Natural Resources

An international guide to tax

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Introduction

For cross-border groups operating in the Natural Resources sector, the complex nature of cross-border taxation means that the consideration of financing, operating and profit repatriation from a taxation perspective is fundamental to ensure that risks are mitigated and efficiency maximised.

At commencement, and through the exploration and development phase, provision of services and funds flows are likely to be from the parent company to the often overseas based subsidiary and will be of significant value. How these are structured and priced is fundamental, as the provision of loans and services will have VAT consequences for all entities concerned, and potential Withholding Tax issues. Transfer Pricing principles will define the correct price for such transactions, be it service value or interest cost – whilst also protecting against a potential mismatch between taxable income, and lower allowable costs.

Once extraction operations commence, and income is generated, funds flow requirements will reverse. Loans may be repaid and profit distributed back to the parent – to fund dividends to investors, new operations, or maybe simply to house financial resources in a more stable environment. Again, a multitude of tax risks will need to be considered here.

Our guide cannot tell you how to structure your Natural Resources business and transaction flows, as every overseas jurisdiction will give a differing balance of risks and opportunities. However, our team of experts have set out the key issues that you will need to consider before embarking on, and during your overseas venture, so that you can seek the right advice at the correct time.

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Transfer pricing in the natural resources sector

01

Transfer pricing in the natural resources sector

The industry is beset with its own complexities. We offer advice to multinationals on how to navigate transfer pricing at a time of increased scrutiny.

Natural resources companies operate in a fast-moving and increasingly regulated market. There are many opportunities, but in challenging times the sector is undergoing change. Growing economic and public pressures mean companies are introducing more ESG-friendly policies. Established business models are being reviewed. Disruptive new players are entering the market. Getting the right funding is also becoming increasingly complex.

The evolving impact of transfer pricing rules is particularly important in the natural resources sector. The high volume and value of cross-border trade makes tax compliance, and efficiency, risk management and reputation top priorities.

Understanding value chains

From initial stages of exploration through to production, and from IPO to growth and expansion, natural resources businesses may have to manage a multitude of cross-border operations and stakeholders.

As a result, these businesses can have a diverse range of value drivers and processes in their upstream, midstream and downstream activities:

01
upstream: exploration; mine / field development; mining and concentration / extraction,

02
midstream: transport; refining, processing and smelting / liquefaction and regasification; and storage,

03
downstream: distribution; marketing; trading and sales.

Each natural resources business has its own value chain, which should be mapped to critically evaluate the transfer pricing implications.

Transfer pricing considerations

Most countries apply transfer pricing rules to ensure that internal transactions by multinationals are priced at arm's length. That means on terms which would have prevailed between independent parties. Mispricing such transactions can distort the profit and tax reporting outcomes across tax jurisdictions.

Failure to anticipate and plan for transfer pricing risks can lead to tax authority audits and disputes. These, in turn, may mean fines, penalties, economic double taxation, and time-consuming procedures that drain the company's management resources. Company auditors, investors, regulators and customers also expect compliance as part of corporate governance.

Transfer pricing rules require that intra-group flows (which are typically in goods, services, financing, and use of intangibles) comply with the arm's length principle. In the natural resources sector, the related party transactions typically arise through:

- centralised operations hubs: procurement, sales and marketing, IP management or other value-driving activities in a strategic hub location
- intra-group services: management and back office, R&D, technical and scientific services (e.g. site development, refining)
- use of intangibles: exploration licences, patents, know-how, trademarks, supplier contracts, and customer lists
- ownership and leasing of equipment: infrastructure and capital-intensive assets (e.g. drilling rigs, vessels, construction and transport equipment)
- intra-group financial support: loans, financial and performance guarantees, hedging, and cash pooling arrangements.

As noted in our article discussing **withholding taxes on extraction funds**, correct financial recognition of the intra-group services and financial support may give rise to profit extraction opportunities for the group, and drive additional tax efficiencies.

Transfer pricing in the natural resources sector

The transfer pricing policy challenge

Developing a transfer pricing policy can be difficult in the natural resources sector. This is because of factors like volatility in commodity prices, complex supply chains, long-term contractual commitments, and significant expenditure on infrastructure and equipment assets.

This complexity is increased by the sector's large international presence. It encompasses both developing and developed countries, each with its own tax and regulatory requirements.

Transfer pricing requires profit and tax reporting outcomes to correspond to each group entity's value creation. The natural resources sector is characterised by senior management who are geographically spread, and by skilled personnel temporarily based at project sites who may create or use valuable assets. When business arrangements or market conditions evolve but internal tax policies do not keep pace, the risk of misreporting tax positions can increase significantly.

The implications of greater scrutiny

International initiatives are also increasing scrutiny and there's a greater risk of challenge by more and well-trained transfer pricing specialists from tax authorities.

One example is the Fiscal Transition Support Programme in West Africa (FTSP). It is funded by the European Union and, as the name suggests, its objective is to implement fiscal transition programmes in West Africa after the implementation of regional trade liberalisation policies. Under the programme, the OECD and the Global Forum on Transparency and Exchange of Information for Tax Purposes are helping West African states to fight tax base erosion, profit shifting, and illicit financial flows. Their aim is to mobilise domestic resources and improve tax transparency by multinationals.

Another example is the partnership between the OECD Centre for Tax Policy and Administration and the IGF to deliver the **Base Erosion and Profit Shifting in Mining Program**. The aim of the program is to equip resource-rich developing countries with the knowledge, skills, and tools to build and administer a **robust mining tax system**.

Regular reviews, proper development and robust execution of transfer pricing policies with supporting documentation, all help towards compliance and to defend companies against the risks and adverse outcomes of tax audits. Record keeping requirements to support compliance with transfer pricing rules are typically an obligation (rather than an expectation) of tax authorities. Multinationals with significant intercompany transactions should prepare and annually update transfer pricing documentation, based on standards set by the OECD (known as the Group Master File and Local Country File) or otherwise in accordance with local rules.

Next steps

The natural resources sector offers opportunities. But it also requires careful consideration of the industry's unique characteristics and challenges if multinationals are to optimise their tax and transfer pricing positions.

Withholding taxes: extracting the profits of extraction

02

Withholding taxes: extracting the profits of extraction

The rules can sometimes seem like a minefield. We explore the regulations and offer guidance on how natural resources companies can minimise the effect of withholding taxes on their extraction funds.

Many businesses in the natural resources sector with assets held overseas are structured with an ultimate UK parent company. When the overseas operations reach the point of income (and profit) generation, their focus often turns to repatriation of those funds for a number of potential reasons:

01

The need to apply transfer pricing principles to services provided intra-group (often, services from the parent company to the subsidiary) that may have been charged, or accrued earlier, and remain relevant now the subsidiary is income generating.

02

Requirements to move funds upstream, to fund corporate-level costs of the group (such as costs of maintaining a listing), to make dividend payments to shareholders, or to fund new investments by the parent.

03

The desire to reduce the level of cash holding in the subsidiary undertakings, perhaps because of the economic risks (for example, the operations may be in a jurisdiction that's at greater risk of fraud activity or political instability).

How such fund movements are made may give rise to tax issues (and opportunities) in both the parent and subsidiary jurisdiction.

Repayment of investments

In many jurisdictions, this is only likely to be a viable option where the investments initially made in the subsidiary were advanced by way of loan, rather than subscription of share capital. Not only is the repayment of equity capital legally more complex in many jurisdictions, but capital control and investment incentives may make such a route impossible or at least a bad idea.

Where loans have been made to the subsidiary, their repayment (if possible) would not typically incur tax. But where interest has been charged on the loan, any local withholding taxes on the interest are likely to crystallise in the subsidiary company on payment, where that interest is deemed settled by the payment.

Payment of dividends

Firstly, check whether the subsidiary can pay dividends. In many jurisdictions, they can only be paid from retained profits. So this may not be appropriate for an early stage extractor that has free cash but has not yet recouped its initial development spend. Again, capital controls may in any case prevent such fund flows.

Many jurisdictions continue to charge withholding taxes (WHT) on dividend payments. From a UK perspective this is often overlooked as the requirement was scrapped for UK companies in 1998. If these taxes are charged on dividends paid to the UK, they are a sunk cost. This is because the general exemption applying to dividend income removes dividends received (and associated WHT) from the charge to (and credit against) UK Corporation Tax.

Withholding taxes: extracting the profits of extraction

Provision of services

Often a parent undertaking (or other service entity) within the group will provide a function to the operating subsidiary which, under transfer pricing principles, should be charged for as a service provision at an arms-length rate. In a listed environment, as the parent undertaking often doesn't trade externally, without charging for services provided to the group, it will likely accrue operating losses which may not have an outlet for relief.

So, in many cases, the imposition of charges will be a win:win group-wide. The subsidiary will obtain relief for the services charged, but the parent provider won't recognise the same level of taxable profit due to the offset of costs. What's more, by providing genuine services to subsidiary entities, and being correctly remunerated for them, the parent (if established in the UK) may be able to register for VAT in the UK. This allows recovery of UK VAT incurred on

There may also be future services, such as the sales function for extracted assets into the market, which need not be performed in either the parent or subsidiary jurisdiction, but may form part of the operating structure in the future. These could provide tax advantages or make it easier to indirectly repatriate 'cash' by ensuring that it doesn't transfer into the overseas subsidiary to start with.

That said, there will often be situations where WHT applies on the provision of services and local VAT may also potentially be charged in the overseas jurisdiction. The scope of such charges is often not as clear as knowing whether interest or dividends are subject to WHT, so it may be wise to seek local advice, as to whether a specific service provided falls within the scope of WHT.

The role of tax treaties

WHT exposures are determined by the tax jurisdiction of the overseas subsidiary and are likely to be greater in less developed economies. But where transactions are between two jurisdictions that share a tax treaty, this may operate to:

- set a lower potential rate of WHT for transactions in scope (a treaty can only ever reduce the rate from the domestic basic provision); or
- set tighter parameters for the transactions to which the WHT applies (again, it can only reduce the potential exposure).

So where a company operates in multiple jurisdictions, it may be possible to ensure that certain services or transactions are entered into between 'tax treaty friendly' countries to reduce the potential burden. But beware. Increasingly, substance ("Boots on the Ground") is required in a participating jurisdiction to benefit from a relevant tax treaty. Interposing a shell company with no real presence in a country into the transaction chain to benefit from treaties is unlikely to work. In fact, it could even worsen the position if it adds new levels of withholding into the chain.

Start at the beginning

While profit extraction from overseas subsidiaries may be a long way off at the time of initial evaluation, it's still of course the ultimate goal of any natural resources business. So it's important to take time at the outset to identify the likely flows of funds, services and functions (all supported by transfer pricing analysis). This will enable new exploration and/or extraction companies to take appropriate tax advice early on. And that in turn should help them to implement their initial plans (initial funding, parent company VAT structure, service and function flows) in a way that prevents future WHT leakage – or at least anticipates it.

UK VAT: how to keep your natural resources company ahead of HMRC

03

UK VAT: how to keep your resources company ahead of HMRC

It's easier than you think to fall foul of the complicated VAT rules for holding companies. We help you steer through the obstacles.

Many natural resources groups set up a company in the UK that issues shares to subscribers, for example on AIM. These companies then incur significant UK VAT on associated legal and professional fees, not only related to the initial fundraising but also on future costs (such as audit fees).

HMRC can challenge the recovery of such UK VAT on expenditure on the basis that the company does not have a UK fixed establishment (for UK VAT purposes) and / or it is not making (or cannot show to HMRC's satisfaction its intention to make) 'taxable supplies' for UK VAT purposes.

To prevent UK VAT becoming an additional cost, many UK group holding companies apply to HMRC to register for UK VAT. This means they can file UK VAT return forms, on which they try to reclaim from HMRC the VAT incurred on expenses. HMRC can raise queries when it receives the VAT registration application or when it receives the first VAT return seeking a refund of VAT. But it often doesn't do so at this stage. As a result, the holding companies believe HMRC agrees that they are entitled to be registered for VAT and can reclaim UK VAT incurred on expenses.

Beware of retrospective reviews

But case law precedent shows that just because HMRC hasn't challenged the content of a form, it doesn't mean there is implicit agreement.

So, many UK holding companies of natural resources groups find themselves in a precarious position when HMRC carries out a review of VAT returns filed in the past four years and are told that, not only are they not entitled to receive UK VAT refunds relating to their expenditure, but they should not even be UK VAT-registered at all.

HMRC then issues assessments clawing back the VAT refunds made in the past four years. It also charges interest (currently 7.75% per annum) and potentially a 'careless error' penalty of 15-30% of the value of the VAT clawback assessments. Penalties may seem harsh. But HMRC's view is that the CFO of a natural resources group's UK holding company cannot argue that they've taken 'reasonable care' with the company's UK VAT accounting, when HMRC's website clearly explains the main EU / UK case law precedent relating to the recovery of VAT incurred by holding companies. Many of those cases involve holding companies of natural resources groups. HMRC also gives guidance on the route they should follow to recover VAT on expenditure.

Route to success

Firstly, the UK holding company must either belong in the UK or have a UK fixed establishment for VAT purposes. Merely being incorporated in the UK and having a UK registered office is not enough for VAT purposes. It needs one or more of the following:

01
a UK office,

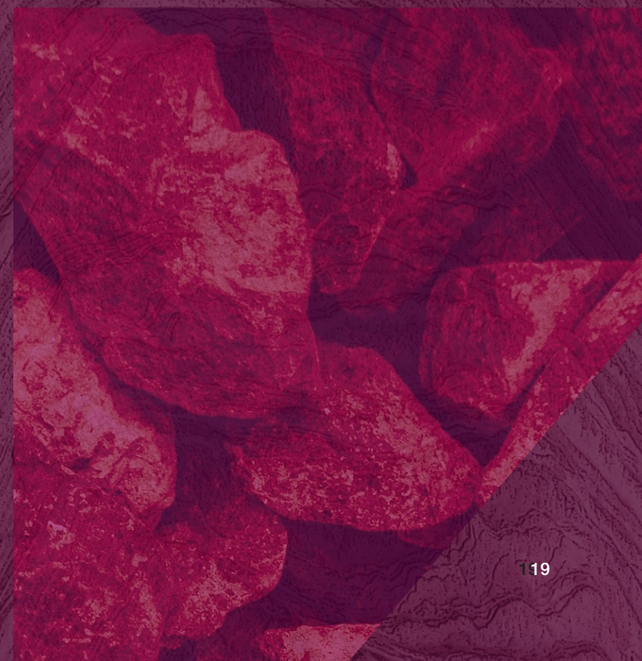
02
UK-resident employees and / or UK-resident self-employed contractors,

03
UK-resident directors,

04
in-person board meetings in the UK.

There is good news. If a UK holding company isn't eligible to be UK VAT-registered on the criteria above, not only should it not be UK VAT-registered but neither should the UK suppliers of legal and professional services to the company have charged UK VAT on those services.

If VAT has been incorrectly charged, companies should seek refunds from their suppliers in respect of historic services, and check that no VAT is charged in future (unless or until the holding company does establish some kind of UK presence for VAT purposes.



UK VAT: how to keep your resources company ahead of HMRC

Tax supplies matter

Secondly, the UK holding company must have an intention to make 'taxable supplies' in the future. For VAT purposes, taxable supplies include:

- loan interest charged to overseas subsidiaries, and paid for (in cash or with shares)
- loan interest charged to UK subsidiaries, where those subsidiaries are members of the same VAT group registration as the holding company, and paid for (in cash or with shares)
- management / support services supplied to subsidiaries, whether they are in the UK or overseas and where they are members of the same VAT group registration as the holding company, and paid for.

Unfortunately, an intention to receive future share dividends from subsidiaries is not enough. This is because share dividends are not (for VAT purposes) consideration paid in return for services supplied by the shareholders.

For further information, visit our related articles on the wider consequences (and potential benefits) of making such downstream supplies, and the requirements for these to be priced correctly for transfer pricing purposes.

Providing future intentions

Unsurprisingly, HMRC is sceptical of tales from holding company CFOs attempting to defend against UK VAT assessments. Backed up by VAT case law precedent in its favour, HMRC expects to see documented evidence of the holding company's intention to make 'taxable supplies' in the future. These documents typically include one or more of:

- board meeting minutes
- initial share offer prospectus
- financial accounts
- draft / final agreements for interest-bearing loans, management services and support services.

Evidence of supplies

When services are supplied, HMRC expects to see payments being made or received. This is because payment is a requirement for a service to take place for VAT purposes. Ideally, payments will involve cash movements from the subsidiaries' bank accounts into the UK holding company's bank account. Where this isn't possible, intercompany account entries may be accepted, so long as they actually discharge the debt owed to the holding company and are not merely an indication that the money is owed and needs to be paid in due course.

Interaction with Corporation Tax

The challenge is to ensure that loan interest and service fees charged by holding companies to their subsidiaries do not create withholding tax or transfer pricing issues. So, it's best to adopt a holistic approach by considering all the taxes at the outset, ideally before the initial share issue to raise funds for the holding company.

Too often, we find ourselves fighting a rear-guard defensive action after HMRC VAT assessments are issued, or while the annual audit is going on. This is unfortunate because tax specialists understand the route to success. So the holding company CFOs just need to access that knowledge as early as possible to avoid future problems.

Our Tax services
to the Natural Resources sector

We offer comprehensive tax compliance and advisory services to mining and oil & gas companies, both in the UK and globally, helping them find their way in the increasingly complex world of tax.

By bringing together the extensive expertise and experience of our tax specialists we can provide a fully rounded service that offers excellent value for money.

We offer the following **specialist tax services:**

Business Tax

Our Business Tax team will ensure tax compliance, whilst also improving overall efficiency. Our aim is to provide solutions and help your natural resources business understand the complex issues involved.

We provide specialist corporate and business tax advice on both a local and international level, starting from correctly structuring your business operations, extraction of profits, and ensuring compliance with the regulations of relevant jurisdictions, all in a commercial manner.

For mining and oil and gas companies with operations or planned transactions outside the UK, we are supported by the extensive PKF Global network to provide expert advice locally, and joined-up solutions that, most importantly, reflect the commercial aims of the UK and overseas businesses.

Read more

Transfer Pricing

Our experienced Transfer Pricing team can assist you in developing transfer pricing strategies and solutions for your local, regional, and global business operations and end markets in the natural resources sector.

We can provide practical and tailored solutions to your business across the full suite of transfer pricing services, including planning, compliance, documentation, and defence. We work with local experts across PKF Global, our international network of professional advisory firms.

Read more

VAT and Indirect Taxes

We can help natural resources groups to unlock and maximise recoveries of VAT (and similar non-UK taxes) on expenditure as quickly as possible. We do this by following the guidance provided by HMRC, non-UK tax authorities and decades of VAT case law precedent relating to holding companies of natural resources groups and businesses incurring significant VAT-bearing expenditure now in order to generate income many years in the future.

We know the challenges that HMRC are likely to raise and so can pre-empt them by implementing proven, HMRC-approved strategies so that any potential challenges to VAT recovery are resolved at the first HMRC inquiry.

Read more

Human Capital

Our dedicated team provides advice on global and UK employment-related taxes, social security and Human Capital services. We work with both listed and privately-owned businesses, as well as individuals across the Natural Resources sector.

Our natural resources tax specialists will support you across a range of issues including employment tax, employee benefits, off-payroll labour and international assignments including policy drafting and support for every stage of the assignment lifecycle.

Read more

About our Natural Resources team

We are specialists in the natural resources sector. Understanding such global, technically complex businesses has become a specialism of ours, and we are auditors to over 100 businesses in the sector from private companies to large listed multinational groups.

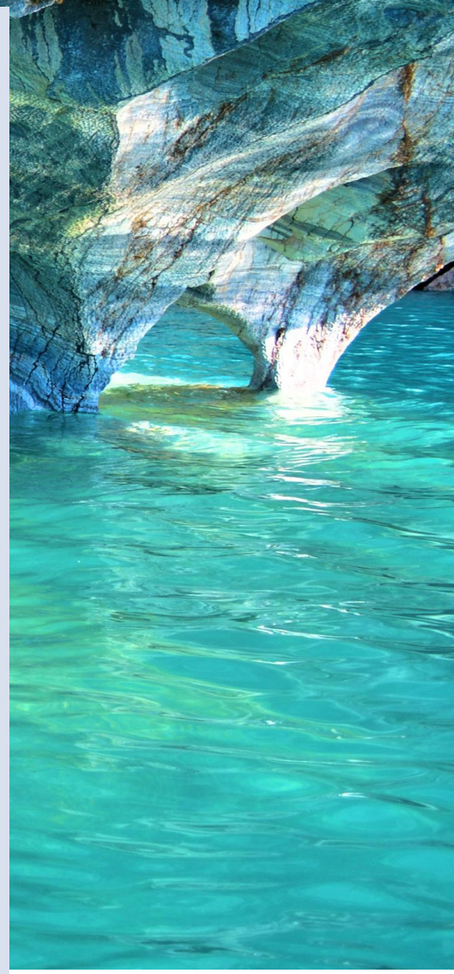
In the listed market we are ranked 1st as auditors to both LSE Basic Materials companies and LSE Energy clients. We provide tax services to many non-audit natural resources clients.

We foster long term relationships with companies across the sector from initial stages of exploration through to production, and from IPO to growth and expansion. Our natural resources team are all sector specialists, supporting clients that operate across all continents,

Our knowledge of the sector includes numerous oil and gas, mineral and energy projects including gold/silver; precious metals; copper, nickel, iron and both the base metals, agricultural minerals, lithium; uranium, diamonds and other precious gemstones; and coal.

Get in touch with our Natural Resources specialists

to see how we can help...



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