Let the Sunshine In: Solar Energy Tax Reduction

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Before 2020, West Virginia provided no tax incentives to encourage investment in solar-powered electricity generation facilities.[1] However, during the 2020 regular legislative session, the Legislature passed S.B. 578, which reduces the business and occupation (B&O) tax for the generation, production, or sale of electricity from solar energy facilities. The bill was signed into law by Gov. Jim Justice (R) on March 25.

This article discusses the contents of the bill, other recent legislative changes to provide B&O relief for electricity generators, and property tax incentives that are available to wind power electricity generators that are not available to solar generation entities.

Business and Occupation Tax Reduction for Solar Power Electricity Generators

West Virginia imposes a B&O tax on electricity generators or producers.[2] For most new generating units, the annual tax is the product of $22.78 multiplied by 40 percent of the taxable generating capacity, in kilowatt hours, of each generating unit owned or leased by the taxpayer. The B&O tax on electricity generators is paid monthly through estimated payments.

Special rates have been available for years for specific types of generating facilities. For example:

- county or municipally owned plants pay zero B&O tax;[3]
- peaking units, which are generating units designed for the limited purpose of meeting peak demands of electricity or filling emergency electricity requirements, pay B&O tax based on 5 percent, rather than 40 percent, of the taxable generating capacity of the unit;[4]

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- wind power units pay B&O tax based on 12 percent, rather than 40 percent, of the taxable generating capacity of the unit;[5] and
- flue gas desulfurization units are taxed at 40 percent of nameplate capacity, but at a reduced rate of $20.70.[6]

S.B. 578 provides that "for taxable years beginning on or after January 1, 2020, the taxable generating capacity of a generating unit utilizing solar photovoltaic methods shall equal eight percent of the official capacity of the unit."[7] A solar photovoltaic method is a module or array of solar cells electronically connected in a series or in parallel to provide suitable voltages and currents for the generation of electricity.

In the fiscal note to the companion bill introduced in the House of Delegates,[8] the Department of Revenue notes that the use of 8 percent of nameplate capacity in calculating the B&O tax is "to reflect the portion of a twenty-four hour day with useable sunlight for electric power generation relative to the taxation of baseload plants that operate on a twenty-four hour basis." The Department of Commerce advocated for passage of other solar-power bills during the legislative session based on the contention that many companies that are being recruited to the state, particularly tech companies, demand that alternative energy, including solar, be available.[9] The specific bill[10] supported by the Department of Commerce is the Renewable Energy Facilities Program, which allows electric utilities to file with the Public Service Commission an application for a multiyear comprehensive renewable energy facilities program, which would include solar. The program is also available to some entities that are not electric utilities.[11] While this program is not associated with tax incentives for solar energy producers, it demonstrates movement in West Virginia to encourage solar-produced electricity. This bill was signed into law by the governor on March 25.

Note that several tax credits and exemptions can be used to offset a portion of the B&O tax, but that is beyond the scope of this article. Those credits and exemptions are not geared to solar energy electricity producers, but can nonetheless be used by them.

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B&O Tax Reduction for Merchant Power Plants and Coal-Fired Electricity Generators

During the first extraordinary session of the Legislature in 2019, it passed H.B. 207, which exempts "merchant power plants" from the B&O tax beginning January 1, 2020. A merchant power plant is an electricity generating plant that (1) is not subject to regulation of its rates by the Public Service Commission, (2) sells electricity it generates only on the wholesale market, (3) does not sell electricity under one or more long-term sales contracts, and (4) does not sell electricity to retail consumers.[12]

In conjunction with enacting B&O tax relief for solar power producers, the Legislature passed S.B. 793 during the 2020 regular legislative session. S.B. 793, also signed by the governor on March 25, makes slight changes to the merchant power plant bill that passed in 2019, and enacts new provisions to lessen the B&O tax on some coal-fired generating facilities.

Regarding the merchant power plant provisions, S.B. 793 clarifies that the exemption applies only to coal-fired merchant power plants for which the owners, operators, interest holders, or any combination thereof do not receive regulated cost recovery under tariffs, regulated rates, or a cost recovery fee mandated or authorized by the Public Service Commission, or any other federal or state rate-making authority.[13] The amendments to the definition are retroactive to January 1, 2020.[14]

A new statute provides for a recomputation of the taxable generating capacity of some coal-fired generating facilities.[15] Beginning July 1, 2021, the tax on coal-fired generating units that were in operation before January 1, 1995, may be recomputed, at the election of the owner or operator, so that the tax is computed based on 45 percent of the official nameplate capacity of the unit. [16] The election is irrevocable, and the owner or operator that makes the election shall agree to keep the units in operation until at least July 1, 2025.[17]

If the units cease operations before July 1, 2025, the owner or operator of the plant must return to the West Virginia State Tax Department all the B&O tax savings accrued between July 1, 2021,

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and the date that the plant ceases to operate.[18] Also, recapture is required if the owner whose tax was recomputed transfers the unit to another entity.[19] The recapture tax would not apply only in the case of a federally mandated closure of the facility.

Property Tax Incentives for Wind Power Electricity Producers

In the early 2000s, several wind power electricity generation projects were undertaken in West Virginia, and legislation was passed to provide a substantial property tax incentive. Generally, property in West Virginia is appraised at its "true and actual value. [20] That is "the price for which the property would sell if voluntarily offered for sale by the owner thereof, upon the terms as the property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if the property were sold at a forced sale.[21] The assessed value of the property is 60 percent of the true and actual value, and the amount of property tax is calculated by multiplying the assessed value by the levy rate for a particular locality.

Since 1973 "pollution control facilities" have been valued at salvage value for property tax purposes.[22] Salvage value means "the price for which the facility would sell in place if voluntarily offered for sale by the owner of the facility; that is to say, the scrap value of the material of an eligible facility less the cost of removal of the facility. Administratively, salvage value is five percent (5 percent) of the original cost.[23] Thus, for pollution control facilities, property tax is calculated by multiplying the original cost of the facility by 5 percent to arrive at the true and actual appraised value, then multiplying that value by 60 percent before applying the levy rate to arrive at the amount of tax.

A pollution control facility is defined as "any personal property designed, constructed or installed primarily for the purpose of abating or reducing water or air pollution or contamination by removing, altering, disposing, treating, storing or dispersing the concentration of pollutants, contaminants, wastes or heat in compliance with air or water quality or effluent standards prescribed by or promulgated under the laws of this state or the United States, the design, construction and installation of which

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personal property was approved as a pollution control facility by either the office of water resources or the office of air quality, both of the division of environmental protection, as the case may be."[24]

Since 2001, power projects designed, constructed, or installed to convert wind into electrical energy are statutorily deemed pollution control facilities, with no approval by the Department of Environmental Protection necessary for such designation.[25] Salvage value treatment is afforded for the wind turbine and the tower upon which the turbine is affixed. Beginning July 1, 2007, the portion of the turbine and tower assigned salvage value treatment is no greater than 79 percent of the total value of the facility. All personal property at a wind power project other than the turbine and tower are not considered part of the pollution control facility and the true and actual value of that property is its then-current value and not salvage value.[26]

To date, no statutory language has been passed that deems solar-powered electricity facilities as pollution control facilities for property tax purposes, and solar-powered facilities are thus not valued for property taxes based on salvage value. In fact, bills have been introduced in recent years, albeit unsuccessfully, that would strip wind power projects of their designation as pollution control facilities.[27]

For more information, please contact any member of the Frost Brown Todd Tax practice group.

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[1] West Virginia previously provided a residential solar energy tax credit against personal income tax for individuals. The solar energy system had to be installed between July 1, 2009, and June 30, 2013. W. Va. Code section 11-13Z-1 et seq.

[2] W. Va. Code section 11-13-2o.

[3] W. Va. Code section 11-13-2o(c)(2).

[4] W. Va. Code section 11-13-2o(a)(7) and (c)(3).

[5] SW. Va. Code section 11-13-2o(c)(2) (note that the tax on wind was originally based on 5 percent of generating capacity until being increased to 12 percent beginning in 2008).

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[6] W. Va. Code section 11-13-2o(b)(1) and (c)(2).

[7] W. Va. Code section 11-13-2o(c)(2).

[8] H.B. 4462 as introduced during the 2020 regular legislative session has similar provisions to S.B. 578. A fiscal note was provided only for the House version.

[9] Hoppy Kercheval, "Solar Bill Important for West Virginia's Economic Future," MetroNews, Feb. 6, 2020.

[10] S.B. 583 from the 2020 regular legislative session.

[11] New W. Va. Code section 24-2-1o(n).

[12] W. Va. Code section 11-13-2q.

[13] W. Va. Code section 11-13-2q(b).

[14] W. Va. Code section 11-13-2q(c).

[15] W. Va. Code section 11-13-2r.

[16] W. Va. Code section 11-13-2r(a).

[17] *Id.*

[18] W. Va. Code section 11-13-2r(b).

[19] W. Va. Code section 11-13-2r(c).

[20] W. Va. Code section 11-3-1(a).

[21] *Id.*

[22] W. Va. Code section 11-6A-3.

[23] W. Va. Code R. section 110-6.2.7.

[24] W. Va. Code section 11-6A-2.

[25] W. Va. Code section 11-6A-5a(a).

[26] W. Va. Code section 11-6A-5a(b) and W. Va. Code R. section 110-6-4.

[27] See S.B. 132 from the 2020 regular legislative session.

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