

CHAPTER 302

TAXATION

HOUSE BILL 08-1368

BY REPRESENTATIVE(S) Buescher, McKinley, Carroll M., Carroll T., Fischer, Kerr A., Kerr J., Loofer, Lundberg, Madden, Middleton, Stafford, Todd, Frangas, Gallegos, Merrifield, and Summers;
also SENATOR(S) Brophy, Romer, Tupa, Gibbs, Groff, Harvey, Isgar, Kester, Kopp, Mitchell S., Penry, Schultheis, Shaffer, Spence, Taylor, Ward, and Wiens.

AN ACT**CONCERNING THE TAXATION OF PROPERTY USED TO PRODUCE ALTERNATING CURRENT ELECTRICITY
FROM A RENEWABLE ENERGY SOURCE.**

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

SECTION 1. Part 1 of article 5 of title 39, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

39-5-104.7. Valuation of real and personal property that produces alternating current electricity from a renewable energy source. (1) (a) EXCEPT AS PROVIDED IN PARAGRAPH (b) OF THIS SUBSECTION (1), ON AND AFTER JANUARY 1, 2008, ALL REAL AND PERSONAL PROPERTY USED TO PRODUCE TWO MEGAWATTS OR LESS OF ALTERNATING CURRENT ELECTRICITY FROM A RENEWABLE ENERGY SOURCE SHALL BE VALUED BY THE ASSESSOR IN THE COUNTY WHERE THE PROPERTY IS LOCATED IN ACCORDANCE WITH VALUATION PROCEDURES DEVELOPED BY THE ADMINISTRATOR.

(b) THE VALUATION REQUIREMENTS SPECIFIED IN PARAGRAPH (a) OF THIS SUBSECTION (1) SHALL NOT APPLY TO WIND ENERGY FACILITIES AS DEFINED IN SECTION 39-4-101 (4).

(2) IN DEVELOPING THE VALUATION PROCEDURES SPECIFIED IN PARAGRAPH (a) OF SUBSECTION (1) OF THIS SECTION, THE ADMINISTRATOR SHALL UTILIZE THE PROCEDURES ADOPTED FOR DETERMINING THE ACTUAL VALUE OF A RENEWABLE ENERGY FACILITY AS SPECIFIED IN SECTION 39-4-102 (1) (e).

(3) A TAXPAYER SHALL NOTIFY THE TAXPAYER'S COUNTY ASSESSOR WHEN THE

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

TAXPAYER INSTALLS REAL AND PERSONAL PROPERTY USED TO PRODUCE TWO MEGAWATTS OR LESS OF ALTERNATING CURRENT ELECTRICITY FROM A RENEWABLE ENERGY SOURCE; EXCEPT THAT, IF THE TAXPAYER OBTAINS A BUILDING PERMIT UNDER THE JURISDICTION OF A LOCAL GOVERNMENT FOR THE INSTALLATION, THE NOTIFICATION REQUIRED IN THIS SUBSECTION (3) SHALL NOT BE NECESSARY.

SECTION 2. 39-4-101 (4), Colorado Revised Statutes, is amended to read:

39-4-101. Definitions. As used in this article, unless the context otherwise requires:

(4) "Wind energy facility" means a new facility first placed in production on or after January 1, 2006, that uses property, real and personal, including one or more wind turbines, leaseholds, and easements, to generate and deliver to the interconnection meter any source of electrical or mechanical energy IN EXCESS OF TWO MEGAWATTS by harnessing the kinetic energy of the wind.

SECTION 3. 39-4-102 (1) (e) and (1.5) (b) (V), Colorado Revised Statutes, are amended to read:

39-4-102. Valuation of public utilities. (1) The administrator shall determine the actual value of the operating property and plant of each public utility as a unit, giving consideration to the following factors and assigning such weight to each of such factors as in the administrator's judgment will secure a just value of such public utility as a unit:

(e) (I) When determining the actual value of a renewable energy facility that primarily ~~generates~~ PRODUCES MORE THAN TWO MEGAWATTS OF ALTERNATING CURRENT electricity, the administrator shall:

(A) Consider the additional incremental cost per kilowatt of the construction of the renewable energy facility over that of the construction cost of a comparable nonrenewable energy facility that primarily ~~generates~~ PRODUCES ALTERNATING CURRENT electricity to be an investment cost and shall not include such additional incremental cost in the valuation of the facility; AND

(B) NOT ADD VALUE TO A RENEWABLE ENERGY FACILITY FOR ANY RENEWABLE ENERGY CREDITS CREATED BY THE PRODUCTION OF ALTERNATING CURRENT ELECTRICITY.

(II) For purposes of this paragraph (e), "renewable energy" has the meaning provided in ~~section 40-1-102 (6), C.R.S.~~ SECTION 40-1-102 (11), C.R.S., ~~For purposes of this paragraph (e), "renewable energy"~~ BUT shall not include energy generated from a wind energy facility.

(III) (A) FOR PURPOSES OF DETERMINING THE ACTUAL VALUE OF A RENEWABLE ENERGY FACILITY AS SPECIFIED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (e), AN OWNER OR OPERATOR OF A FACILITY SHALL PROVIDE A COPY OF THE FACILITY'S CURRENT POWER PURCHASE AGREEMENT TO THE ADMINISTRATOR BY APRIL 1 OF EACH ASSESSMENT YEAR AS AN ATTACHMENT TO THE STATEMENT REQUIRED AS SPECIFIED IN SECTION 39-4-103 (1); EXCEPT THAT, IF A COPY OF THE CURRENT POWER

PURCHASE AGREEMENT WAS PREVIOUSLY PROVIDED EITHER BY THE OWNER OR OPERATOR OR BY THE PURCHASER OF POWER AND THERE IS NO MATERIAL CHANGE IN THE FACILITY'S CURRENT POWER PURCHASE AGREEMENT, THE OWNER OR OPERATOR OF A FACILITY SHALL NOT BE REQUIRED TO PROVIDE A COPY OF THE AGREEMENT.

(B) IF THE OWNER OR OPERATOR OF A FACILITY DOES NOT PROVIDE A COPY OF THE FACILITY'S CURRENT POWER PURCHASE AGREEMENT AS SPECIFIED IN SUB-SUBPARAGRAPH (A) OF THIS SUBPARAGRAPH (III), THE ADMINISTRATOR SHALL HAVE THE AUTHORITY TO REQUEST A COPY OF THE CURRENT POWER PURCHASE AGREEMENT FROM THE PURCHASER OF POWER GENERATED AT THE FACILITY; EXCEPT THAT, IF A COPY OF THE CURRENT POWER PURCHASE AGREEMENT WAS PREVIOUSLY PROVIDED EITHER BY THE OWNER OR OPERATOR OR BY THE PURCHASER OF POWER AND THERE IS NO MATERIAL CHANGE IN THE FACILITY'S CURRENT POWER PURCHASE AGREEMENT, THE PURCHASER OF POWER SHALL NOT BE REQUIRED TO PROVIDE A COPY OF THE AGREEMENT.

(C) ALL POWER PURCHASE AGREEMENTS PROVIDED TO THE ADMINISTRATOR PURSUANT TO THIS SUBPARAGRAPH (III) SHALL BE CONSIDERED PRIVATE DOCUMENTS AND SHALL BE AVAILABLE ONLY TO THE ADMINISTRATOR AND THE EMPLOYEES OF THE DIVISION OF PROPERTY TAXATION IN THE DEPARTMENT OF LOCAL AFFAIRS.

(1.5) The administrator shall determine the actual value of a wind energy facility as follows:

(b)(V) For purposes of calculating the tax factor as required in subparagraph (IV) of this paragraph (b), an owner or operator of a wind energy facility shall provide a copy of the wind energy facility's current ~~purchase~~ power PURCHASE agreement to the administrator by April 1 of each assessment year. The administrator shall also have the authority to request a copy of the current ~~purchase~~ power PURCHASE agreement from the purchaser of power generated at a wind energy facility. All agreements provided to the administrator pursuant to this subparagraph (V) shall be considered private documents and shall be available only to the administrator and the employees of the division of property taxation in the department of local affairs.

SECTION 4. Part 7 of article 26 of title 39, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

39-26-724. Components used to produce alternating current electricity from a renewable energy source - definitions. (1) FOR FISCAL YEARS COMMENCING ON OR AFTER JULY 1, 2006, ALL SALES, STORAGE, AND USE OF COMPONENTS USED IN THE PRODUCTION OF ALTERNATING CURRENT ELECTRICITY FROM A RENEWABLE ENERGY SOURCE, INCLUDING BUT NOT LIMITED TO WIND, SHALL BE EXEMPT FROM TAXATION UNDER THE PROVISIONS OF PARTS 1 AND 2 OF THIS ARTICLE.

(2)(a) AS USED IN THIS SECTION, "COMPONENTS" SHALL INCLUDE, BUT SHALL NOT BE LIMITED TO, WIND TURBINES, ROTORS AND BLADES, SOLAR MODULES, TRACKERS, GENERATING EQUIPMENT, SUPPORTING STRUCTURES OR RACKS, INVERTERS, TOWERS AND FOUNDATIONS, BALANCE OF SYSTEM COMPONENTS SUCH AS WIRING, CONTROL SYSTEMS, SWITCHGEARS, AND GENERATOR STEP-UP TRANSFORMERS, AND

CONCENTRATING SOLAR POWER COMPONENTS THAT INCLUDE, BUT ARE NOT LIMITED TO, MIRRORS, PLUMBING, AND HEAT EXCHANGERS.

(b) AS USED IN THIS SECTION, "COMPONENTS" SHALL NOT INCLUDE ANY COMPONENTS BEYOND THE POINT OF GENERATOR STEP-UP TRANSFORMERS LOCATED AT THE PRODUCTION SITE, LABOR, ENERGY STORAGE DEVICES, OR REMOTE MONITORING SYSTEMS.

SECTION 5. 29-2-105 (1) (d), Colorado Revised Statutes, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

29-2-105. Contents of sales tax ordinances and proposals. (1) The sales tax ordinance or proposal of any incorporated town, city, or county adopted pursuant to this article shall be imposed on the sale of tangible personal property at retail or the furnishing of services, as provided in paragraph (d) of this subsection (1). Any countywide or incorporated town or city sales tax ordinance or proposal shall include the following provisions:

(d) (I) A PROVISION THAT THE SALE OF TANGIBLE PERSONAL PROPERTY AND SERVICES TAXABLE PURSUANT TO THIS ARTICLE SHALL BE THE SAME AS THE SALE OF TANGIBLE PERSONAL PROPERTY AND SERVICES TAXABLE PURSUANT TO SECTION 39-26-104, C.R.S., EXCEPT AS OTHERWISE PROVIDED IN THIS PARAGRAPH (d). THE SALE OF TANGIBLE PERSONAL PROPERTY AND SERVICES TAXABLE PURSUANT TO THIS ARTICLE SHALL BE SUBJECT TO THE SAME SALES TAX EXEMPTIONS AS THOSE SPECIFIED IN PART 7 OF ARTICLE 26 OF TITLE 39, C.R.S.; EXCEPT THAT THE SALE OF THE FOLLOWING MAY BE EXEMPTED FROM A TOWN, CITY, OR COUNTY SALES TAX ONLY BY THE EXPRESS INCLUSION OF THE EXEMPTION EITHER AT THE TIME OF ADOPTION OF THE INITIAL SALES TAX ORDINANCE OR RESOLUTION OR BY AMENDMENT THERETO:

(A) THE EXEMPTION FOR SALES OF MACHINERY OR MACHINE TOOLS SPECIFIED IN SECTION 39-26-709 (1), C.R.S.;

(B) THE EXEMPTION FOR SALES OF ELECTRICITY, COAL, WOOD, GAS, FUEL OIL, OR COKE SPECIFIED IN SECTION 39-26-715 (1) (a) (II), C.R.S.;

(C) THE EXEMPTION FOR SALES OF FOOD SPECIFIED IN SECTION 39-26-707 (1) (e), C.R.S.;

(D) THE EXEMPTION FOR VENDING MACHINE SALES OF FOOD SPECIFIED IN SECTION 39-26-714 (2), C.R.S.;

(E) THE EXEMPTION FOR SALES BY A CHARITABLE ORGANIZATION SPECIFIED IN SECTION 39-26-718 (1) (b), C.R.S.;

(F) THE EXEMPTION FOR SALES OF FARM EQUIPMENT AND FARM EQUIPMENT UNDER LEASE OR CONTRACT SPECIFIED IN SECTION 39-26-716 (2) (b) AND (2) (c), C.R.S.;

(G) THE EXEMPTION FOR SALES OF LOW-EMITTING MOTOR VEHICLES, POWER SOURCES, OR PARTS USED FOR CONVERTING SUCH POWER SOURCES AS SPECIFIED IN

SECTION 39-26-719 (1), C.R.S.;

(H) THE EXEMPTION FOR SALES OF PESTICIDES SPECIFIED IN SECTION 39-26-716 (2) (e), C.R.S.; AND

(J) THE EXEMPTION FOR SALES OF COMPONENTS USED IN THE PRODUCTION OF ALTERNATING CURRENT ELECTRICITY FROM A RENEWABLE ENERGY SOURCE, INCLUDING BUT NOT LIMITED TO WIND, SPECIFIED IN SECTION 39-26-724, C.R.S.; EXCEPT THAT THIS SUB-SUBPARAGRAPH (J) SHALL NOT APPLY TO ANY INCORPORATED TOWN, CITY, OR COUNTY THAT ADOPTED THE EXEMPTION SPECIFIED IN SUB-SUBPARAGRAPH (A) OF THIS SUBPARAGRAPH (I) PRIOR TO THE EFFECTIVE DATE OF THIS SUB-SUBPARAGRAPH (J).

(II) IF A TOWN, CITY, OR COUNTY SALES TAX EXPRESSLY INCLUDES ANY EXEMPTIONS SPECIFIED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (d) BY AN AMENDMENT TO THE INITIAL SALES TAX ORDINANCE OR RESOLUTION, SUCH AMENDMENT SHALL BE ADOPTED IN THE SAME MANNER AS THE INITIAL ORDINANCE OR RESOLUTION.

(III) IN THE ABSENCE OF AN EXPRESS PROVISION FOR ANY EXEMPTION SPECIFIED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (d), ALL SALES TAX ORDINANCES AND RESOLUTIONS SHALL BE CONSTRUED AS IMPOSING OR CONTINUING TO IMPOSE THE TOWN, CITY, OR COUNTY SALES TAX ON SUCH ITEMS.

SECTION 6. 29-2-106 (4) (a), Colorado Revised Statutes, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

29-2-106. Collection - administration - enforcement. (4) (a) (I) THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF REVENUE SHALL, AT NO CHARGE, ADMINISTER, COLLECT, AND DISTRIBUTE THE SALES TAX OF ANY HOME RULE MUNICIPALITY UPON REQUEST OF THE GOVERNING BODY OF SUCH MUNICIPALITY:

(A) IF THE PROVISIONS OF THE SALES TAX ORDINANCE OF SAID MUNICIPALITY, OTHER THAN THOSE PROVISIONS RELATING TO LOCAL PROCEDURES FOLLOWED IN ADOPTING THE ORDINANCE, CORRESPOND TO THE REQUIREMENTS OF THIS ARTICLE FOR SALES TAXES IMPOSED BY COUNTIES, TOWNS, AND CITIES;

(B) IF NO USE TAX IS TO BE COLLECTED BY THE DEPARTMENT OF REVENUE EXCEPT AS PROVIDED IN SECTION 39-26-208, C.R.S.; AND

(C) WHETHER OR NOT THE ORDINANCE APPLIES THE SALES TAX TO THE EXEMPTIONS LISTED IN SECTION 29-2-105 (1) (d) (I).

(II) WHEN THE GOVERNING BODY OF ANY HOME RULE MUNICIPALITY REQUESTS THE DEPARTMENT OF REVENUE TO ADMINISTER, COLLECT, AND DISTRIBUTE THE SALES TAX OF SAID MUNICIPALITY AS SPECIFIED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (a), SAID GOVERNING BODY SHALL CERTIFY TO THE EXECUTIVE DIRECTOR OF THE DEPARTMENT A TRUE COPY OF THE HOME RULE MUNICIPALITY'S SALES TAX ORDINANCE.

SECTION 7. The introductory portion to 29-2-109 (1), Colorado Revised

Statutes, is amended to read:

29-2-109. Contents of use tax ordinances and proposals. (1) The use tax ordinance, resolution, or proposal of any town, city, or county adopted pursuant to this article shall be imposed only for the privilege of using or consuming in the town, city, or county any construction and building materials purchased at retail or for the privilege of storing, using, or consuming in the town, city, or county any motor and other vehicles, purchased at retail on which registration is required, or both. For the purposes of this subsection (1), the term "construction and building materials" shall not include parts or materials utilized in the fabrication, construction, assembly, or installation of passenger tramways, as defined in section 25-5-702 (4), C.R.S., by any ski area operator, as defined in section 33-44-103 (7), C.R.S., or any person fabricating, constructing, assembling, or installing a passenger tramway for a ski area operator. THE ORDINANCE, RESOLUTION, OR PROPOSAL MAY RECITE THAT THE USE TAX SHALL NOT APPLY TO THE STORAGE AND USE OF COMPONENTS USED IN THE PRODUCTION OF ALTERNATING CURRENT ELECTRICITY FROM A RENEWABLE ENERGY SOURCE, INCLUDING BUT NOT LIMITED TO WIND, AS EXEMPTED FROM THE STATE USE TAX PURSUANT TO SECTION 39-26-724, C.R.S. The ordinance, resolution, or proposal shall recite that the use tax shall not apply:

SECTION 8. 39-26-709 (1) (a), Colorado Revised Statutes, is amended 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:

(I) (Deleted by amendment, L. 2004, p. 1022, § 2, effective July 1, 2004.)

(II) Except as allowed in section 39-30-106, on or after July 1, 1996, purchases of machinery or machine tools, or parts thereof, in excess of five hundred dollars to be used in Colorado directly and predominantly in manufacturing tangible personal property, for sale or profit; AND

~~(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 9. Legislative intent. (1) 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, Colorado Revised Statutes, as in effect prior to legislative amendments made in the 2007 legislative session. 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, Colorado Revised Statutes.

(2) The general assembly is cognizant of pending litigation concerning the scope of section 39-26-709, Colorado Revised Statutes, as in effect prior to 2007. 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, Colorado Revised Statutes, or whether the final determination is a change in policy. Furthermore, by enacting this legislation, the general assembly does not intend to indicate whether certain components specified in section 4 of this act may already be exempt from sales and use tax under section 39-26-709, Colorado Revised Statutes.

SECTION 10. 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 27, 2008