

CHAPTER 281

TAXATION

HOUSE BILL 07-1279

BY REPRESENTATIVE(S) McKinley, Gardner C., Gallegos, Hodge, Witwer, Buescher, Butcher, Frangas, Jahn, Lambert, Looper, Lundberg, Madden, McFadyen, Mitchell V., Rice, Riesberg, Rose, Stephens, White, Carroll M., Labuda, and Stafford; also SENATOR(S) Romer, Boyd, Brophy, Fitz-Gerald, Renfroe, Schwartz, Shaffer, Tochtrop, and Wiens.

AN ACT

CONCERNING THE CLARIFICATION OF THE GENERAL ASSEMBLY'S INTENT TO INCLUDE MACHINERY USED TO PRODUCE ELECTRICITY IN THE EXEMPTION FROM SALES AND USE TAX FOR PURCHASES OF MACHINERY USED TO MANUFACTURE TANGIBLE PERSONAL PROPERTY.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. (1) The general assembly hereby finds and declares that:

(a) On November 6, 2006, the executive director of the department of revenue issued final determination DD-598, in which the executive director concluded that machinery used to produce electricity did not qualify for exemption from sales and use tax under section 39-26-709 (1), Colorado Revised Statutes. Final determination DD-598 is inconsistent with final determination DD-567, which was issued by the executive director on February 5, 2001, and which concluded that certain machinery used in the production of electricity qualified for the exemption from sales and use tax under section 39-26-709 (1), Colorado Revised Statutes.

(b) The application of the final determination DD-598 to projects for which long-term power purchase agreements, as defined in section 39-26-709 (1) (c) (I), Colorado Revised Statutes, were signed between February 5, 2001, and November 7, 2006, may be unfair to the owners of those projects. In addition, final determination DD-598 is inconsistent with the general assembly's intent to encourage the development of projects that produce electricity from renewable energy sources in Colorado. Therefore, the general assembly adopts the following amendments to section 39-26-709 (1) (a) and (1) (c), Colorado Revised Statutes, in order to specify that final determination DD-598 does not apply to any project for which a long-term power purchase agreement was fully executed between February

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

5, 2001, and November 7, 2006, or to any project that produces electricity from a renewable energy source.

(c) By enacting this legislation, the general assembly does not intend to indicate whether final determination DD-598 reflects the correct construction or interpretation of section 39-26-709 (1), Colorado Revised Statutes, whether it is a change in policy, or whether final determination DD-598 was legally or validly implemented.

SECTION 2. 39-26-709 (1) (a), Colorado Revised Statutes, is amended BY THE ADDITION OF THE FOLLOWING NEW SUBPARAGRAPHS to read:

39-26-709. Machinery and machine tools. (1) (a) The following shall be exempt from taxation under the provisions of part 1 of this article:

(III) PURCHASES OF MACHINERY AND MACHINE TOOLS, OR PARTS THEREOF, USED IN THE PRODUCTION OF ELECTRICITY FROM A RENEWABLE ENERGY SOURCE, INCLUDING BUT NOT LIMITED TO WIND, WHETHER OR NOT SUCH PURCHASES ARE CAPITALIZED OR EXPENSED; AND

(IV) PURCHASES OF MACHINERY AND MACHINE TOOLS, OR PARTS THEREOF, USED IN THE PRODUCTION OF ELECTRICITY IN A FACILITY FOR WHICH A LONG-TERM POWER PURCHASE AGREEMENT WAS FULLY EXECUTED BETWEEN FEBRUARY 5, 2001, AND NOVEMBER 7, 2006, WHETHER OR NOT SUCH PURCHASES ARE CAPITALIZED OR EXPENSED.

SECTION 3. 39-26-709 (1) (c), Colorado Revised Statutes, is amended to read:

39-26-709. Machinery and machine tools. (1) (c) As used in this subsection (1):

(I) "LONG-TERM POWER PURCHASE AGREEMENT" MEANS AN AGREEMENT EXECUTED BETWEEN ONE OR MORE INDEPENDENT POWER PRODUCERS AND A PROVIDER OF RETAIL ELECTRIC SERVICE FOR A TERM OF NO LESS THAN TEN YEARS, PURSUANT TO WHICH THE INDEPENDENT POWER PRODUCER OR PRODUCERS AGREE TO SELL ALL OF THE PRODUCTION OFFERED FOR SALE FROM A PARTICULAR POWER GENERATION FACILITY FOR A SPECIFIED PRICE OVER A SPECIFIED TERM.

(II) "Machinery" means any apparatus consisting of interrelated parts used to produce an article of tangible personal property. The term includes both the basic unit and any adjunct or attachment necessary for the basic unit to accomplish its intended function.

(III) "Manufacturing" means the operation of producing a new product, article, substance, or commodity different from and having a distinctive name, character, or use from raw or prepared materials.

(IV) "SPECIFIED PRICE" MEANS A PRICE SET BY A LONG-TERM POWER PURCHASE AGREEMENT THAT IS NOT DEPENDENT ON EITHER THE COST OF PRODUCTION OR THE MARKET PRICE OF ELECTRICITY; EXCEPT THAT A SPECIFIED PRICE MAY PROVIDE FOR A PERCENTAGE INCREASE OVER TIME SO LONG AS THE PERCENTAGE INCREASE IS

SPECIFIED IN THE ORIGINAL LONG-TERM POWER PURCHASE AGREEMENT AND IS ALSO NOT DEPENDENT ON EITHER THE COST OF PRODUCTION OR THE MARKET PRICE OF ELECTRICITY.

SECTION 4. 39-26-601 (1), Colorado Revised Statutes, is amended to read:

39-26-601. Definitions. As used in this part 6, unless the context otherwise requires:

(1) "Qualified taxpayer" means a natural person, a C corporation, as defined in section 39-22-103 (2.5), a partnership, as defined in section 39-22-103 (5.6), a limited liability company that is not a C corporation, an S corporation, as defined in section 39-22-103 (10.5), or a sole proprietorship that purchases, stores, uses, or consumes tangible personal property, including machinery, as defined in ~~section 39-26-709 (1) (c) (f)~~ SECTION 39-26-709 (1) (c) (II), that is or will be used in Colorado directly and predominantly for research and development or in a combined activity of research and development and manufacturing that is exempt pursuant to section 39-26-709 (1).

SECTION 5. 39-26-602 (1), (2), and (3), Colorado Revised Statutes, are amended to read:

39-26-602. Fiscal years commencing on or after July 1, 2002 - temporary refund of state sales and use tax paid for tangible personal property used for research and development to refund state revenues exceeding TABOR limit - application requirements and procedures - legislative declaration. (1) The general assembly finds and declares that providing a refund of state sales and use tax paid in connection with the sale, purchase, storage, use, or consumption of tangible personal property, including machinery as defined in ~~section 39-26-709 (1) (c) (f)~~ SECTION 39-26-709 (1) (c) (II), used in Colorado directly and predominantly for research and development or in a combined activity of research and development and manufacturing that is exempt pursuant to section 39-26-709 (1) is a reasonable method of refunding a portion of the excess state revenues required to be refunded in accordance with section 20 (7) (d) of article X of the state constitution.

(2) (a) Subject to the provisions of subsection (6) of this section, for the state fiscal year commencing on July 1, 2002, if, based on the financial report prepared by the controller in accordance with section 24-77-106.5, C.R.S., the controller certifies that the amount of state revenues for said state fiscal year exceeds the limitation on state fiscal year spending imposed by section 20 (7) (a) of article X of the state constitution for said state fiscal year and the voters statewide either have not authorized the state to retain and spend all of the excess state revenues for that state fiscal year or have authorized the state to retain and spend only a portion of the excess state revenues for that state fiscal year, each qualified taxpayer shall be allowed to claim a refund in an amount equal to fifty percent of all state sales and use tax paid by the qualified taxpayer pursuant to parts 1 and 2 of this article during that state fiscal year on the sale, purchase, storage, use, or consumption of tangible personal property, including machinery as defined in ~~section 39-26-709 (1) (c) (f)~~ SECTION 39-26-709 (1) (c) (II), that is or will be used in Colorado directly and predominantly for research and development or in a combined activity of research and development and manufacturing that is exempt pursuant to section 39-26-709

(1).

(b) Subject to the provisions of subsection (6) of this section, for state fiscal years commencing on or after July 1, 2003, if, based on the financial report prepared by the controller in accordance with section 24-77-106.5, C.R.S., the controller certifies that the amount of state revenues for said state fiscal year exceeds the limitation on state fiscal year spending imposed by section 20 (7) (a) of article X of the state constitution for said state fiscal year and the voters statewide either have not authorized the state to retain and spend all of the excess state revenues for that state fiscal year or have authorized the state to retain and spend only a portion of the excess state revenues for that state fiscal year, each qualified taxpayer shall be allowed to claim a refund in an amount equal to all state sales and use tax paid by the qualified taxpayer pursuant to parts 1 and 2 of this article during that state fiscal year on the sale, purchase, storage, use, or consumption of tangible personal property, including machinery as defined in ~~section 39-26-709 (1) (c) (I)~~ SECTION 39-26-709 (1) (c) (II), that is or will be used in Colorado directly and predominantly for research and development or in a combined activity of research and development and manufacturing that is exempt pursuant to section 39-26-709 (1).

(3) To claim the refund allowed by subsection (2) of this section, a qualified taxpayer shall submit a refund application to the department of revenue on a form provided by the department. Such application shall be submitted no earlier than January 1 and no later than April 1 of the state fiscal year immediately following the state fiscal year for which the refund is claimed. The application shall be accompanied by proof of payment of state sales and use taxes paid by the qualified taxpayer in the immediately preceding state fiscal year on the sale, purchase, storage, use, or consumption of tangible personal property, including machinery as defined in ~~section 39-26-709 (1) (c) (I)~~ SECTION 39-26-709 (1) (c) (II), that is or will be used in Colorado directly and predominantly for research and development or in a combined activity of research and development and manufacturing that is exempt pursuant to section 39-26-709 (1). The application shall also include any additional information that the department may require by rule, which may include, without limitation, a detailed list of all expenditures that support a claim for a refund, the name and addresses of an individual who maintains records of such expenditures, and a statement that the qualified taxpayer agrees to furnish records of all such expenditures to the department upon request. No refund shall be allowed if the qualified taxpayer has not complied with the provisions of this subsection (3).

SECTION 6. 39-30-106 (1) (b), Colorado Revised Statutes, is amended to read:

39-30-106. Sales and use tax - machinery and equipment exempted.

(1) (b) The provisions of section 39-26-709 (1) shall govern the administration of this subsection (1), except to the extent that such section and this subsection (1) are inconsistent. For purposes of this section, in addition to the definition of "manufacturing" found in ~~section 39-26-709 (1) (c) (II)~~ SECTION 39-26-709 (1) (c) (III), "manufacturing" shall include refining, blasting, exploring, mining and mined land reclamation, quarrying for, processing and beneficiation, or otherwise extracting from the earth or from waste or stockpiles or from pits or banks any natural resource.

SECTION 7. Applicability. This act shall apply to all audits, assessments,

appeals, claims for refunds, and transactions relating to the imposition of sales and use tax on machinery that are pending on or after the effective date of this act.

SECTION 8. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 23, 2007