

CHAPTER 318

TAXATION

SENATE BILL 17-299

BY SENATOR(S) Holbert and Moreno, Fields, Hill, Jahn, Kefalas, Lambert, Lundberg, Neville T., Smallwood, Tate, Todd, Williams A., Grantham;
also REPRESENTATIVE(S) Van Winkle and Kraft-Tharp, Beckman, Bridges, Buckner, Catlin, Covarrubias, Garnett, Melton, Neville P., Pabon, Pettersen, Duran.

AN ACT**CONCERNING THE APPORTIONMENT OF INCOME FOR STATE INCOME TAX FOR TAXPAYERS WITH ENTERPRISE DATA CENTERS IN THE STATE.**

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

SECTION 1. In Colorado Revised Statutes, **add** 39-22-303.9 as follows:

39-22-303.9. Apportionment of the income of a taxpayer with enterprise data center operations in the state - definitions. (1) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "CAPITAL INVESTMENT" MEANS THE:

(I) PURCHASE AND CONSTRUCTION OF REAL ESTATE; OR

(II) PURCHASE AND DEPLOYMENT OF CAPITAL EQUIPMENT, MACHINES, BUILDING SYSTEMS, INFRASTRUCTURE, OR OTHER DEPRECIABLE ASSETS, INCLUDING CAPITAL LEASES.

(b) "ENTERPRISE DATA CENTER OPERATION" MEANS A BUSINESS THAT:

(I) PHYSICALLY HOUSES INFORMATION TECHNOLOGY EQUIPMENT SUCH AS SERVERS, SWITCHES, ROUTERS, DATA STORAGE DEVICES, OR RELATED EQUIPMENT;

(II) MANAGES AND PROCESSES DIGITAL DATA AND INFORMATION TO PROVIDE APPLICATION SERVICES OR MANAGEMENT FOR DATA PROCESSING, SUCH AS WEB HOSTING, INTERNET, INTRANET, TELECOMMUNICATION, AND INFORMATION

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

TECHNOLOGY SERVICES;

(III) IS OWNED BY A TAXPAYER; AND

(IV) IS OPERATED SUBSTANTIALLY FOR THE TAXPAYER'S OWN USE.

(c) "OFFICE OF ECONOMIC DEVELOPMENT" OR "OFFICE" MEANS THE COLORADO OFFICE OF ECONOMIC DEVELOPMENT CREATED IN SECTION 24-48.5-101.

(d) "PERSON" HAS THE SAME MEANING AS PROVIDED IN SECTION 39-21-101 (3).

(e) "TAXPAYER" MEANS A PERSON OR AN AFFILIATED GROUP OF C CORPORATIONS AUTHORIZED TO ELECT TO MAKE A CONSOLIDATED RETURN UNDER SECTION 39-22-305, AND AN AFFILIATED GROUP AS DEFINED IN SECTION 39-22-303 (12).

(2) NOTWITHSTANDING ANY PROVISION OF SECTION 39-22-303.5, FOR TAXABLE YEARS COMMENCING ON OR AFTER THE JULY 1 IN THE YEAR IN WHICH THE OFFICE PROVIDES WRITTEN CERTIFICATION TO THE TAXPAYER AND TO THE DEPARTMENT OF REVENUE THAT THE REQUIREMENTS DESCRIBED IN SUBSECTION (3)(a) OF THIS SECTION HAVE BEEN MET BY THE TAXPAYER, BUT NO SOONER THAN THE TAXABLE YEAR COMMENCING JULY 1, 2018, PURSUANT TO THE SCHEDULE SET BY THE OFFICE AS DESCRIBED IN SUBSECTION (3)(c)(II) OF THIS SECTION, IN APPORTIONING THE INCOME OF A TAXPAYER WITH ENTERPRISE DATA CENTER OPERATIONS IN THE STATE, SALES FROM SERVICES ARE COLORADO SALES FOR PURPOSES OF SECTION 39-22-303.5 (4)(c)(I) TO THE EXTENT SUCH SALES CONSTITUTE REVENUES FROM SERVICES THAT ARE DELIVERED TO THE TAXPAYER'S CUSTOMER'S LOCATION IN THE STATE, AS DEMONSTRATED BY THE CUSTOMER'S BILLING ADDRESS.

(3) (a) EXCEPT AS PROVIDED IN SUBSECTION (3)(d) OF THIS SECTION, IF A TAXPAYER MAKES A CAPITAL INVESTMENT IN AN ENTERPRISE DATA CENTER OPERATION IN THE STATE AS DESCRIBED IN SUBSECTION (3)(b) OF THIS SECTION AND ENTERS INTO A MEMORANDUM OF UNDERSTANDING WITH THE OFFICE AS DESCRIBED IN SUBSECTION (3)(c) OF THIS SECTION, THEN THE TAXPAYER IS AUTHORIZED TO USE THE APPORTIONMENT METHOD SET FORTH IN SUBSECTION (2) OF THIS SECTION PURSUANT TO THE SCHEDULE SET FORTH IN THE MEMORANDUM OF UNDERSTANDING WHEN THE CAPITAL INVESTMENT IS FULLY FUNDED.

(b) THE TAXPAYER SHALL MAKE A CAPITAL INVESTMENT IN AN ENTERPRISE DATA CENTER IN THE STATE EQUAL TO AT LEAST ONE HUNDRED FIFTY MILLION DOLLARS WITHIN ANY CONSECUTIVE FIVE-YEAR PERIOD COMMENCING ON OR AFTER JANUARY 1, 2013.

(c) (I) THE TAXPAYER SHALL ENTER INTO A MEMORANDUM OF UNDERSTANDING WITH THE OFFICE THAT SETS FORTH:

(A) THE AMOUNT OF THE CAPITAL INVESTMENT;

(B) THE SPECIFIC CONSECUTIVE FIVE-YEAR PERIOD IN WHICH THE CAPITAL INVESTMENT WILL OCCUR;

(C) THE MINIMUM NUMBER OF NET NEW EMPLOYEES THAT WILL BE HIRED BY THE

TAXPAYER; AND

(D) ANY OTHER INVESTMENTS OR ACTIONS ON THE PART OF THE TAXPAYER THAT WILL SUPPORT THE ECONOMIC DEVELOPMENT OF THE STATE.

(II) THE MEMORANDUM OF UNDERSTANDING MUST INCLUDE A SCHEDULE, TO BE SET BY THE OFFICE, THAT INCREMENTALLY TRANSITIONS THE TAXPAYER, OVER A PERIOD NOT TO EXCEED EIGHT YEARS, TO THE APPORTIONMENT METHOD DESCRIBED IN SUBSECTION (2) OF THIS SECTION.

(III) WHEN NEGOTIATING THE TERMS OF THE MEMORANDUM OF UNDERSTANDING WITH THE TAXPAYER, THE OFFICE MAY SEEK INPUT FROM THE DEPARTMENT OF REVENUE. THE DEPARTMENT OF REVENUE SHALL PROVIDE TAXPAYER-SPECIFIC INFORMATION THAT WILL ASSIST THE OFFICE IN SETTING THE TERMS OF THE MEMORANDUM OF UNDERSTANDING. NOTWITHSTANDING SECTION 39-21-113, IT IS LAWFUL FOR THE DEPARTMENT OF REVENUE TO PROVIDE SUCH TAXPAYER-SPECIFIC INFORMATION TO THE OFFICE. THE OFFICE SHALL NOT DISCLOSE TAXPAYER-SPECIFIC INFORMATION TO THE PUBLIC THAT IT RECEIVES PURSUANT TO THIS SUBSECTION (3)(c)(III) AND SUBSECTION (3)(c)(V) OF THIS SECTION AND SHALL KEEP SUCH TAXPAYER-SPECIFIC INFORMATION CONFIDENTIAL. ALL EMPLOYEES OF THE OFFICE ARE SUBJECT TO THE LIMITATIONS SET FORTH IN SECTION 39-21-113 (4) AND THE PENALTIES SET FORTH IN SECTION 39-21-113 (6).

(IV)(A) THE MEMORANDUM OF UNDERSTANDING MUST BE SIGNED BY THE OFFICE AND THE TAXPAYER NO LATER THAN ONE YEAR AFTER THE LAST YEAR OF THE CONSECUTIVE FIVE-YEAR CAPITAL INVESTMENT PERIOD DESCRIBED IN SUBSECTION (3)(b) OF THIS SECTION.

(B) WHEN THE TAXPAYER FULLY FUNDS THE CAPITAL INVESTMENT AND SIGNS THE MEMORANDUM OF UNDERSTANDING, THE OFFICE SHALL PROVIDE WRITTEN CERTIFICATION TO THE TAXPAYER AND THE DEPARTMENT OF REVENUE THAT THE REQUIREMENTS DESCRIBED IN SUBSECTION (3)(a) OF THIS SECTION HAVE BEEN MET BY THE TAXPAYER AND THE TAXPAYER SHALL ATTACH A COPY OF THE SIGNED MEMORANDUM OF UNDERSTANDING WITH ITS TAX RETURN IN ORDER TO PROVIDE THE DEPARTMENT OF REVENUE WITH THE TRANSITION SCHEDULE DESCRIBED IN SUBSECTION (3)(c)(II) OF THIS SECTION FOR THE APPORTIONMENT METHOD.

(V) THE TAXPAYER SHALL PROVIDE ANY INFORMATION REQUIRED BY THE OFFICE FOR THE OFFICE TO DETERMINE COMPLIANCE WITH THE TERMS OF THE MEMORANDUM OF UNDERSTANDING.

(VI) THE OFFICE AND THE DEPARTMENT OF REVENUE HAVE THE RIGHT TO AUDIT COMPLIANCE WITH THE MEMORANDUM OF UNDERSTANDING AND REVIEW ANY INFORMATION PROVIDED BY THE TAXPAYER PURSUANT TO THE MEMORANDUM OF UNDERSTANDING OR REQUESTED BY THE OFFICE AS ALLOWED UNDER SUBSECTION (3)(c)(V) OF THIS SECTION.

(d) IF THE TAXPAYER FAILS TO FULLY FUND THE CAPITAL INVESTMENT OR FAILS TO FULFILL THE OBLIGATIONS ESTABLISHED IN THE MEMORANDUM OF UNDERSTANDING, THE TAXPAYER MAY NO LONGER USE THE APPORTIONMENT METHOD SET FORTH IN SUBSECTION (2) OF THIS SECTION AND APPORTIONMENT SHALL

BE DETERMINED PURSUANT TO SECTION 39-22-303.5.

(4) NOTWITHSTANDING SECTION 24-1-136 (11), ON NOVEMBER 1, 2019, AND EACH NOVEMBER 1 THEREAFTER, THE OFFICE AND THE DEPARTMENT OF REVENUE SHALL SUBMIT A REPORT TO THE FINANCE COMMITTEE OF THE HOUSE OF REPRESENTATIVES AND THE FINANCE COMMITTEE OF THE SENATE, OR ANY SUCCESSOR COMMITTEES, THAT INCLUDES A SUMMARY OF THE USE OF THIS SECTION, THE CAPITAL INVESTMENTS MADE, AND THE NUMBER OF MEMORANDA OF UNDERSTANDING ENTERED INTO AND THAT INCLUDES AN UPDATE ON THE USE OF MARKET-BASED APPORTIONMENT IN THE STATE.

SECTION 2. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 9, 2017, if adjournment sine die is on May 10, 2017); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2018 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

Approved: June 5, 2017