronas and Pacific Northwest as project counsel in its \$27 billion LNG project located near Prince Rupert, B.C.
- ❖ Meadow Lake Tribal Council (MLTC), in connection with its power purchase agreement and other material agreements for its 6.6 MW green energy biomass project located near Meadow Lake, Sask.





- ❖ The Ontario Independent Electricity System Operator with respect to Procurement of Electricity from Energy from Waste (EFW).
- ❖ Occidental Petroleum in its US\$1.1 billion acquisition of direct air capture technology innovator Carbon Engineering Ltd.



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## Energy Overview

Since the 18th CPC National Congress in 2012, China has entered a new era for high-quality energy development.

According to [Energy in China's New Era](#) published in December 2020, China categorizes energy types into coal, oil, natural gas, electricity, nuclear energy, new energy and renewable energy.

On September 2020, President Xi pledged that China will scale up its intended Nationally Determined Contributions by adopting more vigorous policies and measures, striving to have carbon dioxide emissions peak before 2030 and to achieve carbon neutrality before 2060.

On February 29, 2024, Xi re-emphasized that energy is the lifeline of the economy and industrial development, and China shall vigorously promote the high-quality development of new energy continuously in the upcoming years.

In order to support the development of new energy in China, the country has been implementing a series of preferential policies nationwide for new energy vehicles, energy storage, hydrogen energy, photovoltaics, wind power, and other fields. These preferential policies include but are not limited to financial subsidies, tax reductions and financial support.

From 2019 to 2023, the number of investment and merger transactions in the new energy industry in China were 304, 299, 439, 512, and 647 respectively, showing an overall upward trend.

With a large number of funds pouring in to promote capacity expansion, the scale of the photovoltaic industry continues to grow. However, there is also an oversupply situation, leading to a continuous decline in the prices of photovoltaic products from 2023.

Competition for lithium resources is becoming increasingly fierce, and sodium and hydrogen battery technologies are attracting more attention from companies.

By the end of 2023, the cumulative installed capacity of newly built and operational storage projects nationwide reached 31.39 million kilowatts/66.87 million kilowatt-hours, with an average energy storage duration of 2.1 hours.

## Tax Overview

All provinces in China follow the same tax rules to impose income taxes. The major taxes include Value Added Tax ("VAT"), Enterprise Income Tax ("EIT") which needs to be paid when conducting business activities and Individual Income Tax ("IIT"). There is also a consumption tax on some specific types of goods, vehicle purchase tax and resource tax which needs to be paid when extracting natural resources.

China also imposes withholding VAT and EIT on various payments of active and passive natures (e.g., interest, dividends, royalties and labour services) made by Chinese residents to non-residents.

The applicable withholding VAT rate will be all 6%. The EIT rate will be 10% for passive incomes including interest, dividends, royalties, and will be 3.75% to 12.5% for on-shore labour services. Off-shore labour services (if accepted by authority) will not be subject to withholding EIT.

China levies income tax on the world-wide income of persons (including corporations) that are residents of China. This also applies to individuals (including non-residents) earning income from carrying on a business in China.

## Taxation of Energy Projects

China has a considerable number of tax preferential policies for energy enterprises, mainly applicable to the following four types of corporations:

- ❖ Corporations that support environmental protection;
- ❖ Corporations that promote energy conservation;
- ❖ Corporations engaged in comprehensive utilization of resources; and
- ❖ Corporations that promote the development of low-carbon industries, such as wind resources, hydropower resources, and photovoltaic resource corporations.

Tax preferential policies for major taxes in China include, but are not limited to, the following aspects:

### EIT

- ❖ **If an eligible** energy service company that carries out an energy performance contracting project meets the relevant provisions of the Corporate Income Tax law, it is entitled to the exemption of corporate income tax from the first year to the third year since the tax year in which the project had its first production and operation income, and it may enjoy a tax reduction by half of the 25% statutory tax rate from the fourth year to the sixth year.

### VAT

- ❖ Taxpayers selling self-produced electricity products generated using wind resources are eligible for a 50% VAT refund;
- ❖ Energy service companies are entitled to exemption of VAT for energy goods/services contracting projects (for e.g., energy management);
- ❖ Another tax preferential policy, effective from 2019, which is nationally applicable to all corporations is a taxpayer which meets corresponding requirements may apply for the refund of incremental uncredited input VAT amount.





Any taxpayer who meets **all** of the following criteria may apply:

- ❖ From the tax period of April 2019, the incremental uncredited input VAT for each of six consecutive months (two consecutive quarters if taxed quarterly) is a positive number, and the incremental uncredited input VAT in the sixth month is not less than CNY500,000;
- ❖ Its taxation credit rate (in China tax system) is A or B;
- ❖ It has not committed fraud for overpaid VAT refund or export refund or falsely issued special VAT invoices for 36 months before its claim for VAT refund; and
- ❖ It has not been penalized by tax authorities for two or more times for tax evasion for 36 months before its claim for VAT refund.

### Consumption Tax

Batteries made by some kind of new resource are exempted from consumption tax, such as solar cells.

### Thin-Capitalization Rule

State Administration for Foreign Exchange ("SAFE") will ask to review whether the Chinese entity has sufficient Foreign Debt Quota ("Quota") balance. The Quota is generally calculated based on the Registered Capital (Paid-in Capital) of the Chinese borrower, as follows.

Registered Capital (X, unit in Million USD)	Maxim Cap for Foreign Loan (Y, unit in Million USD)
$0 < X < 2.1$	$Y = 3/7 X$
$2.1 \leq X < 5$	$Y = X$
$5 \leq X < 12$	$Y = 1.5 X$
$12 \leq X$	$Y = 2 X$

China has a Thin Capitalization Rule which applies to interest on an excess related party loan. Interest paid to a related corporation is deductible if the debt/equity ratios are observed:

- 5:1 for financial service enterprises; and
- 2:1 for non-financial service enterprises

Interest on the debts in excess of the ratios will be non-deductible and cannot be carried forward.

### Other Tax Issues To Be Considered

Chinese energy projects are complex and tax-intensive, and often include a variety of taxes. In addition to the major taxes mentioned above, the Chinese government also offers various preferential policies for the following taxes:

### New energy automobile industry

- ❖ New energy vehicles are subject to a 50% reduction in vehicle and vessel tax;
- ❖ Provinces in China have different levels of financial subsidy policies for corporations.
- ❖ China has been providing financial subsidies for new energy automobiles since 2010, including but not limited to exempting vehicle purchase tax (expired in 2022) and subsidizing each new energy vehicles with up to CNY 60,000 (expired in 2019).

### Mining industry

- ❖ Coal (layer) gas required to be extracted by coal mining enterprises due to work safety needs shall be exempted from Resource Tax;
- ❖ 30% Resource Tax reduction for mineral products exploited from depleted mines;
- ❖ The Resource Tax on shale gas shall continue to be reduced by 30%;
- ❖ Part of the land for hydroelectric power stations is exempted from urban land use tax;
- ❖ Other taxes may include mineral resources compensation, mining rights usage fee, mining area usage fee, land reclamation fee and other compensation fees.

### Relevant Experience

- ❖ Hendersen has previously assisted on the spin-off of Alstom China business lines, advising on the restructuring implications in comprehensive detail.
- ❖ China tax compliance, advisory and retainer services for SABIC;
- ❖ China restructuring, Customs related and repatriation advisory projects for GE Energy;
- ❖ TP benchmarks and local files for BP China.



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## Energy Overview

Denmark stands as a global leader in renewable energy and sustainability, with a longstanding commitment to environmental preservation and carbon neutrality. The Danish Energy Agency's 2023 Energy Outlook report highlights Denmark's achievements and future goals in the energy sector, emphasizing the country's innovative approach to energy production and consumption.

Denmark is renowned for its pioneering role in wind energy, being home to some of the world's leading wind turbine manufacturers and a substantial offshore wind farm infrastructure. The country's investment in wind power has positioned it as one of the highest per capita producers of wind energy globally. Additionally, Denmark has made significant strides in solar energy, biogas, and other renewable sources, contributing to a diverse and resilient green energy portfolio.

The Danish government has set ambitious targets to become independent of fossil fuels by 2050, with interim goals to reduce greenhouse gas emissions by 70% from 1990 levels by 2030. This commitment is reflected in the country's comprehensive Climate Act, which mandates binding targets and regular progress assessments to ensure Denmark stays on track with its climate objectives.

In response to international developments and the European Union's Green Deal, which aims to reach climate neutrality by 2050, Denmark has accelerated its efforts to decarbonize its economy. The country has implemented a range of policies to encourage the adoption of electric vehicles (EVs), including tax incentives and substantial investments in charging infrastructure.

Denmark's focus on energy efficiency extends to the building sector, where stringent codes and retrofitting initiatives aim to reduce energy consumption in both residential and commercial properties.

Tax policy in Denmark supports the transition to a green economy, with carbon taxes and levies designed to incentivize reductions in carbon emissions. The government also provides funding and support for research and development in clean energy technologies, fostering innovation and positioning Denmark as a hub for green technology.

Denmark's approach to energy is holistic, integrating energy production, distribution, and consumption within a framework that prioritizes sustainability and climate action. The country's energy system is increasingly interconnected with those of neighboring countries, allowing for the exchange of renewable energy and enhancing regional energy security.

In summary, Denmark's energy landscape is characterized by a strong commitment to renewable energy, ambitious climate targets, and innovative policies that support a sustainable and carbon-neutral future. The nation's proactive measures in energy efficiency, green taxation, and technology development are key components of its strategy to achieve a fossil-free society by 2050, serving as a model for other countries pursuing a green transition.

## Tax Overview

Denmark levies income tax on the world-wide income of individuals tax residents in Denmark. Companies are subject to a territorial tax system where income from permanent establishments and real estate located abroad are exempt from Danish taxes.

Individuals pay a progressive income tax on all forms of personal income, such as wages, pensions, and benefits. Denmark's tax system is divided into state income taxes, municipal taxes, and health contributions, all of which are combined to form the individual's total tax liability.

Companies in Denmark pay a flat 22% corporate income tax rate on their net taxable income.

The Danish VAT, known as "moms," is a general tax applied to most goods and services. As a member of the European Union, Denmark's VAT system is harmonized with EU regulations, ensuring consistency within the internal market. The standard VAT rate is 25%.

Denmark also imposes withholding taxes on certain payments to non-residents, such as dividends, interest, and royalties.

In addition, Denmark levies various environmental taxes and duties aimed at promoting sustainability and reducing the environmental impact of consumption and production.

Generally, Danish companies etc. must apply the arm's length terms and pricing for intercompany transactions. When determining arm's length Denmark overall follows the OECD Transfer Pricing Guidelines.

Danish companies must prepare and retain written documentation regarding the applied pricing and terms for intercompany transactions. However, special rules apply for companies which on a standalone basis or together with other (Danish or non-Danish) group companies have less than 250 employees and either have a total balance sheet of less than DKK 125m or revenues / turnover of less than DKK 250m. If so, written documentation should only be prepared for intercompany transactions with individuals and companies etc. that are domiciled in a country with no tax treaty with Denmark.





## Taxation of Energy Projects

### Ordinary corporate income taxes

Danish energy projects are often executed through a corporate entity providing a measure of limited liability to investors. In principle, both a Danish corporate entity may be used as well as a non-corporate entities, e.g., partnership. However, as non-corporate entities tend to be more tax compliance burdensome for the investors (as each investor will generally be seen as having a permanent establishment in Denmark and required to fill tax returns etc. in Denmark), then corporate entities tend to be the preferred alternative.

Danish entities are subject to mandatory joint taxation. Based on the joint taxation regime, each entity must prepare stand-alone tax returns, which are subsequently consolidated into a joint taxation return which is filed by the so-called 'administration company' (i.e., the parent company of the group). The administration company has the responsibility to settle the joint tax liabilities of the group with the Danish tax authorities. All entities within the joint taxation group are jointly and severally liable for corporate income taxes and withholding taxes of the group as long as the joint taxation group exists. Entities are deemed to be part of the same joint taxation group if the administration company holds the majority of voting rights in the entity, may appoint or remove a majority of the members of the senior body of the entity, or is able to control the entity in any other way.

Generally, under Danish tax law, a cost is tax deductible if i) the taxpayer claiming the deduction qualifies as the rightful bearer of a cost, and ii) the cost is incurred during the income year in order to obtain, secure and maintain the taxable income. However, there are three rules that may apply to limit the level of interest expenses (arising on both internal and external debt), namely:

- ❖ the thin capitalization rule applies where a company's related party debt (which include third party debt where such debt is guaranteed or otherwise secured by a related party) exceeds DKK 10m and the general debt-to-equity ratio exceeds 4:1);
- ❖ the interest ceiling rule (limits deductibility of net financing expenses if the expenses exceed a standard rate of return (FY2024 6%) on the tax value of certain qualifying assets), and
- ❖ the EBITDA rule (net financing expenses are limited in deductibility if the net finance expenses exceed the higher of DKK 22.3m and 30% of the debtor's EBITDA (earnings before interest, taxes, depreciation, and amortization)).

Special considerations may apply to debt where the creditor's claim against the debtor is restricted. Interest paid to non-resident creditors is generally not subject to withholding tax unless the creditor is closely related to the debtor, or the interest is "participating" (that is, calculated based on profits, revenue, etc.).

### Solar plants and wind farms

Solar plants and wind farms which are driven on a commercial basis are taxed as ordinary companies.

Dividends paid to non-residents are subject to 27% Danish withholding tax.

The tax treatment of substantial investments in energy projects is contingent on the category of tax those expenditures fall under. Buildings, equipment, and machinery are typically "depreciable assets", with expenditures on these assets grouped into different classes based on the asset type and usage. Operating equipment and machinery including wind turbines solar cells, are depreciated at a rate of up to 25 percent annually.

However, fixed installations such as wind turbines with a capacity of more than 1 MW, acquired in income years starting on January 1, 2013, or later, are depreciated at a rate of up to 15 percent annually.

### Oil and gas activities

The taxation of companies with income from the extraction of oil and gas is effected partly through the general corporate tax and supplementary corporate tax, and partly through the special hydrocarbon tax.

The corporate tax amounts to a total of 25 percent (22 percent corporate tax and 3 percent supplementary corporate tax), and the hydrocarbon tax is 52 percent. The corporate tax can be deducted when calculating the income subject to hydrocarbon tax, resulting in an effective tax rate of 64%.

Income from extraction is separately assessed for the calculation of corporate/supplementary corporate tax and hydrocarbon tax, resulting in two income assessments:

One for the calculation of corporate/supplementary corporate tax.

One for the calculation of hydrocarbon tax.

In both assessments, the taxpayer can only deduct expenses related to the income from extraction activities, or expenses incurred for preliminary surveys and exploration in connection with the taxpayer's business from hydrocarbon extraction.

If a taxpayer subject to hydrocarbon tax has general costs or joint expenses, such expenses must be allocated between the two types of income.

Drilling rigs, production platforms, and other facilities for preliminary surveys, exploration, extraction, and refining of oil and gas are considered operating assets and machinery, and depreciation is allowed up to 15% annually on a declining balance. Pipelines etc. may be depreciated up to 7% annually.

A temporary tax incentive regime for oil and gas companies allows for increased depreciations of production assets subject to hydrocarbon tax to 20% and an uplift to 6.5% in six years (39% in total).



## Taxation of Energy Projects

Further, hydrocarbon companies are entitled to deduct from their taxable income under the Hydrocarbon Tax Act the costs associated with the removal of decommissioning facilities, even after the cessation of hydrocarbon extraction activities. The Hydrocarbon Tax Act also includes a carry-back scheme, which allows companies to receive a payout of the tax value of unutilized losses related to removal costs deductions if the hydrocarbon extraction activities have ended. This scheme aims to place companies in a similar financial position as if the costs had been incurred while the activities were still profitable, thus compensating for the significant expenses that arise post-operations.

## CO2 storage (Carbon capture)

On 1 July 2023, new Danish tax legislation came into force which modifies the existing carry-back scheme for companies using hydrocarbon facilities' usage, particularly concerning CO2 storage activities. Following this, companies are able to claim a payout of the tax value of the part of a final loss in hydrocarbon income that relates to deductions for removal costs, even if they choose not to decommission facilities maintained for CO2 storage activities.

Furthermore, the new legislation allows companies to claim the tax value of deductions for the removal of facilities used for CO2 storage activities once those facilities are eventually decommissioned. This two-stage application of the carry-back scheme ensures that companies are not deterred from engaging in CO2 storage due to potential loss of tax benefits.

## Relevant Experience

Bech-Bruun has been involved in many of Denmark's largest and leading energy projects. Set out below is a description of some of our work.

- ❖ Assisted with M&A tax and other tax restructuring work for Danish and international companies. In the period between 2022-2023, we handled over 70 M&A deals.
- ❖ In 2023, we provided advice to a UK-based fund in connection with the establishment of a joint venture with a major Danish infrastructure company.
- ❖ In 2022, we provided tax advice to a foreign energy company in connection with the largest Danish biogas transaction.
- ❖ In 2022 and 2021, we provided continued tax advice to a major German acquirer of Danish solar plants.



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## Energy Overview

Finland has one of the lowest levels of reliance on fossil fuels among International Energy Agency member countries. This is due to substantial domestic production of renewable energy (primarily from forestry solid biomass, hydro and wind power) and the presence of several nuclear plants. In 2021, 86% of Finland's electricity production was derived from renewables and nuclear energy, with renewable sources contributing 53% to the country's electricity production.

Finland has no domestic fossil fuel production, and all supplies of crude oil, natural gas, and coal are imported. The energy intensity of the economy and per capita energy consumption are both high, attributable to the country's sizeable heavy industry sector and the significant heating demand imposed by its cold climate.

Regarding energy sector trends, solar power production in Finland has seen a marked increase in recent years. Additionally, there is growing interest in investments in electricity storage projects, as energy storage capacity is essential for balancing weather-dependent electricity production.

Finland is also remarkably active in the entire battery supply chain, from mining and processing raw materials to manufacturing batteries and charging technologies.

Moreover, the Finnish Government is preparing a new law to regulate offshore wind power in Finland's exclusive economic zone (EEZ). The draft of the law proposal is expected to be published in May 2024. In terms of nuclear energy, small and modular reactors (SMRs) are being considered as an alternative to fossil fuels, prompting the Finnish Government to reform the Nuclear Energy Act to enable the construction of SMRs.

According to Finland's Climate Act, the country should achieve carbon neutrality by 2035. To reach this target, Finland plans to significantly increase renewable energy production, including onshore and offshore wind power. Wood fuels are expected to play a crucial role in reducing fossil fuel use in the near term, but in the long run, the government aims to transition to non-combustion-based heating and cooling systems, such as heat pumps, waste heat recovery, and geothermal energy. The Finnish Government intends to incentivize new renewable energy investments to attract energy-intensive green transition investments.

## Tax Overview

**Tax residency** – Finnish limited liability companies are Finnish tax residents purely as a result of having been incorporated in Finland, and thus, are separately liable to Finnish income tax. Further, corporate entities whose place of effective management is located in Finland are also considered resident taxpayers in Finland.

A Finnish limited partnership is treated as a flow-through entity for Finnish taxation purposes, meaning that the partnership as such is not a separate taxpayer, i.e., the partnership itself will not be subject to corporate taxation. However, the partnership is treated as an accounting and tax calculation unit required to file a tax return.

**Tax rates** – the Finnish Corporate Income Tax ("CIT") rate is a flat 20%. Finland has implemented the EU VAT Directive, and the standard rate of VAT as of September 2024 is proposed to be 25.5% (until then 24%). However, two reduced VAT rates (14% and 10%) are applied to certain goods and services, in addition to the goods and services entirely exempted from VAT.

Finland also imposes a withholding tax on various payments, especially dividends and royalties, made by Finnish residents to non-residents. Base rates are 20% for corporations and 30% for individuals. The WHT levied is more often than not mitigated by the extensive double tax treaty ("DTT") network or EU-level exemptions, mainly the Parent-Subsidiary Directive and the Interest and Royalties directive.

According to domestic law, interest paid to a non-resident is usually exempt from WHT in Finland. See also below notes for debt pushdown and interest deduction limitations.

**Determination of taxable income** – income recognition in taxation is generally aligned with accounting, i.e., on an accrual basis. In practice, the key differences between taxation and accounting profit calculations concern depreciations and interest deductions.

**Group taxation** – corporations are taxed separately under Finnish tax regime. However, the Finnish group contribution regime allows, under certain conditions, Finnish group companies and Finnish permanent establishments to offset their profits and losses.

Finland has an advanced transfer pricing regime, which is largely consistent with the OECD Transfer Pricing Guidelines. Pre-emptive proceedings, including Advance Pricing Agreements ("APAs"), are frequently utilised.

**Specific tax items** – further to CIT and VAT, Finland also levies:

*Real Estate Tax* on owners of Finnish real estate (land area and buildings). The applicable tax rate depends on the nature and location of the property. Current general real estate tax rate differs between 1.30% and 2% and for certain power-plants amounts up to 3.1%. The real estate tax rules are currently being revised.

*Transfer Tax* of 1.5% for non-listed securities and 3.0% for Finnish directly owned real estate is levied in connection to transfer of ownership. A transfer between non-residents is exempted unless the target is a Finnish real estate or housing company. The purchaser is liable to pay the transfer tax and file a transfer tax return to the Finnish Tax Administration.



## Taxation of Energy Projects

**General** - Finnish energy projects are typically structured within limited liability companies, offering a liability shield for investors. Partnerships may be utilised in a financing context, most often as fund vehicles. Finland has effective tax consolidation between corporations under the Group Contribution regime.

**Financing** – given the typical capital-intensive nature of energy projects, the structuring of the financing is of particular importance. There are several aspects impacting the taxation of the financing structure, however, in general Finland offers an efficient framework for leveraged investments:

*Interest deduction limitations:* Finland has adopted Anti-Tax Avoidance Directive based interest deduction limitations with the following key characteristics.

- ❖ Interest deduction limitations are applied if the taxpayer's net interest expenses exceed €500k
- ❖ In this case deductibility of net interest expenses is limited to 25% of tax EBITD
- ❖ However, net interests paid to non-related parties are always deductible up to €3m and prioritised within the 25% EBITD quota
- ❖ There are specific complex exemptions available e.g. for certain infrastructure projects and based on comparative debt/equity ratios
- ❖ Disallowed interest deductions may be carried forward indefinitely and deducted within the limitations in following tax years

*Transfer pricing rules:* Finland has no formal thin capitalization regulation in force and generally i.e. the debt/equity ratio of Finnish companies is not restricted as far as it can be shown to be at arm's length. Especially in cases of significant leverage, a debt capacity analysis is recommended to support the arm's length debt/equity ratio.

*Debt pushdown:* for most acquisitions, the preferred means to push down debt in the structure is the usage of a Finnish Special Purpose Vehicle ("SPV"). Following the (share) acquisition, the target's profits may be offset against the SPV's interest expenses under Finnish group contribution rules. Debt pushdown has generally been accepted in connection with 3rd party acquisitions, however, detailed case-by-case analysis is always required to avoid triggering the anti-avoidance provisions.

**Other considerations** – Finland has a relatively restricted Participation Exemption regime for capital gains, meaning that Finnish corporate shareholders can make tax-exempt divestments only under limited circumstances.

Further, there are specific provisions regarding Finnish companies holding significant real property. Capital gains derived from disposals of these real estate rich companies may be taxable in Finland also for non-residents, depending on the relevant DTT provisions. Also, specific transfer tax rules apply to real estate companies.

## Other Tax Issues To Be Considered

### Temporary green investment incentive

In April 2024, the Finnish Government announced a new tax credit for substantial green industrial investments. The temporary new tax credit prepared by the Government appears to be well aligned with the EU's Temporary Crisis Framework, where the EU has relaxed its State aid policy to boost green investments. The EU's Temporary Crisis Framework allows Member States to grant aid to incentivise accelerated investments in sectors strategic for the transition towards a net-zero economy, such as battery and hydrogen projects and the fossil-free steel industry. This aid, which may take the form of tax relief, can reach up to EUR 150 million per project – a provision that is consistent with Finland's investment climate and ambitions to become a central hub for net-zero ecosystems.

The proposed tax credit is preliminarily designed to be 20 per cent of the total investment cost, subject to a ceiling of EUR 150 million per project, in accordance with the EU's framework. It will be available for new investment projects that are resolved upon by the end of 2025 with the tax reduction applicable no earlier than 2028, thus establishing a unique funding mechanism for the state. The legislative process is underway to define the technical requirements and details of the tax credit.

### Finnish R&D incentive

Finland also has a separate R&D cost driven tax incentive. The incentive is an additional tax deduction by nature, allowing for multiplied tax deductions determined based on the taxpayer's annual R&D expenses.

The deduction consists of a general additional deduction amounting to 50 percent of the actual qualifying R&D expenses. The applicable minimum threshold is €5k for the tax year, with a corresponding maximum of €500k.

Further, the incentive includes an extra additional deduction component, based on a year-on-year growth of the taxpayer's R&D expenses. The extra additional deduction amounts to 45 per cent of the growth in actual qualifying R&D expenses. The extra deduction has no minimum threshold but a maximum of €500k.

The incentive is a general tax incentive, available to all tax taxpayers engaged in R&D related business activities regardless of their form of business. The incentive is calculated on an entity-level, i.e., several group entities may claim benefit simultaneously.





## Excise duties

In Finland, a range of excise duties are imposed on the consumption and sale of specific goods that are either produced or imported within the country. This includes both national excise taxes on items like waste, as well as EU-harmonized excise duties. Within the energy sector, harmonized duties extend to electricity and select fuels, encompassing coal, natural gas, fuel peat, and pine oil.

A reduced electricity excise duty rate applies to electricity that is separately metered and utilized for industrial production, data centre operations, and professional greenhouse horticulture.

## Relevant Experience

Borenius (Taxand Finland) regularly advises clients of Finland's largest and most groundbreaking energy projects. Below we have listed certain recent engagement highlights in the energy sector where we advised:

- ❖ Neoen on the acquisition of Lumivaara wind farm in Finland from Prokon, and the formation of a joint venture regarding the wind farm between Neoen and Prokon. The parties entered into a new power purchase agreement with Equinix that covers the majority of the output of the Lumivaara wind farm.
- ❖ Neoen and Prokon in the project financing of a Finnish onshore wind farm portfolio. We acted as the local counsel in the approx. EURm 220 project financing of a Finnish onshore wind farm portfolio.
- ❖ Keliber when the company signed an investment agreement on bridge financing of EURm 40 with Sibanye Stillwater Limited. The arrangement enables Keliber to significantly advance its lithium project in Finland.
- ❖ The State of Finland on the EURb 2.35 bridge financing for Fortum. Fortum is one of the largest energy companies in northern Europe and a fundamental part of the Finnish national energy production system. Our multi-disciplinary team advised the State of Finland on all aspects of the transaction.
- ❖ Deutsche Anlagen-Leasing on the project financing of Finland's first major ground-mounted PV system, developed by CPC Finland Oy and based on a PPA with Neste for its Porvoo refinery, a global technology leader in sustainable fuels and chemicals.
- ❖ Renewable Power Capital Limited (RPC) in forming a joint venture with Aurinkokarhu Oy to co-develop up to 1 GW of solar PV projects in Finland, marking RPC's first Finnish solar investment.

- ❖ Fingrid, Finland's transmission system operator, in a real estate tax dispute regarding a reserve power plant, successfully arguing through all appellate levels. The Finnish Supreme Administrative Court issued a landmark precedent in June 2021, ruling in favor of Fingrid that non-commercial reserve power plants should be taxed at the general real estate tax rate rather than the higher rate for commercial power plants. This decision sets a significant precedent for the interpretation of Finnish real estate tax law.



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## Energy Overview

Global greenhouse gas emissions are rising steadily (+58% between 1990 and 2021), even though they are decreasing at the same time in Europe (-27%) and France (-23%). Two thirds of these emissions are linked to the combustion of fossil fuels.

*In France, CO<sub>2</sub> emissions linked to energy combustion was expected to reach 4.1 tons of CO<sub>2</sub> per inhabitant in 2022.*

This is due to the concomitant reduction in the carbon intensity of the French energy mix and the energy intensity of the French economy including:

- ❖ partial replacement of coal and oil by gas, nuclear power and renewable energies
- ❖ increased service-sector activity and lower industrial production
- ❖ improved energy efficiency of industrial processes

On the other hand, transport emissions, which account for a third of energy-related emissions, are not declining.

At every level, greenhouse gas emission reduction objectives have been set, starting with those linked to fossil fuels:

- ❖ Global level, with the Paris Agreement signed in 2015
- ❖ European level, with the Green Pact and the European Climate Law
- ❖ French level, with the National Low-Carbon Strategy (SNBC) – starting with those linked to fossil fuels.

*In France, electricity is mainly produced from nuclear power (61% in 2022), and is largely carbon-free.*

*However, the transport and construction sectors are still highly dependent on fossil fuels, which France imports almost entirely.*

## Tax Overview

Taxation of electricity, gas and oil products in France is governed by European law (directives 2003/96/EC of October 27, 2003 and (EU) 2020/262 of December 19, 2019.)

**Directive 2020/262/EU** provides a framework for the overall excise duty system (tobacco, alcoholic beverages and energy products).

**Directive 2003/96/EC**, specific to energy products, sets minimum levels of taxation and, under certain conditions, exemptions or differentiated rates of taxation.

**Directive 2023/2413** promotes energy from renewable sources.

In France, the new **Goods and Services Tax Code (CIBS)** came into force in January 2022, providing a clearer overview of the legislative texts relating to the indirect tax framework.

Over the past few years, responsibility for taxes has been transferred from French Customs to the French tax authorities:

- ❖ **2019:** transfer for non-alcoholic beverages
- ❖ **2020 and 2021:** transfer for general taxes regarding polluting activities
- ❖ **2022:** transfer of the French import VAT, the consumption taxes on electricity, gas and carbon, and the annual registration fee.
- ❖ **2023:** transfer of Customs penalties
- ❖ **2024:** the domestic taxes on energy products and the collection of the indirect contribution on alcohol and tobacco

### Excise duties on energies are divided into 5 "fractions" on the Goods and Services Tax Code namely:

- ❖ **Fraction levied on electricity:** refers to **TICFE** (Final consumption tax on electricity) which was also known as CSPE (Contribution au service public de l'électricité) – from 0,5€/MWh to 1€/MWh
- ❖ **Fraction levied on natural gas:** refers to **TICGN** (Consumption Tax on Natural Gas) – 1,52€/MWh - 8,37€/MWh
- ❖ **Fraction levied on energy products other than natural gas and coal (France mainland):** refers to **TICPE** (Consumption Tax on Energy Products) – 59,40€/l - 70,04€/l
- ❖ **Fraction levied in French overseas departments and regions on energy products other than natural gas and coal:** refers to the special consumption tax (TSC) applicable in the five overseas departments and regions;
- ❖ **Fraction levied on coal:** refers to **TICC** (domestic consumption tax on coal, lignite and coke).

### However, the national Customs code still regulates 2 last taxes:

- ❖ **TIRUERT:** Incentive tax on the use of renewable energy in transport (from 140€/hl to 160€/hl).
- ❖ **TGAP:** General tax on polluting activities levied on companies who have a polluting activity or use polluting products. It consists of 4 components: the TGAP on waste (dangerous and non-dangerous), the TGAP on the emission of polluting substances, the TGAP on laundry detergents, auxiliary washing preparations, fabric softeners and the TGAP on Extraction Materials.
- ❖ The amount varies according to the activity and the product.

## Taxation of Energy Projects

### The following energy tax measures have been taken in France:

- ❖ **TICPE:** the use of used cooking oil as fuel has been legalised. Used cooking oils are defined as oils produced from or derived from residue of fats of vegetable or animal origin used for human consumption, in the food processing industry or in collective or commercial catering (e.g. frying oils).
- ❖ Some TICPE exemptions will no longer apply from 2027:
  - the exemption for consumption of energy products, excluding electricity, used for the construction, development, testing and maintenance of aircraft and ships or their engines;
  - the exemption applicable to the consumption of coal for the purposes of biomass recovery.
- ❖ **TGAP:** In line with the “polluter pays” principle, the “waste” component of the TGAP is intended to encourage waste producers to comply with the principles of the circular economy, by increasing the cost of thermal treatment and waste storage.
  - Therefore, waste received in exceptional situations unrelated to the circular economy (natural disasters, public landfill sites), for energy production (co-incineration) or material recovery, is exempt from the tax.
  - A TGAP exemption has been added for waste treatment residue received by hazardous waste storage facilities.
- ❖ **HFC Tax:** The introduction of the tax on hydrofluorocarbons (HFCs), which aims to encourage companies to reduce their hydrofluorocarbon emissions by reducing the number of these products placed on the French market, has been postponed until January 1 2025.
- ❖ **TICFE:** The electricity tariff shield has been introduced for the period from February 1 2022 to January 31 2023 and extended until January 31 2025. It means that excise duty on electricity has been maintained at the minimum levels allowed under European law (0,5 €/MWh). On February 1st 2024, this tax increased to 20,50 euros per megawatt-hour (MWh). It will be fully restored to normal levels in February 2025 as it was before (22,50 €/MWh for companies and 32.44/MWh for individuals).
- ❖ **TIRUERT:** from January 1 2023, the rates of this tax were increased from €104 to €140 per hectoliter of gasoline and diesel, and from €125 to €168 per hectoliter of jet fuel, in order to strengthen the tax incentive for the use of renewable energy in transport, in line with European and national objectives.

- ❖ **TICGN:** since January 1 2020, the fuel use of natural gas has been subject to the domestic consumption tax on natural gas (TICGN). Previously, it had been subject to the domestic consumption tax on energy products (TICPE) since 2014.

**Energy taxation is therefore constantly evolving. It is imperative for operators to be aware of this in order to optimise their consumption (if applicable) and prevent any associated risks.**

## Other Tax Issues To Be Considered

### Reduced rates and exemptions of energy taxes are available depending on the type of activity performed

- ❖ **TICFE – Reduced rates** (various rates according to the use concerned).
  - for electricity-intensive companies
  - for the transport of people (by bus, streetcar or metro) or goods under certain conditions, and for the collective transport of people by road
  - for data centers
  - for airfield operators for the supply of electricity to sea-going ships and river boats when they are docked at the quayside
  - electricity supplied to parked aircraft at airfields.
- ❖ **TICFE – Zero rate**
  - dual use, i.e. chemical reduction, electrolysis, metallurgical processes etc.
  - manufacture of non-metallic mineral products - electricity-intensive goods production
  - electricity generated onboard ships and boats
  - taxable products consumed for electricity generation purposes, as well as electricity consumed to maintain electricity generation capacity.

### Similar reduced rates and exemptions of energy taxes are available on (various rates available):

- natural gas (TICGN e.g. certain industrial processes and activities are zero-rated)
- on coal (TICC e.g. exemption for electricity production) and
- on petroleum product (TICPE e.g. the manufacture of non-metallic mineral products is zero-rated).



## ❖ TIRUERT – Zero rate and sale of certificates

- This incentive-based tax sets a target (incorporation rate according to the nature of the product) for the use of renewable energy in transport fuels.
- The rate is zero if the taxpayer can demonstrate that sufficient renewable energy has been incorporated.
- Volumes of renewable energy exceeding the thresholds can be sold to other taxpayers in the form of certificates and generate a profit.

**The release for consumption and/or use of energy in industrial and commercial processes can therefore be optimised from an energy taxes perspective.**

## Relevant Experience

ARSENE (Taxand France) has worked on many of France's largest and most innovative energy projects and also performed works covering various EU Member States. ARSENE covers both advice and litigation.

Set out below is a representative sample of some of our work in this sector.

- ❖ Advice and litigation regarding the energetic tax on electricity for freeze production, electro intensive companies and cogeneration.
- ❖ Advice and litigation regarding the energetic tax such as the dual use exemption and electricity production exemption.
- ❖ Petroleum sector intervention regarding customs and excise organization, accounting and authorization requests.
- ❖ Drafting contracts to secure energetic tax treatment and management between parties.
- ❖ Electric charging point mechanism implementation for various companies.
- ❖ Ruling application regarding any energetic tax.
- ❖ Due diligence on any energetic tax.
- ❖ Biofuel tax mechanism analysis and implementation assistance.
- ❖ Lobbying actions regarding French energetic tax regulation or implementation regulation.



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## Energy Overview

Germany has set itself the goal of becoming climate-neutral by 2045. This goal is to be achieved, among others, by moving away from fossil fuels and expanding renewable energy production.

- ❖ Renewable energies accounted for 56% of the electricity mix in 2023. Wind power was the most important source of energy for electricity generation in Germany in 2023 with a share of 31 %.
- ❖ The aim is that renewable energies cover at least 80% of electricity consumption in Germany by 2030.
- ❖ The second most important energy source for electricity generation in Germany in 2023 was coal with a share of 26%. Nevertheless, coal-fired power generation is to be phased out by 2038.
- ❖ Nuclear power was phased out in 2023 in Germany.

To meet its energy demand, Germany imports more than two thirds of its fossil fuels from abroad.

- ❖ The country is therefore dependent on countries and regions such as the Middle East. The expansion of renewables also serves to reduce this dependence.
- ❖ However, Germany also has its own resources from which energy can be obtained. These deposits consist primarily of brown coal and hard coal. There are also deposits of natural gas and crude oil and small quantities of uranium.

Hydrogen is seen as the energy source of the future. It is expected to play a decisive role in replacing natural gas, oil and coal.

- ❖ Among other things, the National Hydrogen Strategy ("Nationale Wasserstoffstrategie") describes the expansion of a hydrogen infrastructure and sets government guidelines for the production, transport and use of hydrogen.
- ❖ It is planned that the German government will invest €18.6 billion in the development of the hydrogen industry between 2024 and 2027.

The war in Ukraine is affecting energy markets worldwide. The consequences of the war for Germany range from extremely high energy prices to efforts to ensure energy security and diversify energy sources.

- ❖ Gas deliveries from Russia via Nord Stream 1 fell drastically in 2022 and finally dropped to 0 TWh at the beginning of September 2022.
- ❖ The most important sources of gas imported to Germany in 2022 were Norway, the Netherlands and Belgium, with a combined share of 68 %.
- ❖ Electricity and gas prices rose sharply as a result of the Ukraine war.

E-cars are set to play a central role in achieving the goal of climate neutrality by 2050 as part of the European Green Deal. From 2035, no new diesel or petrol cars may be registered in the EU.

- ❖ In Germany, the share of e-cars in total car sales has increased 10 times since the start of the Covid pandemic. This is partly due to government purchase incentives, such as the environmental bonus.
- ❖ The share of e-cars in the passenger cars in Germany has risen continuously in recent years and stood at around 3.9 % in 2023. According to recent forecasts, the share of e-cars could be 11.1% by 2025 and 24.4% by 2030.
- ❖ The German government has set a target of at least 15 million e-cars on the road by 2030. In order to achieve this goal, a well-developed charging infrastructure must be in place. Furthermore, the electricity grid must be able to bear the higher loads caused by the charging infrastructure. This requires capital-intensive investments.

In 2022 the German government showed (contrary to the public expectations) that it is in a position to react adequately to critical events at an appropriate pace and that important decisions can be made fast. The following was decided:

- ❖ A total of 6.9 GW of hard coal and lignite-fired power plant capacity returned to the electricity market for a limited period during the declaration of emergency.
- ❖ The operating life of the 3 remaining nuclear power plants was extended until April 2023.
- ❖ The first German floating LNG terminal in Wilhelmshaven went into operation in December 2022. In January and March 2023, two more floating LNG terminals followed.

## Tax Overview

Germany levies income tax on the worldwide income of individuals who are either resident or domiciled in Germany (unlimited income tax liability). Natural persons who are neither residents nor domiciled in Germany are subject to limited income tax liability if they have domestic income (limited income tax liability).

- ❖ The income tax rate is progressive, depending on the income.
- ❖ The maximum income tax rate is 45%. Under certain circumstances, the solidarity surcharge (5.5% on income tax) is also levied.

Furthermore, Germany levies corporation tax on corporations that have their management or registered office in Germany (unlimited corporation tax liability). Similar to income tax, corporations that have neither their registered office nor their management in Germany are subject to limited corporation tax on their domestic income (limited corporation tax liability).



- ❖ The corporation tax rate is 15% plus 5.5% solidarity surcharge (on the corporate taxes).

Trade tax is also imposed in Germany. Every standing commercial enterprise is subject to this tax if it is operated in Germany. The activity of a corporation is always and fully considered a commercial enterprise.

- ❖ The tax base for trade tax is the trade income. Trade income is defined as the profit from business operations determined in accordance with tax laws (German Income Tax or Corporation Tax Act), adjusted for additions and deductions.
- ❖ The trade tax rate depends on the municipality levying it. On average, it is around 14%. Trade tax is payable in addition to corporation tax, so that the combined corporation tax and trade tax rate is approximately 30%.
- ❖ Trade tax can be offset against income tax (but not against corporate income tax).

If distributions are made to residents or non-residents, they are subject to a withholding tax, so that equivalence is achieved in the taxation of corporations and partnerships. Depending on the double tax treaty, an exemption certificate would provide for not paying withholding taxes.

Besides, there is a withholding tax on domestic income earned by, among others, license grantors. In addition, income from capital is also subject withholding tax plus a solidarity surcharge.

Germany also levies a VAT. It applies, among others, to supplies and other services that an entrepreneur carries out in Germany in return for payment as part of his business.

- ❖ The VAT rate is either 19% or 7%.

## Taxation of Energy Projects

In Germany, energy projects are typically carried out either within a corporation (e.g. GmbH, AG) or a partnership (e.g. KG, OHG).

- ❖ A corporation and a partnership differ, among other things, in terms of their scope of liability and their taxation. According to the German Corporate Income Tax Act (KStG), the corporation itself is the tax debtor for the corporation tax (non-transparent). The income is also determined at the level of the corporation.
- ❖ In contrast, partnerships are fiscally transparent for German income tax purposes. Although the income of a partnership is also determined at company level, the partners are liable for tax according to the German Income Tax Act (EStG).

If an investor wants to invest in an energy project (e.g. wind farm or solar park), he has the choice between an asset deal and a share deal. These differ, among other things, in their ongoing tax treatment as well as in the treatment of profits that arise in the event of a sale.

- ❖ In case of an asset deal, the investor must recognise the acquired assets (and also the liabilities) in the balance sheet with realisation of hidden reserves. This can result in increased tax depreciation and consequently lower taxable income. A sale is fully subject to tax.
- ❖ In case of a share deal, the shares are not subject to depreciation and can thus not reduce taxable income. However, the sale of the shares - if the shares are held via a German holding company, for example - is effectively 95% tax-free. 5% of the capital gain is deemed to be non-deductible operating expenses and is subject to taxation.
- ❖ Whether an energy project should be realised via an asset deal or a share deal cannot be assessed in general terms. This requires a case-by-case assessment.

Usually, energy projects are very capital intensive. That's why financing is typically an issue of high importance. Especially the capital structure - the mixture of debt and equity - of a company must be determined by the company as the cost of debt and the cost of equity are treated differently for tax purposes.

- ❖ In general terms, interest on debt incurred by the company realising the energy project will be deductible in computing income for tax purposes, while equity distributions (e.g., dividends on shares of a project corporation) are non-deductible by the company.
- ❖ The interest deduction is limited by the so-called interest barrier ("Zinsschranke"). According to this regulation, interest expenses of a company are deductible in the amount of the interest income and beyond that only up to the amount of the offsetable EBITDA, which is equivalent to 30 % of the EBITDA. Furthermore, the payment of interests or dividends can be subject to withholding tax.
- ❖ With the Growth Opportunities Act, a debt-capacity test was included in the Foreign Tax Act. This test is adopted from the OECD, but has been implemented more tightly. According to this test, it does not comply with the arm's length principle if an interest expense resulting from a cross-border financing relationship within a multinational group of companies has reduced the taxpayer's income and the taxpayer cannot credibly demonstrate that it could have provided the debt service for the entire term of this financing relationship from the beginning and that the financing is economically necessary and used for the business purpose.

If an energy project is carried out in Germany and investments are made in buildings, equipment and machinery, the depreciation amount is deducted from income, which reduces taxable income.





- ❖ Land is not depreciable property, and so its cost generally cannot be depreciated and thereby deducted against income.
- ❖ Mining companies, quarries and other operations that involve the consumption of substance can either make use of straight-line depreciation or they can make deductions in accordance with the consumption of assets. If an energy company extracts natural resources such as natural gas, oil or coal, which in turn are used to generate energy, this company has the option of calculating the deduction amount according to the ratio of the quantity extracted in the financial year to the total quantity available at the time of acquisition.

A special feature of the Trade Tax is the breakdown of the tax assessment amount to the municipalities with a permanent establishment (PE). Generally, the breakdown is based on the wages paid to the employees employed at the respective PE. However, often in practice there are no employees employed at the locations of the power generation plants (e.g. wind power plants). Therefore, special rules applying to wind and solar power plants were adopted in 2021 in order for the municipalities to be allocated a share of the tax assessment amount so they can levy Trade Tax.

Wind power plants in Germany with no employees of their own constitute PEs for German tax purposes acc. to Art. 12 of the German General Tax Code ("Abgabenordnung"):

- ❖ The OECD Report on the Attribution of Profits to Permanent Establishments considers PEs without personnel to be functionless, i.e. no profits can be assigned to a PE.
- ❖ However, Germany applies special rules ("BsGaV") for which a court case is existent that also assets without personnel functions in Germany would justify a certain taxable profit to be allocated to the PE.
- ❖ The difference in approaches of Germany (e.g. location of the PE) and other countries (e.g. the energy company's home countries) on the assets allocation could lead to double taxation in cross-border cases.

From a VAT perspective there are special tax rules with regard to energy companies as well, e.g.:

- ❖ Sales related to supply of electricity, gas or heating are subject to special VAT principles (e.g. with regard to the determination of the place of energy supply, reverse-charge-procedure, special rules for intra-Community supplies, intra-Community acquisitions and imports, etc.).
- ❖ Due to the continuously rising gas, electricity and oil prices, the German legislator attempted to provide relief for consumers and introduced a temporarily reduction of the VAT rate on gas and heat supplies from 1.10.2022 to 31.3.2024 from 19 % to 7 %.

## Other Tax Issues To Be Considered

- ❖ As of January 2023, end consumers are relieved of rising energy costs through energy price brakes under the Electricity Price Brake Act and Natural Gas Heat Price Brake Act ("Strompreisbremsegesetz" and "Erdgas-Wärme-Preisbremsegesetz").
- ❖ The energy price brakes are paid to energy suppliers, who pass them on to end consumers. This leads to an increased VAT risk arising for energy companies (e.g. due to the possibility of incorrect invoicing by the energy suppliers and an insufficient VAT credit by the end consumer).

In Germany, electricity tax must be taken into account, which is levied on electricity in the tax territory.

- ❖ The tax arises from the fact that electricity supplied by the supplier based in the tax territory is withdrawn from the supply grid by final consumers in the tax territory, or from the fact that the supplier withdraws electricity from the supply grid for its own consumption.
- ❖ Tax debtor is the supplier.

In addition, energy products are subject to energy tax in Germany. The term energy product includes, among others, brown coal, hard coal, petrol or natural gas.

- ❖ In relation to natural gas for example, the tax generally arises when natural gas supplied or self-produced in the tax territory (Federal Republic of Germany excluding Büsingen and the island of Helgoland) is withdrawn from the pipeline network for consumption.
- ❖ The tax debtor is the supplier if he is resident in the tax territory and the natural gas supplied is not withdrawn from the pipeline network by another supplier. Otherwise, the person who takes the natural gas from the pipeline network is the tax debtor.

The Growth Opportunities Act ("Wachstumschancengesetz") came into force on 27.3.2024 and claims to encompass measures aiming economic growth, investments and innovations. In total, the law has a relief volume of 3.2 bn. EUR. The following measures are / could be (directly or indirectly) related to the topics of energy and energy transition:

- ❖ Strengthening research and development tax incentives ("Forschungszulagengesetz");
- ❖ Improved tax depreciation rules;
- ❖ Extended loss carryforward rules;
- ❖ Tax incentives concerning the taxation of the private use of company e-vehicles;



- ❖ However, the enacted law does not include the initially intended climate protection investment premium which was supposed to be a tax incentive for investments in the decarbonization of the economy.

## Key investment issues for foreign investors

- ❖ Investments in renewable energies (e.g. wind farms, solar parks or storage sites): They should be made in a tax-optimised manner, especially with regard to the use of depreciation potential.
- ❖ Investments in the electricity grid: At the moment, the German electricity grid is not in a position to bear the high loads caused by the charging infrastructure for the 15 million e-cars by 2030. An expansion of the grid is therefore essential. This requires capital-intensive investments that can be financed in various ways. The different tax treatment of the financing options must be taken into account.
- ❖ Tax-optimized investments in energy projects by share or asset deals: Companies wishing to realise an energy project in Germany, such as the construction of a wind farm, must choose between a share deal and an asset deal. These differ, among other things, in terms of their tax implications. It is therefore essential to decide in advance in which form the project is to be realised. In order to implement the project in the most tax-optimised way possible, tax aspects must also play a role in this decision. This applies to both, the acquisition of an existing project and the development of a new one.
- ❖ Investments in the hydrogen infrastructure: A pipeline network with a length of 1,500 kilometres is to be built by 2027/2028, which will generate investment potential. There is also the possibility of investing in hydrogen power plants and hydrogen storage facilities. As the use of hydrogen is subsidised, subsidies should be identified at an early stage.

## Relevant Experience

- ❖ Restructuring of energy suppliers and electricity grid operators
- ❖ Advise on M&A activities in wind park projects (investment & sale)
- ❖ Advise on transfer pricing systems for corporations in the energy sector including the trade of energy
- ❖ Advise on the determination of PE profits
- ❖ Ongoing advise during tax audits in the energy sector
- ❖ Application of APA and MAPs for companies in the energy sector.



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## Energy Overview

Greece's energy and climate policies are focused on achieving net zero emissions by 2050 while promoting energy projects, ensuring energy security and improving economic competitiveness.

The National Energy and Climate Plan (NECP), adopted in 2019, is the main document setting energy and climate policy through 2030 and includes targets and supporting measures to put the country on a path to net zero emissions.

The National Climate Law (Law 4936/2022) on the transition to climate neutrality and adaptation to climate change introduced Greece's legal framework on climate action. More specifically, it aims at reducing total greenhouse gas emissions by 55% by 2030, by 80% by 2040 and to reach net zero emissions by 2050. It also provides measures on key emissions reduction, including the phase-out of lignite-fired generation by 2028.

Pursuant to the data provided by the Independent Power Transmission Operator, Renewable Energy Sources (RES) have rapidly developed in our country in recent years. More specifically, 2023 marked a historic milestone in Greece's clean energy production, with 57% of the energy mix being supplied by Renewable Energy Sources (wind and solar) and hydroelectric units, surpassing 25 TWh. In 2022, the corresponding percentage was 50.12%.

Concerning demand, over the last decade, the coverage of total demand by RES production increased by 151%, reaching over 43% in 2023, the highest percentage recorded so far.

Additionally, last year witnessed a further reduction in lignite's contribution to the domestic energy mix, reaching a historic low of 10.1%. This decrease reflects the significant progress of the country's lignite phase-out program—given that in 2014, energy production from lignite exceeded 54%—and the continuous upward trend of environmentally friendly energy sources.

More specifically, pursuant to the data published for 2023 by the Independent Power Transmission Operator, the energy production mix for 2023 comes from:

- ❖ RES
- ❖ Natural gas
- ❖ Lignite
- ❖ Hydroelectricity

## Tax Overview

- ❖ Greek tax resident entities are subject to corporate income tax at a rate of 22% on their worldwide income, while foreign tax residents may be subject to tax in Greece on their Greek-sourced income.
- ❖ Taxable income is determined in accordance with tax law provisions, which provide both for a general test of business relevance of the respective expenses and for specific categories of expenses that do not qualify as deductible for tax purposes; hence tax adjustments for non – deductible expenses should be made for tax purposes on the accounting revenues depicted in the financial statements.
- ❖ Business expenses should in principle be tax deductible provided that they are made to the interest/ benefit of the business, correspond to an actual transaction, are recorded in the accounting books of the period in which they are incurred and are duly supported by proper documentation, as well as do not fall under the restrictively listed non-deductible expenses, as determined in the Income Tax Code.
- ❖ A corporate income tax prepayment for next year equal to 80% of the current tax is also due upon submission of the tax return, while for newly established companies prepayment is reduced to 50% for the first three years of their operation.
- ❖ Tax losses may be carried forward for 5 consecutive years, while no carry back option is available.
- ❖ No tax grouping rules are available in Greek tax law.
- ❖ Withholding taxes may be applicable on various payments (e.g., interest, dividends, royalties, technical works) made by Greek residents to non-residents, under conditions and subject to the provisions of double tax treaties as well as EU directives that have been transposed into domestic tax legislation.
- ❖ Distribution of profits in particular is subject to a withholding tax of 5%, which may be reduced or eliminated under applicable double tax treaties or the EU Parent Subsidiary Directive, as the case may be.
- ❖ Thin capitalization rules apply on exceeding borrowing costs, which may be deductible only up to 30% of the taxpayer's earnings before interest, tax, depreciation and amortisation (EBITDA) or up to the amount of €3.000.000 per year.
- ❖ Transfer pricing rules apply in respect of related party transactions.



## Taxation of Energy Projects

Greek energy projects are mostly carried out through the establishment of Greek SPVs, which usually take the form of limited liability companies (such as Anonimi Eteria ("AE"), which is an equivalent of a Societe Anonyme, or Eteria Periorismenis Efthinis ("EPE"), which is a Limited Liability Company, or the Idiotiki Kefaleouhiki Eteria ("IKE"), which is the equivalent of a Private Company).

Financing may be performed through debt or equity.

As regards debt financing, stamp duty is triggered on debt financing, which is in principle applicable at the rate of 2,4%.

As regards equity financing, capital concentration tax at a rate of 0,2% (plus 0,1% duty in favor of the Hellenic Competition Committee in case of AE companies) is due on share capital increases; while the said tax is not due upon the establishment of a company, to the extent contributed as initial capital.

Tax depreciation on assets is mandatory for the company and should be performed on an annual basis, not being subject to further transfer among tax periods. Tax depreciation rates do not follow accounting rules (Greek GAAP or the IFRS which are equally applicable by entities established in Greece) and are set specifically into tax legislation. As the categorization of assets for depreciation purposes is not exhaustive, each entity should decide on the classification of an asset based on its use, purpose and special characteristics.

The issue of the classification of the assets of solar and wind farms, although not binding, has been subject to various rulings, according to which the depreciation rate to be used for said assets should be 4%, as applicable on special non-building facilities. Enterprises are not obliged though to classify their total assets as "non-building facilities", but they may classify them into a different category based on the relevant purchase invoice, their real use and their substantial characteristics.

A critical issue related to tax depreciation rules for renewable energy sources (RES) projects is also the treatment of development fees, which mainly consist of fees paid to developers for bringing a project to the agreed level of maturity (usually the ready-to-build status), as well as necessary actions (e.g., securing land rights, project design and layout, technical studies, communications/filings with authorities etc.) in view of the issuance of the required regulatory permits and licenses. The part of the consideration paid for development services, could affect the overall income tax liability depending on whether relevant cost has to be expensed, whereby a tax loss will arise in early years of development and prior to operations, or capitalized and depreciated for tax purposes, in line also with the treatment to be followed for similar expenses accounting wise (opex vs capex) per Greek GAAP or IFRS rules. No specific rules or guidelines are in place, so the issue should be further assessed on a case-by-case basis.

## Other Tax Issues To Be Considered

Legislation affecting energy projects is rather complex and fragmented and there is no single legislative act regulating uniformly taxation of said projects. Certain tax aspects are set forth below that need to be taken into consideration on a case by case basis

- ❖ Various charges or duties may be applicable to energy projects depending on the type of project (e.g. photovoltaic projects, wind farms) or the identity of the taxpayer (e.g. producer).
- ❖ The structure to be elected (e.g., Greek SPV holding the projects or foreign entity) may trigger diverse tax implications depending on the transaction (e.g., withholding taxes on dividend distributions, interest payment, transfer of assets vs transfer of shares, permanent establishment considerations, exit taxation).
- ❖ VAT considerations may be triggered in Greece if the place of supply of services is located in Greece. For instance, services for the installation of photovoltaic/wind parks could qualify as a supply of services connected with immovable property, whereby Greek VAT will be triggered and potential VAT registration formalities may arise.
- ❖ The transfer of ownership of real estate property situated in Greece, the establishment and/or transfer of real rights, trigger real estate transfer tax (RETT) at the rate of 3% on the taxable value of the real estate property which is surcharged with a 3% municipality tax, resulting thus at a total rate of 3.09%, payable by the purchaser.
- ❖ Companies and all types of entities (irrespective of whether they are domestic or not and have legal personality or not) holding Greek real estate property located in Greece are subject to an annual special real estate tax at the rate of 15% on the taxable value of the real estate property.
- ❖ Overall, as regards energy projects specific attention should be drawn on the one hand to the investment structure to be opted by each group and on the other hand to the tax considerations that may be triggered depending on the case-by-case analysis so as to accurately design the financial modeling.

## Relevant Experience

Our tax practice group has extensive experience in the energy sector and has been involved in many of the M&A - Energy projects in a multitude of tax aspects, ranging from structuring investments and financing, to drafting tax clauses and dealing with specialized tax matters of the industry, performing tax due diligence for acquisitions on the buy side or vendors' tax due diligence on the sell side, for companies of the sector. We also have a strong track record in day-to-day corporate tax compliance and accounting support to the industry.



Most recent key assignments of our team over the last two years include assistance to the following:

- ❖ **Global leading group in solar power:** Tax advice to a Global leading group in solar power for acquisitions and operations in Greece, including, among others, the structuring of investments in Greece, industry specific aspects including deductibility of depreciations, substation costs direct and indirect tax treatment, VAT and stamp duty issues as well as tax advisory support on restructuring (demergers, conversions etc) and refinancing projects.
- ❖ **One of the more established Spanish RES groups:** Assisting one of the more established Spanish RES groups, active in building and operating hydroelectric power plants, wind farms and solar photovoltaic plants, with structuring its investment in Greece, including support in areas of financing, profit distribution, VAT treatment of development fees etc.
- ❖ **One of the largest developers of onshore wind power in Europe:** On-going support for the acquisition of numerous projects by Swedish Group which is one of the largest developers of onshore wind power in Europe, covering tax and accounting due diligence of SPVs and holding entities and support on the drafting, review and negotiation of tax & accounting tax clauses of transactional documents.
- ❖ **Leading multinational players:** Tax and accounting support to other leading multinational players for their RES investments in Greece (wind farms and photovoltaic plants) for the whole spectrum of services provided above. Handling of tax audits as regards VAT refund claims and other tax issues of project SPVs and development entities.

Indicatively, below you may find a list of some of the clients we assist in tax related energy projects:

- ❖ Aquila Capital Management GmbH
- ❖ Ecoener Group
- ❖ Emergya Wind Technologies
- ❖ OX2 Group
- ❖ European Energy A/S



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## Energy Overview

India is the third largest energy consuming country in the world. India stands 4th globally in Renewable Energy Installed Capacity (including large hydro), 4th in wind power capacity and 5th in solar power capacity. Further, the country has set an enhanced target at the UN Climate Change Conference in Glasgow (COP26) of 500 GW of non-fossil fuel based energy by 2030, which is world's largest expansion plan in renewable energy.

India's installed non-fossil fuel capacity has increased 396% in the last 8.5 years and stands at more than 198.75 GW (including large hydro and nuclear), about 45% of the country's total capacity (as of March 2024). India saw the highest year-on-year growth in renewable energy additions of 9.83% in 2022. The installed solar energy capacity has increased by 30 times in the last 9 years and stands at 81.81 GW as of March 2024.

India's solar energy potential is estimated to be 748 GWp as estimated by National Institute of Solar Energy (NISE). The installed renewable energy capacity (including large hydro) has increased by around 128% since 2014.

Up to 100% Foreign Direct Investment (FDI) is allowed under the automatic route for renewable energy generation and distribution projects subject to provisions of the Electricity Act 2003.

### Industry Scenario

India's combined installed capacity of renewable energy resources is 190.57 GW (as of March 2024). Following is the installed capacity for renewables:

- ❖ Wind Power: 45.88 GW
- ❖ Solar Power: 81.81 GW
- ❖ Biomass/Co-generation: 10.35 GW
- ❖ Small Hydro Power: 5 GW
- ❖ Waste to Energy: 0.58 GW
- ❖ Large Hydro: 46.92 GW.

India has set a target to reduce the carbon intensity of the nation's economy by less than 45% by the end of the decade, achieve 50% cumulative electric power installed by 2030 from renewables and achieve net-zero carbon emissions by 2070.

India aims for 500 GW of renewable energy installed capacity by 2030 and aims to produce 5 million tonnes of green hydrogen by 2030. This will be supported by 125 GW of renewable energy capacity.

50 solar parks with an aggregate capacity of 37.49 GW have been approved in India. Wind energy has an off-shore target of 30 GW by 2030, with potential sites identified.

## Recent Industry Trends...

- ❖ 100 smart city projects: Provision of rooftop solar and 10% renewable energy is mandatory
- ❖ Upgrade and Modernization: Upgrade watermills and micro hydro projects
- ❖ Solar Pumps: 100,000 solar pumps required for agriculture
- ❖ Green Energy Corridor: Plans to set up 10753 circuit km of inter-state and intra-state transmission lines and 27546 MVA capacity of substations having an estimated project cost of US \$ 1451 million.

## Federal Policies and Incentives

### Production Linked Incentive ("PLI") Scheme:

The Ministry of New and Renewable Energy ("MNRE"), Government of India has implemented the PLI Scheme under "National Programme" on "High Efficiency Solar PV Modules" for achieving manufacturing capacity of GW scale in High Efficiency Solar PV modules with an outlay of **US \$ 2.92 billion**.

Solar PV manufacturers are selected through a transparent selection process. This Scheme has provision for PLI to the selected solar PV module manufacturers **for five years** post commissioning, on manufacture and sale of High Efficiency Solar PV modules.

Objective of the PLI Scheme:

- ❖ To build up solar PV manufacturing capacity of high efficiency modules
- ❖ To bring cutting-edge technology to India for manufacturing high efficiency modules. The scheme will be technology agnostic in that it will allow all technologies. However, technologies which yield better module performance will be incentivized
- ❖ To promote setting up integrated plants for better quality control and competitiveness
- ❖ To develop an ecosystem for sourcing local material in solar manufacturing
- ❖ Employment generation and technological self-sufficiency.





### Other Policies including State level policies

- ❖ **National Green Hydrogen Mission** – The Union Cabinet approved the National Green Hydrogen Mission with a total initial outlay of US \$ 2,381 million, including an outlay of US \$ 2,109 million for the SIGHT Programme, INR US \$ 176 million for pilot projects, and other related outlays.
- ❖ **National Policy on Biofuels** – The objective of the policy is to enable availability of biofuels in the market, thereby increasing its blending percentage.
- ❖ **National Electricity Plan 2022-32** – Amongst other things, this includes different technologies available for efficient generation, transmission and distribution, fuel choices based on economy, energy security and environmental considerations.
- ❖ **Development of Micro & Mini Hydro Power Projects** – The objective is to promote micro/mini hydro power projects in the states such as Uttarakhand by providing a favorable environment.
- ❖ Additionally, various State level Renewable Energy Policies are also published in order to provide an impetus to the overall national strategy with respect to the renewable energy.

### Tax Overview

Goods and Services Tax (GST) was implemented on July 1 2017, by replacing almost all indirect taxes as a comprehensive single, pan-India indirect tax ranging from 5%-28%. With its implementation, the cascading effect of taxes impacting the cost of goods has been removed and the taxation system has become more efficient. Further, the Income Tax structure has also undergone some milestone reforms which have regulated the unorganized sectors, reduced tax evasion, and improved compliance.

### Taxation of Energy Projects

With respect to renewable energy, the following tax reforms are important to be taken into consideration:

#### Separate Scheme for Solar Sector under GST:

A separate mechanism was introduced for solar sector projects wherein 30% of value is deemed as 'supply of service' and 70% as 'supply of goods'.

#### Import duty changes

An increased Basic Customs Duty (BCD) of 40% applicable on import of solar modules and 25% applicable on import of solar cells (effective from April 1 2022), has resulted surge in indigenous manufacturing.

#### Reduced Corporate Tax Rates:

- ❖ A reduced tax rate of 22% is applicable to any new domestic manufacturing company (certain deductions including depreciation may not be available if company opts for the reduced rate).
- ❖ A new company which is registered on or after October 1 2019 where manufacturing is commenced before March 31 2024, is eligible for 15% tax rate – likely to be extended.

#### Accelerated depreciation on renewable energy devices:

A benefit in terms of a higher depreciation rate at 40% for initial years is available on specific renewable energy devices.

#### Other Regulatory Compliance:

Additionally, certain other regulatory compliances which may be applicable for renewable energy sector are listed hereunder:

- ❖ **Bureau of Indian Standards (BIS) certification** – The BIS Certification is obligatory for specific products, so that they can be introduced and sold on the Indian market. BIS Certification India or BIS Registration issued by the BIS ensure the quality, safety and reliability of products in accordance with Indian Standards (IS).
- ❖ **Consent to Operate (CTO) from Pollution Control Board for solar plant** – Once the industry or process plant is established along the required pollution control systems, the entity is required to obtain consent to operate the said unit.



## Relevant Experience

ELP (Taxand India) has worked on many large and innovative projects. Set out below is a representative sample of some of our work in this sector:

- ❖ Advised a large group with respect to due diligence, structuring of the transaction and drafting and negotiating transaction documents with respect to private equity investment which currently owns and operates 130 MW of grid connected solar power projects in India.
- ❖ Advised a client in relation to the Jangi – Thopan and Thopan – Powari Hydro-electric Power Projects (480x2 MW), Himachal Pradesh. We advised them in relation to the bidding process for the Projects and reviewed the bid documents, the Pre-implementation Agreement, the Development Loan, the appointment of Consultants for conducting feasibility studies, Implementation Agreement, the Power Purchase Agreements with the State Electricity Board and the EPC Contract.
- ❖ Advised on the tax and contractual aspects of an EPC Contract for setting up a Wind Energy Project in Andhra Pradesh.
- ❖ Advised a major energy company on various benefits under the Foreign Trade Policy (FTP) for setting up a nuclear power project in India.
- ❖ ELP have been indirect tax advisors to clients in the infrastructure sector, including power, in respect of its various projects in the Power Sector including India's largest project in Vemagiri.
- ❖ ELP has represented clients in their proposed contractual arrangements with foreign nuclear equipment suppliers for development of nuclear power projects in India.
- ❖ ELP has advised a client in setting up a coal-based power plant in an Indian state and supply of the entire power to an overseas power distribution company through transmission lines up to the border connecting to the overseas grid. It has further assisted in the drafting, review and negotiation of a power purchase agreement for cross border supply of power to a neighboring country.
- ❖ Advised a client on selling its solar power plant projects in Telangana, Karnataka and Tamil Nadu to two global investors for over INR 700 crore, making it completely debt-free with additional cash to boost its next phase of green energy development.



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## Energy Overview

Whilst being a relatively small country, the Netherlands has a multitude of natural resources, both on- and offshore. Mainly natural gas fields in the North of country have played a major role in the country's energy supply and production during the past decades and export potential. For multiple reasons, the focus has shifted towards renewable energy production; through solar, wind and hydrogen. Exploitation of the onshore gas production in the North was reduced over the last couple of years and is about to be abandoned, this was mainly triggered by the increased number of earthquakes in the area.

As an EU member-state the Netherlands has pledged to adhere to the EU Green Deal; a plan to reduce greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels, and no net emissions by 2050. As part of this deal the EU implemented a tax on carbon usage by businesses. These carbon credits can be traded.

This deal enforced the decommissioning of existing energy structures and reusing materials for the transition towards more electricity use. Old offshore infrastructure is being reused for renewable sources of energy.

One of the challenges for the Netherlands in this transition is a highly congested grid. A lot of effort is being put into initiatives helping to reduce this congestion. Without these efforts, the Netherlands will not be able to provide for the increasing future demand of renewable energy for the use in cars, heating and businesses. Albeit having a big focus on renewables the Netherlands will, for this reason, allow exploitation of the smaller offshore oil and gas blocks.

Also, to secure energy security there are again plans to invest in two to four small sized nuclear plants. This obviously requires planning, for which reason it is not expected these plans will be executed soon.

## Tax overview

The Netherlands levies a tax on business profits from worldwide activities of entities that are resident in the Netherlands. It also taxes foreign entities carrying on business in the Netherlands, on Dutch source income (e.g. from permanent establishment). The Netherlands also have taxing rights on the Dutch part of the continental shelf.

Furthermore, the Netherlands levies a VAT in line with the EU VAT Directive, and taxes on dividends, interest and royalties paid by residents to non-residents.

Since 2024 the Netherlands implemented the global minimum tax on multinationals; an EU-initiative. Companies with more than €750mln in revenues are subject to a 15% worldwide tax. Furthermore, it adheres to the Pillar 1 legislation on digital taxation.

Individuals are subject to personal income tax. Wage tax, being levied as payroll tax, serves as pre-levy for the income tax.

## Taxation of Energy Projects

As energy projects are capital intensive and investors typically require a form of limited liability, Dutch energy projects are carried out through joint ventures in the form of corporations or partnerships. A corporation is subject to taxation whereas the JV partners are taxed on the distributed dividends. Partnerships generally qualify as transparent for tax purposes. Partners are taxed for profits at their level, which allow the partners more flexibility to manage their own tax position.

Energy projects are generally capital intensive and can be done through debt or equity financing. Principally, interest paid on debts is deductible from the taxable base. Dividends paid to shareholders are not deductible and generally subject to a withholding tax, albeit exemptions are available. The Netherlands has implemented several limitations on interest deductions; amongst others relating to intra group financing transactions. Next to this the Netherlands has implemented a general limitation on interest deductions. This limits the deductibility of the net of any interest a company pays to 20% (to be increased to 25%) of EBITDA or €1mln, whichever is bigger. Furthermore, the Netherlands has an abuse of law doctrine limiting deductions in case of abusive constructions. This doctrine is not anchored into law but has an extensive history of case law. It limits interest deductions in cases where the motif of the construction is to evade taxation and the norm of the law should be considered.

In certain situations where the distinction between equity and debt is not clear the deduction of interest can also be limited. This is the case when the provided debt has characteristics of equity. Interest paid on these loans is not deductible.

Losses from previous and later years can be set off against profits in later years. This is limited to €1mln per later year or, if there are more losses to forward, 50% of the profits. Losses can be carried forward indefinitely.

Furthermore, there are possible adjustments of the taxable base in case payments are not 'picked up' in another country or when certain payments or costs have already been deducted at the level of another group company. This legislation aims to prevent hybrid mismatches.

Certain asset classes, such as buildings, machinery, and equipment, are generally depreciable property. When assets are sold, profits do not have to be added to the taxable base in case re-investment takes place (roll-over facility). The re-investment lowers the book value of a newly acquired asset, limiting the future depreciation of this new asset.

On the provision of energy to end-users, the Netherlands levies a digressive energy tax depending on the amount of energy provided, varying from €0.58301-€0.04886 per m<sup>3</sup> natural gas and €0.1088-€0.00254 per kWh electricity. It does under certain conditions, however, not apply to self-produced renewable energy.



On revenues made from the exploitation of natural resources in Dutch territories the government levies a 45%-50% tax; a state profit share. A credit is applicable on this profit share for the corporate income tax. A provision can be formed for future decommissioning costs. The provision considers the expected production and is spread out over its lifetime.

## Other Tax Issues To Be Considered

To help and advance investments in new technologies the Netherlands implemented a regime to reduce taxation on profits from certain R&D activities; the "innovation box". Profits resulting from R&D investments are effectively taxed at a lower rate compared to profits from other activities. The tax rate drops from 25.8% to 9%.

For certain investments in energy saving assets taxpayers can claim an extra deduction of the costs, above the yearly depreciation. The government provides a list of investments that apply for the deductions annually. Under the energy investment deduction (EIA) companies can deduct 40% of the cost of the investment, on top of yearly depreciation. Under the environment investment deduction (MIA and VAMIL) companies can deduct up to 45% of the costs, depending on the asset.

The Netherlands has a consolidation regime (fiscal unity) for entities liable to corporate income taxation. Payments between companies in this fiscal unity are denied for tax purposes. The regime requires a 95% investment.

Next to the fiscal unity the Netherlands has a participation exemption on profits following from subsidiaries. Dividends and capital gains are not taxed at the level of the shareholder. To apply for this exemption a company should own a minimum of 5% in the equity and voting rights of another company.

Furthermore, Dutch taxpayers can ask the DTA for Advance Tax and Advance Pricing Agreements to get certainty on tax positions. The DTA is known for the transparent and cooperative attitude.

Transfer pricing also plays an important role in determining the taxable base of a taxpayer. The Dutch government follows the OECD guidelines in its determination of arm's length prices. For transfer pricing purposes taxpayers with revenues exceeding €50mIn are required to have a Local File and Master File in their administration. The Netherlands also implemented Country-by-Country reporting.

The Netherlands has an extensive network of double tax treaties with other countries. These treaties are under constant inspection and being re-negotiated to keep up with developments. The Netherlands does not tax technical service fees as royalties. Therefore, these services are usually not included as such in tax treaties.

For non-resident entities with activities in the Netherlands the question arises when their activities and presence constitutes a permanent establishment. For energy producers active in Dutch territorial seas on the continental shelf, activities conducted for a period of 30 consecutive days constitute

a PE. When starting activities abroad there are several foreign jurisdictions that claim the existence of a virtual permanent establishment. This generally is not in line with Dutch standards.

Suppliers of offshore activities through seafaring vessels can apply for a different profit determination. A "tonnage tax" applies and relies on the weight being transported.

In some cases of EPC contracts, it can be beneficial to split the contracts in "onshore" and "offshore" activities. This ensures other countries' taxation rights are limited to the local activities. The splitting of the contracts support and should be in line with the transfer pricing qualification.

## Relevant Experience

Taxand Netherlands has worked on an extensive record of energy projects. These include, but are not limited to, the following projects:

- ❖ Reorganisation of an oil major in the Netherlands where the US activities were reorganised to gain synergy effects with the Dutch operations.
- ❖ Several solar rooftop projects, applying for the exemption on energy tax after fitting solar panels to office buildings.
- ❖ Investments by a major oil company in multiple foreign downstream operations.
- ❖ Projects including local initiatives to produce renewable energy locally and applying for the exemption on energy tax.
- ❖ Participation of an oil major in R&D joint ventures. This includes research in renewable energy and the development of e-fuels.
- ❖ Assisting Dutch oil & gas company with their regular tax audits and tax compliance for the state profit share and corporate income tax.
- ❖ Assisting oil major setting up treasury function in the Netherlands including group financing, cash pool and hedging.



### KEY CONTACT

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## Energy Overview

Renewable energy plays a substantial role in Norway's energy sector. Hydro energy accounts for close to 90 pct. of the total production of electric energy, while on-shore wind power accounts for about 9 pct.

The public sector today owns about 90 per cent of the production capacity for electric power in Norway, mainly the state and municipalities. Statkraft SF, which is owned by the state, is Europe's largest producer of renewable energy, mainly hydroelectric power but also to some extent wind power.

Production and sale of electric power are exposed to competition, and the Norwegian legislation has established the principle of market-based power sales. Transmission and distribution of electric power is a natural monopoly. The costs of building grid and other infrastructure are high, and it is not deemed rational to build several parallel and competing grids. Thus, transmission and distribution of electric power is subject to monopoly control. The central grid and overseas cables, which are the highway for distribution of electric energy domestically as well as internationally, are owned by the state-owned company Statnett SF.

Wind power production in Norway is still quite small compared to Europe. Construction of wind power plants requires license from the Government. In recent years, there has been considerable opposition to new wind power projects. This is mainly due to the interventions such projects make in nature, the environment and wildlife.

Moreover, the Norwegian Supreme Court ruled in 2021 that the public licenses allowing the Fosen Peninsula wind power plant, the largest wind power project built in Northern Europe, was invalid due to violation of the reindeer herders' rights under the UN Convention on Civil and Political Rights Article 27. The Supreme Court unanimously ruled that the rights had been violated, and that the decisions on concessions and expropriation permits therefore were invalid.

The offshore oil and gas industry is Norway's most important industry. Oil and gas constitute 20 pct. of the Norwegian GDP, over 30 pct. of the government's total income and nearly 45 pct. of total exports. The framework for the petroleum industry is established and closely supervised by the Norwegian Government.

Equinor ASA, a publicly listed company in which the State owns 70 pct. of the shares, accounts for about 80 pct. of the extracted oil on the Norwegian continental shelf.

Norway is committed under the Paris treaty to reduce greenhouse gas emissions by at least 50 per cent and up to 55 per cent by 2030. Norway's goal is to become a low-emissions society and to reduce emissions by 90-95 per cent in 2050 (both compared to 1990 levels).

## Tax Overview

The profits of all industries are taxed as corporate income at the ordinary rate of 22 pct. The corporate tax is imposed on net taxable income, i.e. the company's total income minus the allowable deductions.

The Norwegian tax system is generally based on the principles of a broad tax base and neutral treatment of different industries, companies and investments.

Despite the general principle of fiscal neutrality, a special resource rent tax is levied on hydropower, wind power and oil and gas exploration companies. The resource rent tax is imposed in addition to the ordinary corporate income tax. The purpose of the tax is to ensure that a substantial part of income from the exploitation of the natural resources is returned the community.

The resource rent tax is designed with the purpose that projects that are profitable before such tax are also profitable after resource rent tax. The resource rent tax is determined on the basis of a normalized market value of the power production (actual production during the relevant time slot multiplied by spot market prices, or norm prices for oil and gas) minus operating expenses, license fee and property tax. The resource rent tax is designed as a cash flow tax with immediate deduction of investments.

The effective resource rent tax rate for hydropower plants is 45 pct., implying that the total tax rate (including corporate income tax) is 67 pct.

Power plants with generators below 10 MVA are exempt from resource rent tax. Hydropower plants with generators of at least 10 MVA are also subject to a natural resource tax of NOK 0.013 per kWh. The natural resource tax is paid to the municipalities but is deductible on a NOK-by-NOK basis in ordinary taxable income and thus normally does not constitute an effective tax for the companies (only a redistribution from the Government to the municipalities).

For oil and gas exploration companies the effective resource rent tax rate is 56 pct., implying that the total tax rate is 78 pct.

For wind power plants the effective resource rent tax rate is 25 pct., implying a total tax rate of 47 pct. In addition, a special tax on on-shore wind power of NOK 0.023 per kWh is introduced. The purpose of the special tax is especially to give the host municipalities additional incentives to facilitate wind power production.



In addition to the tax on ordinary income and the resource rent tax, hydropower, wind power and oil and gas exploration companies are subject to a municipal real estate tax. The tax base is determined as the plant's technical value, which is assessed as the current construction value less value reduction due to wear and tear. The tax rate is subject to the decision by the municipalities, up to a maximum tax rate of 0.7 pct.

A social security contribution of 14.1 pct. is computed on payment of salaries to employees, deductible in the tax base for both corporate income tax and resource rent tax.

Norway applies VAT at a rate of 25 pct.

## Taxation of Energy Projects

Norwegian energy projects are normally carried out in partnerships or corporations.

A partnership is transparent for tax purposes and will thus allow for full tax consolidation between the company and the partners (any tax losses in the partnership may be deducted in the partner's other taxable income). A corporation is not tax transparent, implying that tax consolidation can only be achieved by way of group contribution. In order to qualify for group contribution, the consolidating companies must be under joint ownership and control by more than 90 pct. Otherwise, corporation and partnerships are subject to equal taxation.

Corporations may carry forward tax losses for an unlimited period.

As energy projects often require substantial initial investments, joint venture projects are regularly established as partnerships in order to obtain tax consolidation during the investment phase. The disadvantage by a partnership, however, is that the partners are (fully or partly) liable for the partnership's obligations. Thus, when the project has moved into the operational phase and generates taxable profits, the partnership may be transformed to a corporation exempt of taxation.

Norway applies special limitation rules for deduction of interest expenses, under which interest expenses in excess of 25 pct. of the company's taxable EBITDA are non-deductible (subject to several exemptions).

Interest expenses restricted due to the interest limitation rules may be carried forward for 10 years.

Two important exemptions from the interest limitation rules applies: Firstly, group companies are only subject to the limitations if the total interest expenses of the Norwegian group exceed MNOK 25 (MEUR 2.15). Secondly, the limitations do not apply if the equity ratio of the Norwegian company (or the Norwegian group) exceeds the global equity ratio (the "equity escape rule").

Investments are generally subject to tax depreciation at rates varying from 2 pct. (Office buildings) to 30 pct. (office equipment). 20 pct. rate applies to machinery. Land is not depreciable, and neither are costs to establish roads and installation- and storage spaces connected to power plants.

Operating costs are generally tax deductible. In order to claim deduction in the basis for the resource rent tax, however, only costs regularly incurred by power production are deductible. Costs linked to other parts of the power plant owner's business than power production are not deductible in the basic rate. This additional qualification has given rise to several disputes before the tax administration and the courts.

## Other Tax Issues To Be Considered

- ❖ Owners of larger hydropower plants are obliged to pay a license fee to the Government and municipalities. The fee is calculated independently of the power plant's actual production capacity.
- ❖ Owners of larger hydropower plants are obliged to deliver up to 10 per cent of the power base to the municipality affected by the development as licensed power. The purpose of the licensed power scheme has been to secure the developing municipalities power for general supply at a reasonable price.
- ❖ As the resource rent tax basis for hydro and wind power is generally calculated on power spot prices, exceptions applies to certain long-term power purchase agreements (PPA). It is important to consider such exceptions when PPAs are negotiated, as the total taxes may be substantially reduced due to a more favorable determination of the resource rent tax base.
- ❖ It has become increasingly popular to establish solar cell systems on private roofs and on apartment blocks. There have been several regulatory changes in recent years to facilitate more solar power in private households. There is, however, uncertainty as to the taxation of such generated power. The Norwegian tax administration has clarified that electricity produced and used continuously in the household by the owner is not taxable. However, sale of excess electricity from one's own home or holiday home will normally be taxed as capital income at 22%. It is not clarified how the income should be calculated.
- ❖ Intra-group sale of power must be priced under the arm's length principle. In cross border transactions Norway generally applies the OECD transfer pricing guidelines. Transfer pricing documentation must be prepared.



- ❖ In 2022 and 2023 a certain surtax applied on power production due to the increased power prices (referred to as “high-price contribution”). The revenues were partially used to provide financial support to the households due to the high power prices. The tax for 2022 and 2023 was 23 pct. of the power price exceeding MOK 0.70 per kWh. The surtax was not continued in 2024, but it is not unlikely that it will be reintroduced in the event of increasing power prices.

## Relevant Experience

Selmer has advised on many major Norwegian energy projects:

- ❖ Statkraft SF, in the restructuring and establishment of Fosen Wind Farm, and the sale of part of Fosen to operator Aneo. This is the largest wind power project in Northern Europe.
- ❖ Statnett SF, in numerous projects, including advice on property tax questions as well as tax-related court cases in all levels of Norwegian courts.
- ❖ Advised BKW Energie on structuring, cross border tax issues, and offtake arrangements for the 55MW Marker wind farm
- ❖ Å Energi AS, in the fusion of Agder Energi AS and Glitre Energi AS, creating one of Norway’s largest hydropower companies, yearly producing 11 Twh electricity from hydropower.
- ❖ Pandion Energy AS, in establishing an independent, full-cycle oil and gas company driving value by maturing resources to reserves in high-quality assets on the Norwegian continental shelf.
- ❖ HydrogenPro AS, in establishing green hydrogen technology and systems in Norway and internationally.
- ❖ ST1. Advising the owners of the 800MW Davvi wind farm on part divestment and pre-consent development activities, including CPO process
- ❖ We assist Aker Clean Hydrogen and Varanger Kraft developing a hybrid wind to hydrogen project Finnmark.
- ❖ We have assisted Hafslund Oslo Celsio in its major CCS project for CO2 capture at Klemetsrud, including the financing, state aid, real estate, BECCS certificates and the drafting, review and negotiations of contracts.
- ❖ Carbon Circle is a specialised carbon capture and storage contractor offering turn-key units and engineering support to emitters and operators of carbon capture units. We regularly assist the company with operational support related to contracts and other legal matters.

- ❖ Advised Varanger Kraft on the development, financing, investor process and construction of the 200MW Raggovidda 1 - 3 wind farms
- ❖ Advised Vauban Infrastructure Partners on the due diligence and acquisition of two 80+48 MW operational onshore projects in Norway
- ❖ Advised Finnmark Kraft on licensing and regulatory processes relating to the 70MW Hamnefjell 2 wind farm
- ❖ Advised EnBW on several physical and financial PPAs with Nordic onshore wind projects



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## Energy Overview

Due to its geographical location, political and economic situation, and coal resources, Poland's energy system has been based on coal, natural gas and other fossil fuels. In line with the efforts of all European Union Member States to achieve EU climate neutrality by 2050, Poland has taken steps to develop a low-emission national power system. The commitment to achieving climate neutrality is one of the greatest economic challenges in Poland's history, impacting nearly all areas of citizens' lives and offering an opportunity to boost economic growth. Undoubtedly, a factor that will accelerate the energy transition process in Poland will be the acquisition and expenditure of funds from the National Recovery Plan, a plan for reform aimed at implementing specific tasks at both the national and local levels to reduce Poland's reliance on fossil fuels.

Poland has adopted the National Energy and Climate Plan for 2030, aiming to achieve a relatively low level of CO<sub>2</sub> emissions by that time (the reduction target for 2040 is currently being agreed upon by the new government - it seems that due to high social costs, Poland will not be able to achieve a reduction of 90% by 2024 as assumed by the EU). An additional goal is to ensure stable energy supplies at acceptable prices for consumers, energy-intensive industries and the heating and agriculture sectors.

A noticeable trend in the Polish market in recent years has been significant investments in renewable energy sources, primarily wind and solar farms.

Poland is implementing projects to build offshore wind farms, in cooperation with a private Danish investor. Additionally, individuals, entrepreneurs and households are investing in their own low-capacity solar panels.

In the near future, grant competitions and the allocation of government and EU grants for the development of biogas and biomethane plants will commence, making Poland's energy mix even more eco-friendly.

Polish legislation supports the development of offshore wind farms, among other initiatives, by implementing various compensation models for energy producers, aimed at ensuring the profitability of these investments.

## Tax Overview

The Polish tax system is a nationwide system (i.e. the same taxation rules apply throughout the country). The exception is local taxes (including real estate tax): while the general rules for collection and payment are uniform throughout the country, individual communes can determine the real estate tax rate (within the ranges specified by the national legislator).

Regarding other taxes - including income tax, value added tax and excise duty - the content of Polish regulations should be consistent with the content of Tax Directives established throughout the European Union.

Polish corporate income tax regulations are based on one legal act and are common for all companies in Poland. They do not provide for separate rules for taxing income from transactions involving energy or gas.

In the field of goods and services tax, specific taxation rules are provided for (e.g. regarding the place of taxation or the moment of tax liability), but they are consistent with EU Directives.

A special tax that burdens energy and gas is excise duty.

The national legislator does not provide for VAT exemptions or relief for electricity, gas or heat.

The Polish transfer pricing regulations generally follow the OECD Transfer Pricing Guidelines approach, adopting the arm's length principle, three tier documentation, transfer pricing adjustments, and Advance Pricing Agreements (APA) and Mutual Agreement Procedures (MAP) procedures. However, in some areas more detailed information in the transfer pricing documentation or more reporting obligations might be required (e.g. TPR report).

## Taxation of Energy Projects

In Poland, business activities in the field of electricity, gas and heat are carried out by both private enterprises (corporate companies and partnerships without the participation of the State Treasury) and commercial law companies with partial or full participation of the State Treasury.

The most commonly used structures for energy projects are corporate companies and partnerships which are treated in Poland as corporate income tax taxpayers. Under certain conditions companies can form a Tax Capital Group and file jointly for tax purposes. **The standard Corporate Income Tax (CIT)** rate in Poland is 19%. Taxpayers may be able to choose lower rates or specific methods of taxation however their adoption may not be feasible for energy projects. CIT is generally payable on income, i.e. a difference between tax revenues and tax deductible-costs, separated into two baskets: capital gains and other sources (operational activities).

Financing has to be considered as energy projects are typically capital-intensive, in particular the matter of debt and equity ratio. In general terms, deductions available for equity are rather insignificant and dividends paid are not tax deductible.

Regarding debt-financing, interest is recognized as tax deductible once paid or capitalized (accrued interest is not tax deductible), however it is subject to limitation. A deduction can amount to either PLN 3 million or 30% of a debtor's earnings before interest, taxes, depreciation and amortization in a tax year in accordance with Poland's thin capitalization rules. Interest paid, capitalized but also accrued on financing during the course of construction is allocated to the initial value of fixed assets.



Investments which fall under the long-term public infrastructure project definition may be exempted from this limitation, yet this issue is controversial.

As energy projects generally require a high volume of fixed and intangible assets to operate, income can be also lowered by depreciation write-offs from acquired or constructed assets. Different depreciation rates apply to different classes of assets such as buildings, structures, machinery and equipment, and one of a few different depreciation methods may be chosen. Land is not subject to depreciation.

As a general rule, dividend payments are subject to a 19% Withholding Tax (**WHT**) rate, whilst interest, royalties and certain intangible services are subject to a 20% WHT rate (when paid to non-residents). Exemptions or rate reductions based on double tax treaties or EU Directives may apply, provided that the beneficial owner status of the payment recipient is verified – this is subject to the scrutiny of tax authorities. The pay & refund mechanism applies to those payments (except for intangible services) which exceed PLN 2 million within a year to a related party, meaning that WHT must be collected and may be later refunded by the tax authority. To not apply the pay & refund mechanism, the remitter can either (i) apply for an opinion on the application of WHT preferences, issued within 6 months by a tax authority and valid for 36 months or (ii) submit a management board statement in which the board member confirms possession of documents and performance of verification required to apply the preference. The statement is submitted under personal liability of the board member and severe penalties for misstatement apply.

### Taxation of Energy Projects

With respect to **Transfer Pricing (TP)**, not only foreign, but also domestic transactions, are subject to TP obligations. As a rule, for intercompany transactions exceeding certain materiality thresholds (PLN 10 million for goods and financial transactions, PLN 2 million for services and other transactions), a Local File documentation and TPR report is required.

The Local File documentation must always include a transfer pricing analysis with a benchmarking study or a compliance analysis. All five transfer pricing methods from the OECD Guidelines are accepted. Where it is not possible to apply one of the five standard methods, another so-called "sixth" method which is most appropriate under specific circumstances shall be applied, including the valuation techniques.

Benchmarking studies of energy projects include investment methods (e.g. analysis of the internal rate of return from a particular project). For intragroup financing transactions in this segment, not only the interest rate but also the financing source and debt to equity ratio are in the scope of the tax authority's interest.

If transfer prices are questioned by tax authorities, an additional tax liability may be charged, which amounts to 10-30% (depending on the circumstances) of the total amount of (i) unduly reported or overstated tax loss and (ii) not fully or partially reported tax income, to the extent resulting from the decision. The additional tax liability will be increased by interest on arrears.

For non-filing, late-filing or wrong-filing of the TPR reports to the tax office and the Local File documentation to the Tax authorities (upon their request), there are also fiscal penalties for board members of the company.

In terms of the **tax on goods and services (VAT)**, it applies to the supply of goods and services within the territory of the country, as well as the transactions outside and within the EU.

The regulations provide that for VAT taxation for the supply of energy and gas, the place of taxation is deemed to be the place of residence of the recipient. The regulations also provide for special rules for the creation of the VAT tax moment – it is detached from the date of the supply of energy or gas and depends on the moment of issuing an invoice for such a supply. Advance payments for the supply of energy are not subject to VAT (the supply made after receiving the advance payment is taxed).

The VAT rate on electricity, gas and complementary services (including the sale of guarantees of origin, balancing and scheduling services, distribution and transmission services) is 23%. Due to rising energy and gas prices in 2022, the legislator temporarily reduced the VAT rate on these goods and services to 0% (for electricity) and 5% or 8% (for gas – depending on the period of validity of the reduced rates).

From 2023, the legislator decided to freeze energy and gas prices (establishing a maximum price) and implement a compensation system for sellers – these compensations payments constitute a subsidy subject to VAT.

In terms of **customs and border duties** (except for the **Carbon Border Adjustment Mechanism (CBAM)**), the following applies: a 0% customs rate for all, no customs security and VAT exemption for imports of energy and gas transported via the network system.

A special tax that also covers electricity and gas is excise duty. Excise duty on these goods is harmonized within the EU. Entities that are obliged to settle excise duty are primarily energy and gas trading companies when they sell these goods to end-use buyers (no taxation on sales between two energy companies) and on consumption (when energy was not subject to excise duty at the previous stage of trading). The excise tax rate on energy is PLN 5/1MWh (the lowest possible rate indicated in the EU Directive). Excise duty is settled on a monthly basis. In 2022, due to rising electricity prices, the legislator temporarily exempted energy from excise duty (unconditional exemption for households) and reduced the rate to PLN 4.80/1MWh for entrepreneurs.

## Other Tax Issues To Be Considered

Under EU regulations, each European Union member state is obliged to adopt instruments to implement the EU 'Fit for 55' package of legislation. This includes the import of electricity under the CBAM system from July 2024. This is one of the proposals which has the nature of a carbon border tax (a mechanism for adjusting prices at borders taking into account CO2 emissions). The functioning of the CBAM system assumes both the reporting of CO2 emissions related to the production of imported goods and the payment of duties depending on whether the emission threshold is exceeded.

The Polish Real Estate Tax (**RET**) is a property tax levied on the ownership (or a perpetual use right) of real estate.

RET is a local tax paid in each commune (municipality) where a taxpayer owns real estate infrastructure. The tax applies to land, buildings, and non-building structures, each with different tax rates and bases. Therefore, it's crucial to identify and tax each category of RET-subject property separately.

Due to a lack of specific regulations, the correct subject and method of taxation are often determined by administrative court rulings and the Constitutional Tribunal.

Commune councils independently set RET rates through resolutions. While there are upper limits defined in the Local Taxes and Fees Act (**LTFA**), these limits are adjusted annually for land and buildings.

The Ministry of Finance announces the upper limits for the following year by an official notice published before October 31st of each year. The upper limit for non-building structures is fixed at 2% of the initial value of the structure.

Importantly, the rates established by commune council resolutions cannot exceed the upper limits outlined in the LTFA.

The LTFA classifies various energy and gas infrastructure (e.g. gas pipelines, heating networks, pipelines, power lines) as structures. This classification results in an annual 2% tax based on their initial value.

Companies can deduct RET payments when calculating their CIT.

Effectively from 2024, a local **minimum CIT** (not to be mistaken with the following global minimum tax) is in force, applicable to businesses reporting a tax loss or low profitability, however it is subject to many exemptions.

Poland is also obliged by the Pillar II Directive to introduce global minimum level of taxation for multinational enterprise groups and large-scale domestic groups which would ensure minimal 15% effective rate. The tax act project is currently at the public discussion stage and should enter into force by the beginning of 2025.

Entities acting in the gas or electricity industry are obliged to pay a **specific contribution in the form of the write-off to a dedicated fund**. The write-off is determined based on a special formula which consists of average sale price, transaction volumes and other factors. This was introduced instead of windfall tax.

## Relevant Experience

Crido has worked on many significant energy projects that have covered complex tax matters requiring an innovative approach.

- ❖ For many top energy clients Crido is the principal tax consultant providing ongoing tax advisory services, including analysing contracts from a tax perspective, advising on new business models, tax planning for the future, litigation consulting, audit support, annual tax reviews, support in establishing and selling new companies and TP support.
- ❖ Crido has been providing long-standing services to energy sector clients, including the biggest state-owned companies. We offer services to every type of entity in the value chain: energy trading, energy generation, energy transmission and distribution, developers, service companies, investment funds, and innovation hubs.
- ❖ We have extensive hands-on experience in supporting pioneering in Poland's offshore wind farms joint venture (JVs) projects, including JVs of Polish state-owned or private partners with a foreign renewable energy leader.
- ❖ Providing comprehensive support for strategic international projects for the construction, development, and operation of wind farms in the Baltic Sea. The projects have strategic importance for Poland's energy transition. Crido's support includes:
  - 1) Designing optimal company structures (ProjectCos, ServiceCos, HoldCos, other),
  - 2) Developing tailor-made financial & transfer pricing models accommodating business goals, expectations of stakeholders (incl. financial institutions) and the Contract for Difference (CfD) framework,
  - 3) Financing: Project finance, structuring intercompany financing, guarantees, WHT and project modeling for banks avoiding cash-traps,
  - 4) Addressing transfer pricing risks with the Advanced Pricing Agreement (APA),
  - 5) Managing tax risks that can arise from offshore agreements including (Fixed Price **FP-**) Power Purchase Agreements (**PPA**), Corporate Power Purchase Agreements (**c-PPAs**), Virtual Power Purchase Agreements (**v-PPA**), Operation & Maintenance Agreements (**O&MAs**) and Construction & Management Agreements (**C&MAs**).



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## Energy Overview

South Africa's economy is centred around the energy sector, with high energy intensity and well-developed electricity networks, boasting the highest rates of electricity access in sub-Saharan Africa. The country's energy supply is dominated by coal, followed by crude oil, renewables, and nuclear power. It is the 7th largest coal producer in the world. Coal plays a crucial role in South Africa's energy sector, meeting 80% of the country's primary energy needs and powering 92% of its electricity supply.

The South African government has implemented measures to increase the presence of renewable energy in the energy mix and to oversee the procurement and development of utility-scale renewable energy projects. The measures implemented rely on policy changes, inter-governmental cooperation, and committing to an implementation agreement as a form of government support for each project that has concluded a Power Purchase Agreement (PPA) under the Renewable Energy Independent Power Producer Procurement Programme (REIPPP Programme). The key elements behind supporting renewables are energy security, rapid project development, and reducing the country's carbon footprint. Companies and government continue to face increasing pressure to place a focus on renewables as a preferred energy alternative and move away from fossil fuels as an energy source.

South Africa signed the Paris Agreement in April 2016 and endorsed the submission of its Nationally Determined Contribution (NDC). The NDC requires that emissions peak in 2020 to 2025, plateau for a ten-year period from 2025 to 2035 and declines from 2036 onwards. The Paris Agreement will require sizable reductions in energy-related carbon dioxide in large emitters.

## Tax Overview

The Constitution of the Republic of South Africa establishes a unitary but decentralised system of intergovernmental relations by providing for three distinct spheres of government: national, provincial, and local. The South African Revenue Service (SARS) is the country's national receiver of revenue. SARS administers a number of tax Acts in terms of which money (taxes, duties, and levies) is collected and paid into the National Revenue Fund.

Income tax is the government's main source of income and is levied pursuant to the Income Tax Act 58 of 1962. VAT is levied the VAT Act 89 of 1991 at a standard rate of 15% on the supply of goods and services by registered vendors. South Africa imposes the following withholding taxes on payments which are made to non-residents:

- ❖ dividends paid by resident companies: 20%
- ❖ interest paid by any person: 15%
- ❖ royalties paid by any person for the use of IP: 15%
- ❖ purchasers of immovable property: 7.5% (if the non-resident seller is a natural person; 10% (if the non-resident seller is a company and 15% (if the non-resident seller is a trust).

These rates of withholding tax may be reduced if the non-resident's county of residence has a double tax agreement with South Africa which provides for reduced rates of withholding tax.

The country operates a residence-based taxation system, requiring residents to pay taxes on their global income regardless of where it was earned. Non-residents are taxed on their income from a source in South Africa with appropriate relief to avoid double taxation. Companies are considered to be residents of South Africa if they are incorporated or have their place of effective management in South Africa.

South Africa's fiscal approach has consistently been in step with the nation's transition from dependence on fossil fuels to the adoption of a strategy focused on reducing carbon emissions. It imposes carbon fuel levies which are embedded in the price of petrol and diesel, an electricity levy on non-renewable electricity generation, a carbon tax on carbon dioxide equivalent emissions, taxes on incandescent light bulbs and a motor vehicle carbon dioxide emissions tax.

## Taxation of Energy Projects

Energy projects in South Africa can be funded through different sources and mechanisms. One way is through project finance, where funding is obtained for a specific energy project based on its cash flow and assets. Lenders typically assess the project's feasibility and risk profile. This approach is commonly utilised for large-scale projects like power plants and renewable energy facilities. Energy projects can be financed through debt, where funds are borrowed from banks, financial institutions, or bond markets. Alternatively, they can be financed through equity financing, which involves raising funds by selling shares or ownership stakes in the energy project to investors. Government grants and subsidies, such as the REIPPP programme, offer competitive bidding, particularly for renewable energy projects, and provide financial support through mechanisms such as PPAs. Another financing option for energy projects, especially those that reduce greenhouse gas emissions, is carbon financing through mechanisms such as carbon credits or carbon offset projects.





As most energy projects are carried out by companies, these projects attract corporate income tax at the rate of 27%. They are also often subject to VAT on the sale of goods and services. Imported equipment and materials used in energy projects may be subject to customs duties. Other taxes that an energy project may attract are: carbon tax, dividends tax, tax on royalties, and employment taxes.

Below are some key phases of an energy project as well as some of the tax considerations that are important to note:

- ❖ **Project development phase:** During the project development stage, various taxes may be attracted depending on the nature of the project, its location and the activities involved. Typically, during this phase of an energy project, income-generating activities may not have commenced while on the other hand, certain expenses are being incurred which may still be subject to corporate income tax. VAT may be levied on goods and services acquired during this stage such as feasibility studies, engineering services, and the procurement of equipment.
- ❖ **Project construction phase:** VAT may also be levied on construction-related expenses including the procurement of materials, equipment, and services. Capital allowances may be applicable in relation to certain qualifying capital expenditures incurred during this phase.
- ❖ **Project commercial operation phase:** At this stage of an energy project some key tax considerations include corporate income tax, VAT, carbon tax, capital allowances on qualifying capital expenditure, as well as compliance with tax laws and regulations which includes filing tax returns and maintaining proper records.

## Other Tax Issues To Be Considered

There are also various tax incentives contained in the Income Tax Act for energy projects in South Africa such as the renewable energy tax incentive. This section specifically allows for the deduction of a portion of the cost of qualifying assets from taxable income over a specified period. Businesses may also be entitled to claim a tax deduction based on prescribed energy efficiency savings achieved over a 12-month period. Deductions may also be allowed for expenditure incurred on scientific research and development, meaning that energy projects involving innovative technologies or processes may qualify for it.

In addition to the specific tax provisions and incentives already mentioned, when undertaking an energy project in South Africa, there are various other considerations at play. Energy projects sometimes involve transactions with related parties, such as the procurement of equipment or service agreements which may be subject to transfer pricing rules.

Another consideration is that South Africa has transfer pricing and thin capitalisation rules which limit the deductibility of interest expenses on incorrectly priced debt financing in certain situations. An intra-group loan would be incorrectly priced if the amount of debt funding, the cost of the debt or

both are excessive compared to what is arm's length. Any interest or finance charges on the non-arm's length amount of debt must be disallowed as a deduction (primary adjustment).

In addition to the primary adjustment, a taxpayer may also be subject to dividends tax on the amount of the disallowed deduction.

Capital gains tax must also be considered as it may apply to the disposal of assets used in energy projects such as property, plant, and equipment.

## Relevant Experience

- ❖ ENS has worked on many of South Africa's largest and most innovative energy projects. Set out below is a representative sample of some of our work in this sector:
- ❖ Eskom Holdings SOC Limited, in its reorganisation into separate generation, transmission and distribution entities
- ❖ Eskom Holdings SOC Limited, on the tax treatment of electricity supply agreements with its key customers
- ❖ Eskom Holdings SOC Limited, on the tax treatment of certain aspects of a Construction and/or Erection All Risks and Public Liability insurance policy in respect of the Eskom capital expansion programme
- ❖ Hyphen Hydrogen Energy (Pty) Ltd, on various matters in respect of the development of a green hydrogen project in Namibia
- ❖ Global Energy Alliance for People and Planet, on the establishment of their South African operations
- ❖ City Power Johannesburg SOC Limited, on the carbon tax implications of a power purchase agreement with Kelvin Power Proprietary Limited
- ❖ African Rainbow Energy and Power (Pty) Ltd, on certain aspects of the private equity fund established by it to hold equity investments in various renewable energy projects
- ❖ Ergo Mining (Pty) Ltd, on various aspects in respect of a solar photovoltaic power plant and battery storage project
- ❖ Scatec Kenhardt 1 (RF) Pty Ltd, on the tax treatment of its Engineering, procurement and construction (EPC) contract in relation to the design, execution, completion and commissioning of its renewable energy project.



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## Energy Overview

Its privileged geographical location and its high solar and wind resources (in addition to significant amounts of hydropower, biomass and geothermal energy resources) have enabled Spain to become one of the world's leading countries in the production of renewable energy.

In 2023, the installed capacity of renewable generation sources reached 61.3% of the total installed capacity. The generation from renewable sources reached 50.3%, corresponding the remaining generation mainly to nuclear plants, combined cycles and cogeneration facilities.

Following the International Energy Association, Spain is at the forefront of the energy transition due to its energy and climate change policies. The current Spanish framework for energy and climate is based on the 2050 objectives of national climate neutrality, 100% renewable energy in the electricity mix and 97% renewable energy in the total energy mix.

This framework is fully aligned with the EU's commitment to energy transition and climate neutrality.

Spain's tax policy has followed a double direction: on one side, certain tax incentives has been introduced to promote renewable energies; on the other side, the use of environmental taxation has increased with a significant focus on the energy sector (In some cases taxing renewable and non-renewable sources in the same way and even specifically taxing renewable technologies for their landscape impacts).

## Tax Overview

Income obtained by companies that are resident in Spain is subject to corporate income tax. The tax regime applicable to entities investing in energy projects would, in principle, be the general regime provided for in the Corporate Income Tax Law.

Under the general corporate income tax regime, the tax base shall be calculated by adjusting, pursuant to the provisions established in the CIT Law through certain non-accounting adjustments, income per books (determined in accordance with the accounting rules). For these purposes:

- ❖ Expenses incurred in pursuing the activity (production of electrical energy through photovoltaic technology), such as the facility's operating expenses, the facility's maintenance expenses, management expenses, and other expenses necessary to engage in the activity are tax deductible.
- ❖ Depreciation of the facility will be tax deductible, provided that it relates to actual decline in value of the facility, according to certain methods. Free depreciation (100% depreciation in the first year) and accelerated depreciation is possible for certain investments that use renewable energies, electric vehicles and charging infrastructures for electrical vehicles.
- ❖ Interest expenses on debt financing are deductible up to the limit of 30% of EBITDA of the company.

In any event, net financial expenses would be deductible for the amount of €1 million. There are specialties in case of indebtedness for the acquisition of companies and for the deductibility of financial expenses derived from profit participating loans.

- ❖ Transfer pricing: companies should value at normal market value the transactions they perform with related persons or entities, as well as to keep available to the tax authorities the documentation supporting the nature, characteristics and valuation of those transactions, following the OECD TP Model.

This CIT tax rate is set as a general rule at 25%.

The provision of goods and services by traders and professionals is subject for VAT purposes, in line with the European Union Directive. Tax rate is set as a general rule at 21%.

## Taxation of Energy Projects

Tax landscape for energy projects can be quite complex as several taxes at state, regional and municipal level are involved. The main issues to consider, depending on the different stages of the project, are the following:

### Development phase (ready-to-build status)

Participation exemption (see disinvestment phase) should be carefully analysed when an entity developing an energy project is transferred before the construction phase starts. Special attention should also be paid on the valuation of the development services when rendered by a related entity (transfer pricing rules).

### Construction phase

The municipal tax on erection and installation projects and construction work is levied on the actual and effective cost of the erection or installation projects or construction work (including, for instance, solar panels and wind turbines). The tax rate shall be fixed by each municipal government and may not exceed 4%. Municipal governments are entitled to establish a reduction of up to 95% of the tax due on systems for harnessing solar energy to produce heat or electricity and charging infrastructures for electrical vehicles.

### Operation phase

The generation and feeding of electricity into the grid is subject to the Tax on the value of electricity generation, which is charged at a 7% rate on the total amount the taxpayer is entitled to receive for electricity generated and fed into the electricity system.

Electricity that is not fed into the transport or distribution network of the electricity grid, but directly supplied to the consumer, is subject to the Excise Tax on Electricity, which is typically paid by the supplier but charged to the consumer at a 5,11269632% rate.



The production of energy is also subject to the municipal Tax on Economic Activities (0,721215 euros per kW, multiplied by certain coefficients depending on the revenues of the producer and the location of the plant). Municipal councils may introduce a reduction of up to 50% of the tax charge for taxpayers that use or produce energy from facilities for the harnessing of renewable energy or cogeneration systems and charging infrastructures for electrical vehicles.

Properties used for the production of electrical energy are subject to Real Estate Tax, as real estate with special characteristics. This classification implies the application of special rule to determine the tax base (cadastral value) and the tax rate. Municipal councils are entitled to introduce tax relief under certain conditions, mainly to promote renewable energy and charging infrastructures for electrical vehicles.

Attention should also be paid to state and regional taxes that are levied on specific technologies, such as wind parks and solar plants, hydropower plants, cogeneration plants and nuclear plants. Some of them has been confirmed by the European Court of Justice and the Spanish Constitutional Court.

## Disinvestment

The transferor of a participation in a entity could benefit of a 95% participation exemption in its CIT when the following requisites are met:

- ❖ The direct or indirect participation percentage in the capital or equity of the entity is, at least 5 percent and this participation has been held on an uninterrupted basis during the year prior to the day on which it is transferred.
- ❖ In the case of participations in capital or the equity of entities non-resident in Spanish territory, such entity should has been subject to and not exempt from a foreign tax of an identical or analogous nature to the Spanish CIT at a nominal rate of at least 10 percent. This requirement shall be deemed to have been met when the transferred entity is resident in a country with which Spain has signed an agreement to avoid double international taxation that is applicable and contains a clause for the exchange of information.
- ❖ The transferred entity should carry out an economic activity.

The transfer of energy facilities or of companies owning energy facilities typically raise potential implications on VAT and Transfer tax, as these kinds of facilities and companies are classified as real estate and real estate companies for tax purposes. This classification could also impact on the taxation of capital gains obtained by non-residents and the application of the Tax Treaties to avoid double taxation.

## Other Tax Issues To Be Considered

- ❖ In general, Spain does not offer tax credits for investments in renewable or clean energies, but a strong framework for the promotion of R&D (including innovation) is available. Specific tax credits and other incentives on environmental investments are provided for companies located in certain regions (such as Basque Country, Navarra or Canary Islands).
- ❖ Investment structure should be carefully analysed to evaluate the tax implications of the financing (deductibility of interest) and cash-flows to the investors (taxation of interest and dividends). Exemptions are available for EU investors, but challenges to entitlement for these exemptions have been raised when the beneficial owner is not resident in the EU.

## Relevant Experience

The interdisciplinary background of our professionals enables us to provide broad and comprehensive advice in the energy sector, covering all angles of business law (corporate/commercial, regulatory compliance, environmental, tax, financial, among others). The close collaboration between our energy sector lawyers and G-advisory, Garrigues' consulting arm offering technical, economic and strategic advice on energy and ESG matters, means we are able to gain a broad-based understanding of the complexities of energy deals, giving us a unique market perspective. As a result, clients receive unparalleled service from a team that is not only highly respected in the sector but also participates in the largest, most significant and most complex deals. Our work in this sector includes:

- ❖ Ongoing tax advisory services to energy sector clients.
- ❖ Advise on structures for investment and financing of renewables projects.
- ❖ Advise on agreements to develop green hydrogen projects in Spain.
- ❖ Advise on investments to install, operate and maintain public networks of owned high-power electric vehicle charging points.
- ❖ Advise on self-consumption investments, power purchase agreements and battery storage projects.
- ❖ Advise on the acquisition, transfer and financing of energy facilities.
- ❖ Advise and litigation on environmental taxation.
- ❖ Advise on tax benefits related to R&D, environmental and energy investments.





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## Energy Overview

Sweden enjoys a diverse energy landscape, leveraging its abundant natural resources and sustainability efforts. Sweden emerges as a key player in various energy sectors and stands out globally for its production of hydropower, biomass, wind energy, and other renewable resources with hydropower as the single biggest energy source.

Sweden's commitment to sustainability drives its robust green energy initiatives. While prioritizing renewables the nation aims to minimize environmental impact and Sweden sets ambitious targets for curbing carbon emissions, emphasizing the transition to cleaner energy alternatives.

The Swedish government also provides backing for the energy sector's transition to cleaner renewable options. This support includes investments in renewable energy infrastructure, and funding for research and development (R&D) in clean energy technologies and technologies that capture carbon dioxide emissions from industrial processes and power plants.

Sweden's tax policies aim to promote clean energy investments while discouraging fossil fuel dependency. To reduce society's consumption of goods harmful to the climate and environment, taxes are imposed on the consumption of such items. Partly, energy consumption is taxed for the same reasons.

Sweden was one of the first countries in the world to introduce a carbon tax levied on all fossil fuels in proportion to their carbon content. In addition, incentives for carbon capture and storage projects play a crucial role in Sweden's roadmap towards carbon neutrality in 2045.

## Tax Overview

Sweden levies income tax on the world-wide income of persons (including corporations) that are tax resident in Sweden. Double tax situations are often avoided through double-tax treaties.

The current corporate tax rate is 20.6% (FY 2023). Investment income for natural persons is generally taxed at 30% or 25% for dividend or capital gains from unlisted shares, albeit special rules apply for closely held companies. There is no gift tax, inheritance tax or wealth tax in Sweden.

As Sweden is part of the EU, the Value Added Tax (VAT) system applies in Sweden. The standard VAT rate in Sweden is 25%. For certain VAT liable goods and services, the reduced rates of 12% or 6% apply.

Both EU-regulated as well as national excise duties are in effect in Sweden, which applies to electricity and fuel.

## Taxation of Energy Projects

In Sweden, energy projects are usually conducted through either corporations or partnerships. Corporations are taxed based on their profit or loss, while partnerships are treated as transparent entities for tax purposes. This implies that a partnership calculates its profit or loss like a corporation, but the resulting amount is attributed to and taxed in the hands of the partners, not the partnership itself. If a foreign investor is a partner in a Swedish partnership and the partnership qualifies as having a permanent establishment in Sweden, the investor becomes liable for taxes on the partnership's taxable income in Sweden.

Given that energy projects often require substantial funding, the financing structure, particularly the mix of debt and equity, is crucial. Sweden has imposed restrictions on interest expenses for group entities since 2009. These rules limit the deduction of certain intragroup interest expenses and were updated in January 2019. In 2019, in the light of the EU ATAD directive and the BEPS project, new general interest deduction limitation rules were also introduced in Sweden, affecting both intragroup and external interest expenses. The current interest limitation rules therefore comprise targeted rules for intragroup interest expenses and general rules applicable to all interest expenses. Under the general interest limitation rules, deductions for net interest expenses are generally capped at 30% of EBITDA calculated for tax purposes, on a per-entity basis (with some intra-group netting possibilities). These rules have significant implications for the deduction of interest expenses and should be considered when allocating debt to a Swedish entity.

Under the participation exemption regime Swedish corporate entities benefit from a capital gains tax exemption when disposing of shares held for business purposes, whereas capital losses are non-deductible. The participation exemption always applies to unlisted shares, while listed shares may qualify if the company holds at least 10% of the voting rights or if the shares are part of the business operations. The rules includes shares held (directly or indirectly) in partnerships and certain conditions also extend the exemption to shares in foreign companies. It should however be noted that there are exceptions regarding divestment of shell companies.

Regarding dividend income, a participation exemption applies to dividends received on shares held for business reasons and qualifying holdings via partnerships. However, dividends paid by foreign companies under a hybrid arrangement are subject to Swedish corporate tax for the receiving Swedish company, regardless of whether they are EU/EEA companies or not.





Sweden applies the OECD Transfer Pricing Guidelines and transfer pricing within the energy sector is highly dependent on the regulatory environment and other factors related to the applicable market. Since energy projects entail several crucial steps in the value chain it is important to ensure that the different steps are properly analyzed in order to determine where the main value is created. Although dependent on the type of energy source and supply chain, the ability to develop effective technologies and workstreams, finding the right location, obtaining licenses and financing the projects are generally important aspects in the analysis.

Ensuring the right allocation of profits and losses from inauguration is key to ensure that costs will be deductible and to limit the risk of double taxation and tax penalties (maximum 40% on the tax on the adjustment).

Given the substantial financing that is often required, and where this is further used in intra-group financing, the high market rates and the alignment of the chosen TP model with the ability to carry debt by the different group entities is also crucial.

Excise duties are levied on actors in energy projects in Sweden. In particular, excise duties on electricity and fuels could be levied on private consumers and some companies, primarily targeting the actual consumption of electricity and fuel. Generally, the responsibility to charge and report excise duty on electricity falls on the producers of electricity and grid operators. As for the excise duty on fuel, the responsibility to charge and report the duty primarily falls on various actors who manage tax-liable fuels, such as e.g. fuel manufacturers and those who store or process the fuel. However, tax relief is available for fuels and electricity consumed for certain purposes such as industrial manufacturing. Tax relief is also available for climate-friendly production, such as production of electricity from renewable energy sources.

To reduce and recycle waste, Sweden has implemented a tax on waste for companies for example, one that deposits a larger amount of waste in a facility for a longer period. However, tax relief is available for some activities related to reducing and recycling waste.

The EU Emission Trading System (ETS) is in effect in Sweden. ETS is a complex system of rights and obligations for the participants, e.g. an entitlement to emit a certain amount of carbon. Actors in Sweden within several sectors such as energy (electricity and heat) industry and air travel are obligated to participate. In 2025, ETS 2 comes to effect, and additional sectors will be regulated in a similar system as the ETS.

In October 2023, the EU Carbon Border Adjustment Mechanism (CBAM) came into effect. This means that emissions from certain carbon intensive goods, including electricity, imported to the EU will be priced to reflect the carbon price of domestic production. There is a transition period in the implementation until the end of 2025, where import of CBAM goods needs to be reported but not priced.

Investments in real estate are subject to tax depreciations of up to 30% of the tax acquisition value depending on the type of asset invested in, except land which is not subject to tax depreciations. For wind farms, in general a higher rate of the investment qualifies for a maximum depreciation up to 30%.

The entire cost of mines and quarries may be depleted over their expected exploitation period. These depletion amounts may be deducted annually but are limited to 100% of the acquisition cost of the mine or quarry.

## Other Tax Issues To Be Considered

- ❖ Potential tax incentives:
  - Expert tax relief for highly skilled foreign workers.
  - R&D tax incentives, reducing the cost of the R&D workforce.
- ❖ Property related taxes:
  - Ownership in property/real estate is subject to property tax, paid by the property owner. For energy producing properties the tax rate is 0.5% except for wind farms with a tax rate of 0.2-0.5% of the tax assessed value. For solar energy producing properties, no property tax is levied.
  - In general, property acquisitions are subject to stamp duty at 4.25% (when acquired by a legal entity) on the value.



## Relevant Experience

- ❖ Developing a TP structure related to production of energy within the renewable energy sector. The work included managing regulatory issues related to streamlining the operational model and assessing a proper TP model for several activities in the value chain
- ❖ Support in application for a bilateral APA related to portfolio trading activities for large MNE within the power supply sector
- ❖ Tax advice related to investments in green- and brown fields within the wind- and solar power sector in Europe including related battery investments
- ❖ Tax advice related to investments and joint-ventures within the hydropower sector
- ❖ Reporting obligations have changed rapidly in Sweden over the last years which adds to a complexity for foreign companies to conduct services here. Skeppsbron Skatt has assisted a wind turbine company to set up a compliant process to bring specialized foreign work force from several different countries to Sweden on rotation programs. The client is highly dependent on a smooth process, as the foreign workers are crucial for their business due to that the competence is in general scarce amongst Swedish based workers.



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## Energy Overview

The United States is one of the largest producers and consumers of energy in the world—the largest producer and consumer of oil and natural gas and the second largest producer and consumer of electricity.<sup>1</sup> Its primary sources of energy include fossil fuels, including petroleum, natural gas, and coal; nuclear energy; and renewable sources of energy.

As of 2023, petroleum accounted for a 38% share of total U.S. energy consumption, with natural gas, renewable energy, coal, and nuclear electric power accounting for approximately 36%, 9%, 9%, and 9%, respectively.<sup>2</sup> In recent years, renewable energy production and consumption in the United States have increased greatly and reached record highs, with the increase largely attributable to increases in solar and wind energy production. Biomass energy production and consumption and geothermal energy consumption have also seen notable increases.

The U.S. has introduced major energy and climate policy reforms aimed at strengthening clean energy manufacturing. In 2021, the United States announced its long-term strategy for achieving its ultimate goal of net-zero emissions by no later than 2050.<sup>3</sup> The U.S. government has likewise announced its goals of achieving 100% carbon-free electricity by 2035.<sup>4</sup> To achieve these goals, the U.S. has emphasized the importance of decarbonizing electricity production, decarbonizing consumption by electrifying end uses and switching to other clean fuels, reducing energy waste, reducing non-CO<sub>2</sub> emissions, and increasing carbon sequestration efforts.

Throughout the 20th century, the U.S. created various incentives to encourage the development of certain energy sources, such as oil and gas. In recent years, these incentives have shifted to encourage the development of low carbon energy sources, often called “green” energy sources. The most significant and far-reaching collection of such incentives are contained in the Inflation Reduction Act (the “IRA”), which provides tax credits for green technologies. The IRA’s adoption by industry stakeholders has been rapid, transformative and capital-intensive.

1 U.S. Energy Information Administration, Frequently Asked Questions (last visited Sep. 30, 2024), available at <https://www.eia.gov/tools/faqs/faq.php?id=709&t=6>; Statista, Production of Natural Gas Worldwide in 2023, by Country (last visited Sep. 30, 2024), available at <https://www.statista.com/statistics/264101/world-natural-gas-production-by-country/>; Statista, Natural Gas Consumption Worldwide in 2023, by Country (last visited Sep. 30, 2024), available at <https://www.statista.com/statistics/265407/world-natural-gas-consumption-by-country/>; Statista, Primary Energy Consumption Worldwide in 2023, by Country (last visited Sep. 30, 2024), available at <https://www.statista.com/statistics/263455/primary-energy-consumption-of-selected-countries/>; Statista, Leading Countries in Electricity Generation Worldwide in 2023 (last visited Sep. 30, 2024), available at <https://www.statista.com/statistics/1263669/electricity-generation-worldwide-country/>.

## Tax Overview

The U.S.<sup>5</sup> imposes a federal income tax on the worldwide taxable income of persons (including corporations) that are citizens or residents of the U.S. The federal income tax also applies to non-residents on their income that is effectively connected with a trade or business in the U.S. (“ECI”) and other U.S. source income, including fixed or determinable annual or periodic income (“FDAP” income), such as interest, dividends, rents and royalties. While non-U.S. residents are generally not taxed on capital gains from the sale of property, they are subject to tax on the disposition of U.S. real property interests (which is treated as ECI and subject to withholding at 15% of the total amount realized). In addition, most states impose a state income tax on income calculated for federal income tax purposes with some adjustments.

FDAP income received by non-U.S. persons is generally subject to withholding tax at a rate of 30%, which may be reduced or eliminated by applicable double-tax treaties. With respect to the U.S. federal income tax treatment of interest income, for a non-U.S. person who is not a 10% shareholder (a holder that owns less than 10% of a corporation by vote or less than 10% of the capital or profits interest in a partnership), the portfolio interest exemption generally exempts the interest income from U.S. federal income tax.

For individuals, the income tax rate is progressive, with the maximum rate of 37% currently (which is set to increase to 39.6% starting in 2026). For individuals, capital gain is taxed at a preferential rate of up to 20%. For corporations, the income tax rate is 21% and there is no preferential capital gains rate. Individuals and corporations can generally use capital losses to offset capital gains only, and unused capital losses can be carried back three years and forward five years.

Net operating losses can generally be carried forward indefinitely to offset taxable income in future taxable years. However, this reduction is limited to 80% of taxable income in each taxable year.

For U.S. federal income tax purposes, certain business entities (such as corporations) can only be classified as a corporation (that is, those entities are subject to corporate income tax), i.e., per se corporations. Other entities with multiple owners (such as limited liability companies or state law partnerships) may elect to be classified as a corporation or a partnership. A partnership is a fiscally transparent entity not subject to tax: a partnership computes its income, and its partners include in their income their allocable share of the partnership’s income. If any entity that is not a per-se corporation has one

2 U.S. Energy Information Administration, U.S. Energy Facts Explained (last visited September 30, 2024), available at <https://www.eia.gov/energyexplained/us-energy-facts/>.

3 U.S. Department of State and the Executive Office of the President, the Long-Term Strategy of the United States: Pathways to Net-Zero Greenhouse Gas Emissions by 2050 (Nov. 2021).

4 U.S. Department of Energy, On the Path to 100% Clean Electricity (May 2023).

5 States and localities may also impose income and other taxes, which may be significant.



owner, it may elect to be classified as a corporation or as an entity disregarded as separate from its owner.

The U.S. has generally adopted the arm's length standard for purposes of transfer pricing.

### Taxation of Energy Projects

There are many potential levers through which a governing body might encourage or discourage certain behaviors. In the U.S., tax law is one such lever and it has guided the adoption and development of U.S. energy sources since the early 20th century. The deduction for intangible drilling costs, for example, somewhat mitigated the after-tax financial risks of searching for oil and gas deposits. Similarly, the "percentage depletion" method allowed for often significant deductions as oil deposits were depleted. In 1962, the U.S. government also introduced tax credits, which are distinct from deductions in that they are a reduction of income tax liability whereas a deduction is a reduction of taxable income. The earliest iterations of tax credits came in the form of so-called investment tax credits ("ITC") which encouraged investment into certain types of assets. In the 1990s, another type of tax credit, the production tax credit ("PTC") was introduced, based on an asset's production as opposed to its associated capital commitment. Both the ITC and the PTC have survived in one form or another through to the present day. Throughout the years, the types of assets and behaviors favored by tax credits have changed. However, over the course of the 21st century, U.S. tax credits have been increasingly used to favor the development of green technologies.

**Tax Credits:** In 2022, the U.S. enacted two bills to accelerate its decarbonization and accomplish its net zero commitments: (1) the Infrastructure Investment and Jobs Act and (2) the aforementioned IRA. The broadest piece of clean energy legislation in U.S. history, the IRA is projected to grant about \$663 billion of energy tax incentives over ten years.<sup>6</sup> There are many different types of energy-related credits, and several noteworthy examples are described below.

❖ **Electricity Generation:** The IRA included credits for clean electricity generation, such as solar, wind, and nuclear power generation. There are two types of credits for which taxpayers may be eligible, although a taxpayer can only claim one of them in connection with a particular project. PTCs generally provide 0.3 cents per kWh of electricity produced and sold to an unrelated third party (this amount is annually adjusted for inflation). ITCs for such eligible energy projects generally provide 6% of the eligible cost of the facilities. With respect to projects that fulfill the so-called prevailing wage and apprenticeship ("PW&A") requirements, these credit amounts can be multiplied by 5, leading to a rate of 1.5 cents per kWh (inflation adjustment factors may also apply to increase this amount) for PTCs and 30% of eligible costs for ITCs. 2025 marks a shift in the incentive landscape whereby qualified facilities must have a greenhouse gas emissions

rate of not greater than zero in order to be credit eligible (though certain technologies such as wind and solar are proposed to be whitelisted going forward with respect to this requirement). In addition to the base credit amounts, taxpayers may receive additional credits for being constructed with sufficient quantities of domestically-sourced materials and components or being located in a region designated as an "energy community" (e.g. a brownfield).

- ❖ **Energy Storage:** The IRA introduced an ITC for standalone energy storage, at a rate of 6% of the eligible costs (or 30% if the PW&A requirements are satisfied) with the possibility of additional credits. Prior to the IRA such projects were only credit-eligible to the extent that they were deemed, by virtue of their energy source, to be a component of otherwise credit-eligible projects, such as wind and solar facilities. Under the current credit regime and going forward for the credit regimes in place for 2025 and later, energy storage is its own credit-eligible class of projects and is not limited to electric batteries, but can also include, in some cases, thermal and hydrogen storage.
- ❖ **Clean Vehicles:** The IRA enacted or amended vehicle-specific credits, including the clean vehicle credit, commercial clean vehicle credit, and previously owned clean vehicle credit. The clean vehicle credit of \$7,500 requires that minerals and battery components be sourced from certain countries, and thus, the credit promotes onshoring and "friend-shoring" of EV battery supply chains.
- ❖ **Clean Energy Supply Chain:** The advanced manufacturing production credit provides a credit for manufacturing of solar energy, wind energy, and battery components as well as inverters and certain critical minerals. The credit amount varies by eligible component. The amount of incentives available and its constituent calculation can vary widely depending on the type of component manufactured or critical mineral derived. There is also an ITC incentive for 6% of the eligible costs (or 30% if the PW&A requirements are satisfied) for certain manufacturing components that, through their operation or eventual use of created products, result in greenhouse gas emission reductions in the U.S.; however, that incentive is only available by application only. Finally, the aforementioned PW&A requirements as well as the credits for domestic manufacturing have already begun to spur the payment of wages at prevailing rates and increased use of manufacturing in the U.S.
- ❖ **Clean Hydrogen:** The clean hydrogen production credit provides up to \$3 per kg of clean hydrogen produced. The credit amount depends on a lifecycle GHG emissions rate, and the rate must be less than 0.45 kg of CO<sub>2</sub>e per kg of hydrogen to receive the maximum

<sup>6</sup> Joint Committee on Taxation, Estimated Revenue Effects of a Proposal to Repeal Certain Energy Items Contained in the "Inflation Reduction Act" (May 2023).





credit amount. To qualify for the credit, the proposed regulations include additional requirements related to deliverability, temporal matching, and incrementality that many stakeholders believe would make it difficult for a mature hydrogen industry to develop in the U.S. However, it remains to be seen which aspects of the proposed regulations might survive once final regulations are issued.

- ❖ **Carbon Capture:** The carbon capture credit is available for qualified carbon oxide captured using carbon capture equipment. The credit amount (for projects that fulfill PW&A requirements) is \$85 per metric ton for carbon oxide stored in geologic storage and \$60 per metric ton for carbon oxide used as a tertiary injection in certain oil or natural gas recovery projects (these amounts are annually adjusted for inflation).
- ❖ **Clean Fuel:** Clean fuel credits incentivize production of transportation fuel with low emissions (i.e., less than 50 kg of CO<sub>2</sub>e per mmBtu). The credit amount is up to \$1 per gallon for non-aviation fuel and \$1.75/gallon for aviation fuel.

**Tax Credit Monetization:** Federal tax credits are typically non-refundable general business credits. Historically, to the extent the owner of project did not have the tax capacity to make use of such tax credits, it might have entered into some variety of so-called “tax equity” arrangements, wherein a special purpose vehicle is effected to facilitate an investment by an entity with tax liability sufficient to make use of the non-refundable credits, as well as the underlying accelerated tax depreciation. Tax equity arrangements are still in frequent use and are expected to be on a go-forward basis. However, the IRA introduced two additional mechanisms for monetizing tax credits: the elective payment election (also known as “direct pay”) and transferability election.

The direct pay election is generally available to certain tax-exempt and governmental entities and allows the entities to receive some or all of the credit amount in cash. However, certain credits are eligible for direct pay, despite not being owned by an entity classified as tax-exempt or similar. That is, a taxpayer may earn the advanced manufacturing production credit, the clean hydrogen production credit, and the carbon capture credit on a direct pay basis for a limited 5 year window at its election.

A transferability election allows taxpayers to sell their tax credits to third parties. Tax credits can be sold only once, meaning a buyer of credits cannot go on to sell credits to another party. Further, tax credit sales can only be in exchange for cash and sales of credits can only be made in a limited time frame that begins at the start of the selling entity’s tax year and ends on the extended tax filing date for that entity. Though new, the tax credit transfer market introduced by the IRA has already generated significant activity: a recent study projects that the credit transferability market will be roughly \$20–25 billion in 2024, and it serves as an important financing tool for project developers.

As the credit monetization opportunities have expanded, credits are frequently monetized through a combination of tax equity and transferability, which, depending on specific characteristics, have come to be called hybrid tax equity or synthetic tax equity.

**Debt Financing Considerations:** Energy projects are capital intensive, requiring significant initial investments. As a result, project developers must raise a significant amount of money through a combination of equity, debt, and tax equity. While generally allowing a deduction for interest, the U.S. now limits such deduction in numerous ways. For example, a taxpayer can deduct business interest roughly up to the sum of its business interest income, 30% of its EBIT, and certain motor vehicle acquisition indebtedness. In certain circumstances (for example, when the debt-to-equity ratio is very high), debt may be recharacterized as equity. Then, interest may be recharacterized as a distribution on equity and thus cannot be deducted. Further, in cases where a project is owned (either direct or indirect) by closely-held C-corps or individuals, it’s prudent to be sensitive to so-called non-qualified non-recourse financing considerations that can cause a material reduction in incentives available for ITC projects. Also, both ITCs and PTCs can be reduced as a result of tax exempt bond financing regardless of ownership structure. It should also be noted that the market standard is for any tax equity arrangement to not include debt at the project level and instead any debt is typically structured as “backleverage” where financing is held at an entity above the entity that owns the credit-eligible projects.

**Indirect Ownership by Tax Exempt Entities:** As discussed above, if tax exempt entities directly own or produce credit-eligible property, they may take advantage of direct pay. However, if such entities indirectly own or produce credit-eligible property through pass-through entities (e.g., partnerships), they generally cannot make the direct pay election, largely losing the benefit of tax credits that would otherwise have been available to the extent of tax exempt ownership.

**Withholding Tax:** Foreign investors must consider the tax implications of receiving dividends or interest from a U.S. entity, including withholding tax and applicable double-tax treaties. If foreign investors are providing intellectual property related to particular technologies, it must also consider similar tax implications applicable to royalties. As noted above, interest, dividends, and royalties are generally subject to a 30% withholding tax, subject to reduction due to double-tax treaties. In addition, withholding may be applied to partnership investment on both operating income and sales proceeds.

**Tax on Disposition:** Many energy facilities are treated as U.S. real property interests. For example, installed solar and wind energy components integral to power generation affixed to land are real property. As such, foreign investors are generally subject to tax on their capital gain from the sale of an energy facility



or a corporation holding the facility. To avoid such tax, foreign investors may consider setting up a holding company in their country to hold shares of a U.S. entity that owns the facility instead of owning the U.S. entity directly, and selling the shares of the non-U.S. holding company. The investors, however, must consider tax consequences in their own jurisdictions.

### Other Tax Issues To Be Considered

**Pillar 2 Considerations:** The U.S. has not yet adopted OECD Pillar 2, and, based on the political landscape, the U.S. may be unlikely to implement it in the near term. But other countries' adoption of Pillar 2 may have a considerable impact on the clean energy transition in the U.S. For the three direct-pay eligible credits for regular taxpayers, these credits should generally be treated as qualified refundable tax credits (QRTCs) under the GloBE rules. As a result, they will generally increase GloBE income and have a marginal effect on effective tax rates in the U.S.

As noted above, most IRA credits are transferable only one time. Therefore, while the IRA credits will generally be treated as marketable transferable tax credits (MTTC) for sellers, the credits will not be MTTCs for buyers because they cannot resell the credits. As such, sellers can generally treat cash consideration as GloBE income, but buyers must treat the difference between the credit amount and consideration as a reduction in covered taxes, resulting in a significant reduction in effective tax rates. Thus, this non-MTTC treatment may limit the pool of tax credit buyers.

**Sales and Use Tax:** In addition to state income tax, states generally impose sales and use tax on the sale of tangible personal property. However, there may be relevant exemptions. For example, Texas provides an exemption for the sale of tangible personal property that is used in the production of electricity.

**Tax Credit Insurance:** Buyers of tax credits and investors in tax equity structures face numerous risks. Certain tax credits may be recaptured, causing a taxpayer to lose a certain percentage of a previously claimed credit. A taxpayer may claim excess credits, leading to certain tax credits to be denied years later. To mitigate these risks, project developers often obtain tax credit insurance. The tax insurance market as it relates to tax credits is relatively new and the terms, dynamics, and pricing of such products is rapidly evolving.

**Tariffs:** The U.S. plans to increase import duties for many energy-related products from China (e.g., 100% for electric vehicles; 50% for solar cells; and 25% for battery parts, batteries and certain critical minerals).

**Other Incentives:** Many state and local governments offer tax and non-tax incentives for large investments. For example, companies making significant investments—and thus, contributing to local economic growth—may obtain a property tax abatement for a fixed period and direct cash assistance.

### Relevant Experience

Covington advises clients on their significant energy-related investments and tax credit monetization transactions. Drawing on our deep expertise in these areas and working together with top talent in our Energy, Environment, and Public Policy groups, we regularly interact with Congress and relevant government agencies on tax credit matters. Covington has advised on the tax aspects of significant energy projects, including:

- ❖ Cameco Corporation in its strategic partnership with Brookfield Renewable Partners in their \$8.2 billion acquisition of Westinghouse Electric Company.
- ❖ Borrego Solar Systems in the sale of its Renewable Energy Development Business to ECP.
- ❖ LanzaTech NZ in its \$2.2 billion De-SPAC merger with AMCI Acquisition Corp. II.
- ❖ SK Innovation in its \$13 billion joint venture with Ford to manufacture electric vehicle batteries.
- ❖ Cameco Corporation in its acquisition of interests in GE-Hitachi Global Laser Enrichment from GE-Hitachi Nuclear Energy.
- ❖ SK E&S in its \$75 million joint venture investment with Sunrun, a home solar, battery storage, and energy services company.
- ❖ LanzaTech New Zealand Limited in its \$25 million joint venture with Suncor Energy Inc. and Mitsui & Co., Ltd. to spin out LanzaJet, Inc. into a stand-alone entity that will produce sustainable aviation fuel.
- ❖ Tax-efficient structuring of investments by international and domestic clients related to clean energy infrastructure, including tax equity, partnerships and joint ventures, leasing, and other bespoke arrangements.
- ❖ Clients' monetization of tax credits through elective payment and transferability elections and purchase of tax credits to reduce their tax burden, including negotiating insurance policies.

Leo Berwick is a dedicated transactional advisory firm with deep expertise in infrastructure, renewables and energy transition. Leo Berwick provides tax and financial advisory, financial modeling and valuation services. Experience includes:

- ❖ Negotiating and pursuing a wide variety of insurance policies covering across myriad credit-eligible technologies.
- ❖ Advise developers and IPPs on strategies and tactics the monetization of tax credits and incentives, taking into account short-term goals and long-term aspirations.



- ❖ Ares with its strategic partnership with ENGIE for a 2.7 GW portfolio of Renewables and Storage Assets in the U.S.
- ❖ John Laing Group with its acquisition of Duke Energy’s equity interest in Pioneer Transmission, LLC.
- ❖ ECP and its co-investors with the acquisition of Atlantica Sustainable Infrastructure Plc.
- ❖ Qualitas Energy with its acquisition of Heelstone Renewable Energy, a leading US utility-scale renewable energy platform.
- ❖ Northleaf Capital Partners on its commitment of \$200mn to EVPassport, an open API-driven electric vehicle charging platform.
- ❖ Manulife Investment Management’s \$135 million investment into NineDot Energy, the leading developer of community-scale battery energy storage systems (BESS) in the New York City metropolitan area.
- ❖ Igneo Infrastructure Partners on its acquisition of a majority equity interest in Soltage LLC, an industry leader in the development, financing, and operation of distributed scale solar and storage assets across the US.
- ❖ Amber Infrastructure with its acquisition of 50% interest in GreenGas Colorado, which generates approximately 360,000 MMBtu per year.



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# ABOUT TAXAND

**Taxand is a global organisation comprising top tier local independent tax advisory firms who together provide high quality, integrated tax advice to clients worldwide.**

Overall there are more than 700 tax partners and over 3,000 tax advisors across 48 countries, focussed on understanding you and your business needs; collaborating to deliver tailored, practical local and international tax advice, in consideration of your strategic goals.