WEST VIRGINIA CODE: §11-13EE-2

§11-13EE-2. Definitions.

(a) *General.* — When used in this article, or in the administration of this article, terms defined in subsection (b) shall have the meanings ascribed to them by this section, unless a different meaning is clearly required by either the context in which the term is used, or by specific definition, in this article.

(b) *Terms defined.* —

(1) "Affiliated group" means one or more chains of corporations, limited liability entities, or partnerships, or any combination thereof, connected through the ownership of stock or ownership interests with a common parent which is a corporation, limited liability entity, or partnership, but only if the common parent owns directly, or indirectly, a controlling interest in each of the members of the group.

(2) "Base period" means the five-year period directly preceding the year the qualifying capital investment in new machinery and equipment was placed into service.

(3) "Base period annual average severance taxes" means the annual average of the State portion of severance taxes paid under §11-13A-3 of this code during the five-year period directly preceding the year the qualifying capital investment in new machinery and equipment was placed into service. The annual average of the state portion of severance taxes is found by taking the cumulative total of the state portion of severance taxes paid from all mines operated within the State by the eligible taxpayer and dividing the aggregate cumulative total of the state portion of severance taxes by five.

(4) "Capital investment in new machinery and equipment" means:

(A) Tangible personal property in the form of machinery and equipment that is purchased on or after the effective date of this article and placed in service for direct use in the production of coal, when the original or first use of the machinery or equipment in this state commences on or after the effective date of this article;

(B) Tangible personal property in the form of machinery and equipment that is leased by the taxpayer and placed in service for direct use in the production of coal by the taxpayer on or after the effective date of this article, if the original or first use of the machinery or equipment commences in this state, with the taxpayer, on or after the effective date of this article and the machinery or equipment is depreciable, or amortizable, for federal income tax purposes and has a useful life of five or more years for federal income tax purposes.

(C) Tangible personal property in the form of materials used for infrastructure improvements to real property on or after the effective date of this article and placed in service for direct

WV Legislature

use in the production of coal, when the original or first use of the materials used for the infrastructure upgrades commences in this state on or after the effective date of this article. Such infrastructure upgrades include, but are not limited to, materials used for construction of haul roads or access roads, culverts, belt lines, and ventilation fans; and

(D) Repair or refurbishment costs to tangible personal property directly used in the production of coal that are incurred on or after the effective date of this article, which are capitalized for federal income tax purposes.

(5) "Coal mine" or "mine" includes:

(A) A "surface mine" or "surface mining operation" which means:

(i) Activities conducted on the surface of lands for the removal of coal, or, subject to the requirements of §11-13EE-14 of this code, surface operations and surface impacts incident to an underground coal mine, including the drainage and discharge from the mine. The activities include: Excavation for the purpose of obtaining coal, including, but not limited to, common methods as contour, strip, auger, mountaintop removal, box cut, open pit and area mining; the uses of explosives and blasting; reclamation; in situ distillation or retorting, leaching or other chemical or physical processing; the cleaning, concentrating or other processing or preparation and loading of coal for commercial purposes at or near the mine site; and

(ii) The areas upon which the above activities occur or where the activities disturb the natural land surface. The areas also include any adjacent land, the use of which is incidental to the activities; all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the activities and for haulage; and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to the activities: *Provided*, That the activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed sixteen and two-thirds percent of the tonnage of minerals removed for purposes of commercial use or sale, or coal prospecting. Surface mining does not include any of the following:

(I) Coal extraction authorized pursuant to a government-financed reclamation contract;

(II) Coal extraction authorized as an incidental part of development of land for commercial, residential, industrial or civic use; or

(III) The reclamation of an abandoned or forfeited mine by a no cost reclamation contract; and

(B) An "underground mine" which includes the shafts, slopes, drifts or inclines connected

WV Legislature

with, or intended in the future to be connected with, excavations penetrating coal seams or strata, which excavations are ventilated by one general air current or divisions thereof, and connected by one general system of mine haulage over which coal may be delivered to one or more points outside the mine, and the surface structures or equipment connected or associated therewith which contribute directly or indirectly to the mining, preparation or handling of coal.

(6) "Coal mining operation" includes the mine and the coal preparation and processing plant.

(7) "Coal preparation and processing plant" means any facility (excluding underground mining operations) which prepares coal by one or more of the following processes: breaking, crushing, screening, wet or dry cleaning, and thermal drying.

(8) "Coal production" means the privilege of severing, extracting, reducing to possession and producing coal for sale, profit or commercial use and includes the processing of coal at a coal preparation and processing plant.

(9) "Commissioner" or "Tax Commissioner" are used interchangeably herein and mean the Tax Commissioner of the State of West Virginia, or his or her delegate.

(10) "Controlled group" means one or more chains of corporations connected through stock ownership with a common parent corporation if stock possessing at least 50 percent of the voting power of all classes of stock of each of the corporations is owned, directly or indirectly, by one or more of the corporations; and the common parent owns directly stock possessing at least 50 percent of the voting power of all classes of stock of at least one of the other corporations.

(11) "Controlling interest" means:

(A) For a corporation, either more than 50 percent ownership, directly or indirectly, of the total combined voting power of all classes of stock of the corporation, or more than 50 percent ownership, directly or indirectly, of the beneficial ownership interest in the voting stock of all classes of stock of the corporation;

(B) For a partnership, association, trust or other entity other than a limited liability company, more than 50 percent, ownership, directly or indirectly, of the capital, profits, or beneficial interest in the partnership, association, trust, or other entity;

(C) For a limited liability company, either more than 50 percent ownership, directly or indirectly, of the total membership interest of the limited liability company, or more than 50 percent ownership, directly or indirectly, of the beneficial ownership interest in the membership interest of the limited liability company.

(12) "Corporation" means any corporation, joint-stock company or association, and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by a certificate of interest or ownership or similar written instrument.

WV Legislature

(13) "Delegate" used in the phrase "or his delegate," when used in reference to the Tax Commissioner, means any officer or employee of the State Tax Department duly authorized by the Tax Commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this article.

(14) "Directly used or consumed in the production of coal" means used or consumed in those activities or operations which constitute an integral and essential part of the production of coal, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the production of coal.

(A) Uses of tangible personal property which constitute direct use or consumption in the production of coal include only:

(i) New machinery and equipment that is depreciable, or amortizable, for federal income tax purposes, that has a useful life of five or more years for federal income tax purposes, and that are directly used in the production of coal in this state;

(ii) Transportation of coal within the coal mine from the coal face or coal deposit to the exterior of the mine or to a point where the extracted coal is transported away from the mine;

(iii) Directly and physically recording the flow of coal during the production of coal including those coal treatment processes specified in §11-13A-4 of this code;

(iv) Safety equipment and apparatus directly used in the production of coal, or to secure the safety of mine personnel is direct use in the production of coal;

(v) Controlling or otherwise regulating atmospheric conditions required for the production of coal;

(vi) Transformers, pumps, rock dusting equipment and other property used to supply electricity or water, or to supply or apply rock dust directly used in the production of coal;

(vii) Storing, removal or transportation of economic waste, including coal gob, resulting from the production of coal;

(viii) Engaging in pollution control or environmental quality or protection activity directly relating to the production of coal; or

(ix) Otherwise using as an integral and essential part of the production of coal.

(B) Uses of tangible personal property which do not constitute direct use or consumption in the production of coal include, but are not limited to:

(i) Heating and illumination of office buildings;

WV Legislature

(ii) Janitorial or general cleaning activities;

(iii) Personal comfort of personnel: *Provided*, That safety equipment and apparatus directly used in the production of coal or to secure the safety of mine personnel is direct use in the production of coal when the tangible personal property is depreciable, or amortizable, for federal income tax purposes and has a useful life of five or more years for federal income tax purposes when it is placed in service or use;

(iv) Production planning, scheduling of work or inventory control;

(v) Marketing, general management, supervision, finance, training, accounting and administration;

(vi) Measuring or determining weight, and ash content, water content and other physical and chemical characteristics of the coal after production;

(vii) An activity or function incidental or convenient to the production of coal, rather than an integral and essential part of these activities.

(15) "Eligible taxpayer" means:

(A) Any person who pays the tax imposed by §11-13A-3 of this code on the privilege of producing coal for sale, profit or commercial use for at least two years before the capital investment in machinery and equipment is placed in service or use in this state; or

(B) A taxpayer that has experienced a change in business composition through merger, acquisition, split-up, spin-off or other ownership changes or changes in the form of the business organization from limited liability company to C corporation, or partnership, or from one form of business organization to a different form of business organization, may constitute an eligible taxpayer if the entity currently operating in this state was operating in a different form of business organization in this state at least two years before the capital investment in new machinery and equipment is placed in service or use in this state. In the case of business composition change through merger, acquisition, split-up, spin-off or other ownership changes the current business may constitute an eligible taxpayer if at least 50 percent of the business assets of such component were actively and directly used in coal production activity in this state for such two-year period. If less than 50 percent of the assets of the current entity were not actively and directly used in coal production activity in this state for such two-year period, then the current entity resulting from a business composition change through merger, acquisition, split-up, spin-off or other ownership, shall not constitute an eligible taxpayer.

(C) When the rebate applicant is part of a controlled or affiliated group, for purposes of determining the increase in the state portion of severance taxes paid, the increase in coal production tonnage, and the increase in full-time and full-time equivalent employment, the term, "eligible taxpayer" includes all members of the rebate applicant's controlled or

WV Legislature

affiliated group. Thus, the increase in the state portion of severance taxes is determined by subtracting the base period annual average severance taxes paid by the eligible taxpayer's controlled or affiliated group for all coal mined in this state from the state portion of severance taxes paid by the eligible taxpayer's controlled or affiliated group for all coal mined in this state during the tax year for which the rebate is claimed. Likewise, the "eligible taxpayer's" total aggregate production tonnage and total employment figures referenced in §11-13EE-3(c)(1) and (2) are determined by reference to the controlled group or affiliated group's total aggregate production tonnage and total employment numbers across all mines operated by the controlled or affiliated group with in the state.

(16) "Full-time employee" means an employee who is compensated by an annual salary and who works, on average, at least 35 hours per week.

(17) "Full-time equivalent employee" means the quotient obtained by dividing the total number of hours for which hourly employees were compensated for employment over the 12-month period in question by 1,820.

(18) "Original use" means the first use to which the property is put by anyone in this state.

(19) "Partnership" includes a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business, operation or venture is carried on, which is taxed under Subchapter K of the Internal Revenue Code, as defined in §11-24-3 of this code, and which is not a trust or estate, a corporation or a sole proprietorship. The term "partner" includes a member in such a syndicate, group, pool, joint venture or other unincorporated organization taxed under Subchapter K of the Internal Revenue Code.

(20) "Person" includes any natural person, corporation, partnership, limited liability company or other business entity.

(21) "Production of coal" means privilege of severing, extracting, reducing to possession and producing coal for sale, profit or commercial use and includes the processing of coal at the coal preparation and processing plant.

(22) "Property" means tangible personal property and is limited to new machinery and equipment that is depreciable or amortizable for federal income tax purposes and that has a useful life of five or more years for federal income tax purposes.

(23) "Property purchased or leased for business expansion" means:

(A) Included property. — Except as provided in subparagraph (B) of this section, the term "property purchased or leased for business expansion" means tangible personal property, but only if the tangible personal property was purchased, or leased and placed in service or use by the taxpayer, for use in West Virginia. This term includes only:

(i) Tangible personal property placed in service or use by the taxpayer on or after the effective date of this article, with respect to which depreciation, or amortization in lieu of

WV Legislature

depreciation, is allowable in determining the personal or corporation net income tax liability of the business, or its equity owners, under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code, and which has a useful economic life at the time the property is placed in service or use in this state, of five or more years.

(ii) Tangible personal property acquired by written lease having a primary term of five years or more, that is depreciable or amortizable by the lessor, or lessee, for federal income tax purposes and that has a useful life of five or more years for federal income purposes when it is placed in service or use, and when the lease commences and was executed by the parties thereto on or after the effective date of this article, if used as a component part of a new or expanded coal mining operation in this state shall be included within this definition.

(iii) Repair or refurbishment costs to tangible personal property directly used in the production of coal that are incurred on or after the effective date of this article, which are capitalized for federal income tax purposes.

(B) *Excluded property.* — The term "property purchased or leased for business expansion" shall not include:

(i) Machinery and equipment owned or leased by the taxpayer and for which credit was taken or is claimed under any other article of this chapter for capital investment in the new machinery and equipment;

(ii) Repair costs, including materials used in the repair, unless for federal income tax purposes, the cost of the repair must be capitalized and not expensed;

(iii) Motor vehicles licensed by the West Virginia Division of Motor Vehicles;

(iv) Airplanes;

(v) Off-premise transportation equipment;

(vi) Machinery and equipment that is primarily used outside this state;

(vii) Machinery and equipment that is acquired incident to the purchase of the stock or assets of the seller; and

(viii) Used machinery and equipment.

(C) *Purchase date.* — New machinery and equipment shall be deemed to have been purchased prior to a specified date only if:

(i) The machinery or equipment was owned by the taxpayer prior to the effective date of this article or was acquired by the taxpayer pursuant to a binding purchase contract which was in effect prior to the effective date of this article; or

WV Legislature

(ii) In the case of leased machinery and equipment, there was a binding written lease or contract to lease identifiable machinery or equipment in effect prior to the effective date of this article.

(24) "Purchase" means any acquisition of new machinery or equipment, but only if:

(A) The machinery or equipment is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under Section 267 or 707 (b) of the United States Internal Revenue Code, as defined in §11-24-3 of this code;

(B) The machinery or equipment is not acquired by one component member of a controlled group from another component member of the same controlled group; and

(C) The basis of the machinery or equipment for federal income tax purposes, in the hands of the person acquiring it, is not determined:

(i) In whole or in part by reference to the federal adjusted basis of the machinery or equipment in the hands of the person from whom it was acquired; or

(ii) Under Section 1014 (e) of the United States Internal Revenue Code.

(25) "Qualified coal mining activity" means any business or other activity subject to the tax imposed by §11-13A-3 of this code on the privilege of severing, extracting, reducing to possession and producing coal for sale, profit or commercial use including the treatment process described as mining in §11-13A-4(a)(1) of this code.

(26) "Qualified investment" means capital investment in new machinery and equipment directly used in the production of coal in this state that is depreciable, or amortizable, for federal income tax purposes and has a useful life for federal income tax purposes of five or more years when it is placed in service or use in this state.

(27) "Rebate" means the amount of rebate allowable under §11-13EE-4 of this article.

(28) "Related person" means:

(A) A corporation, partnership, association or trust controlled by the taxpayer;

(B) An individual, corporation, partnership, association or trust that is in control of the taxpayer;

(C) A corporation, partnership, association or trust controlled by an individual, corporation, partnership, association or trust that is in control of the taxpayer; or

(D) A member of the same controlled group as the taxpayer.

For purposes of this subdivision, the term "control," with respect to a corporation, means

WV Legislature

ownership, directly or indirectly, of stock possessing 50 percent or more of the total combined voting power of all classes of the stock of the corporation entitled to vote. "Control," with respect to a trust, means ownership, directly or indirectly, of 50 percent or more of the beneficial interest in the principal or income of the trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association or of a beneficial interest in a trust is determined in accordance with the rules for constructive ownership of stock provided in section 267 (c) of the United States Internal Revenue Code, other than paragraph (3) of that section.

(29) "State portion of severance taxes paid" means the portion of severance taxes due under §11-13A-3 of this code when computed at the 4.65 percent rate of tax.

(30) "Tangible personal property" means and is limited to new machinery and equipment that is depreciable, or amortizable, for federal income tax purposes and that has a useful life of five or more years for federal income tax purposes when it is placed in service or use in this state.

(31) "Taxpayer" means any person exercising the privilege of severing, extracting, reducing to possession and producing coal for sale, profit or commercial use coal, which privilege is taxable under §11-13A-3 of this code.

(32) "This code" means the Code of West Virginia, 1931, as amended.

(33) "This state" means the State of West Virginia.

(34) "United States Internal Revenue Code" or "Internal Revenue Code" means the Internal Revenue Code as defined in §11-24-3 of this code

WV Legislature