WEST VIRGINIA CODE: §11-13GG-3

§11-13GG-3. Definitions.

(a) *General*. -- When used in this article, or in the administration of §11-13GG-1 *et seq.* of this code, terms defined in subsection (b) 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 §11-13GG-1 *et seq.* of this code.

(b) *Terms defined*.

(1) "Affiliated group" means any affiliated group within the meaning section 1504(a) of the Internal Revenue Code, or any similar group defined under a similar provision of state, local, or foreign law, except that section 1504 of Internal Revenue Code shall be applied by substituting "more than 50 percent" for "at least 80 percent" each place it appears in that section.

(2) "Business" means a downstream natural gas manufacturing business activity which is engaged in by any person in this state which is taxable under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code.

(3) "Business expansion" means capital investment in a new or expanded downstream natural gas manufacturing facility in this state.

(4) "Commissioner" or "Tax Commissioner" are used interchangeably in this article and mean the Tax Commissioner of the State of West Virginia, or his or her designee.

(5) "Compensation" means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services.

(6) "Controlled group of corporations" means a controlled group of corporations as defined in section 1563(a) of the Internal Revenue Code.

(7) "Corporation" means any corporation, joint-stock company, association, or other entity treated as a corporation for federal income tax purposes, 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.

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

(9) "Downstream natural gas manufacturing" refers to oil and gas manufacturing operations after the production and processing phases and includes, but is not limited to, facilities that

WV Legislature

use oil, natural gas, natural gas liquids, or the products produced by ethane crackers as raw materials to manufacture industrial and commercial products.

(10) "Downstream natural gas manufacturing business" means a business primarily engaged in this state in downstream natural gas manufacturing.

(11) "Downstream natural gas manufacturing facility" or "downstream manufacturing facility" means any factory, mill, plant, warehouse, building, or complex of buildings located within this state, including the land on which it is located, and all machinery, equipment, and other real and personal property located at or within the facility, used in connection with the operation of the facility, in a business that is taxable in this state, and all site preparation and start-up costs of the taxpayer for the downstream natural gas manufacturing facility which it capitalizes for federal income tax purposes.

(12) "Eligible taxpayer" means any person who makes qualified investment in a new or expanded downstream natural gas manufacturing facility located in this state and creates at least the required number of new jobs and who is subject to any of the taxes imposed by §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code.

(13) "Expanded facility" means any downstream natural gas manufacturing facility, other than a new or replacement business facility, resulting from the acquisition, construction, reconstruction, installation, or erection of improvements or additions to existing property if the improvements or additions are purchased on or after July 1, 2020, but only to the extent of the taxpayer's qualified investment in the improvements or additions.

(14) "Includes" and "including" when used in a definition contained in this article, shall not be considered to exclude other things otherwise within the meaning of the term defined.

(15) "Leased property" does not include property which the taxpayer is required to show on its books and records as an asset under generally accepted principles of financial accounting. If the taxpayer is prohibited from expensing the lease payments for federal income tax purposes, the property shall be treated as purchased property under this section.

(16) "Natural gas" means a gaseous fossil energy source that formed deep beneath the earth's surface that is a combustible mixture of methane and other hydrocarbons.

(17) "Natural gas liquids" includes the following separated from raw natural gas: butane, ethane, isobutane, pentane, propane, and similar liquid hydrocarbons and byproducts separated from natural gas.

(18) "Natural resources" means all forms of minerals, including, but not limited to, rock, stone limestone, coal shale, gravel, sand, clay, natural gas, oil, and natural gas liquids which are contained in or on the soils or waters of this state and includes standing timber.

(19) "New downstream natural gas manufacturing facility" means a business facility which satisfies all the requirements of paragraphs (A), (B), (C), and (D) of this subdivision.

WV Legislature

(A) The facility is employed by the taxpayer in the conduct of a downstream natural gas manufacturing activity the net income of which is or would be taxable under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code. The facility is not considered a new downstream natural gas manufacturing facility in the hands of the taxpayer if the taxpayer's only activity with respect to the facility is to lease it to another person or persons.

(B) The facility is purchased by, or leased to, the taxpayer on or after July 1, 2020.

(C) The facility was not purchased or leased by the taxpayer from a related person. The commissioner may waive this requirement if the facility was acquired from a related party for its fair market value and the acquisition was not tax motivated.

(D) The facility was not in service or use during the 90 days immediately prior to transfer of the title to the facility, or prior to the commencement of the term of the lease of the facility: *Provided*, That this 90-day period may be waived by the commissioner if the commissioner determines that persons employed at the facility may be treated as "new employees" as that term is defined in this subsection.

(20) "New employee" –

(A) The term new employee means an individual hired by the taxpayer to fill a position or a job in this state which previously did not exist in the taxpayer's downstream natural gas manufacturing activity in this state prior to the date on which the taxpayer's qualified investment in a new or expanded downstream natural gas manufacturing facility is placed in service or use in this state. In no case may the number of new employees directly attributable to the investment for purposes of this credit exceed the total net increase in the taxpayer's employment in this state: *Provided,* That the Tax Commissioner may require that the net increase in the taxpayer's employment in this state be determined and certified for the taxpayer's controlled group: *Provided, however*, That persons filling jobs saved as a direct result of taxpayer's qualified investment in property purchased or leased for business expansion may be treated as new employees filling new jobs if the taxpayer certifies the material facts to the commissioner and the Tax Commissioner expressly finds that:

(i) But for the new employer purchasing the assets of a downstream natural gas manufacturing business in bankruptcy under chapter seven or 11 of the United States bankruptcy code and the new employer making qualified investment in property purchased or leased for business expansion, the assets would have been sold by the United States bankruptcy court in a liquidation sale and the jobs saved would have been lost; or

(ii) But for the taxpayer's qualified investment in property purchased or leased for downstream manufacturing business expansion in this state, the taxpayer would have closed its downstream natural gas manufacturing facility in this state and the employees of the taxpayer located at the facility would have lost their jobs: *Provided,* That the Tax Commissioner may not make this certification unless the commissioner finds that the taxpayer is insolvent as defined in 11 U.S.C. §101(32) or that the taxpayer's natural gas

WV Legislature

manufacturing facility was destroyed, in whole or in significant part, by fire, flood, or other act of God.

(B) A person is considered to be a new employee only if the person's duties in connection with the operation of the downstream natural gas manufacturing facility are on:

(i) A regular, full-time and permanent basis:

(I) Full-time employment means employment for at least 140 hours per month at a wage not less than the applicable state or federal minimum wage, depending on which minimum wage provision is applicable to the business.

(II) Permanent employment does not include employment that is temporary or seasonal and therefore the wages, salaries, and other compensation paid to the temporary or seasonal employees will not be considered for purposes of §11-13GG-5 of this code.

(ii) A regular, part-time, and permanent basis: *Provided,* That the person is customarily performing the duties at least 20 hours per week for at least six months during the taxable year.

(21) "New job" means a job which did not exist in the downstream natural gas manufacturing business of the taxpayer in this state prior to the taxpayer's qualified investment being made, and which is filled by a new employee.

(22) "New property" means:

(A) Property, the construction, reconstruction, or erection of which is completed on or after July 1, 2020, and placed in service or use after that date; and

(B) Property leased or acquired by the taxpayer that is placed in service or use in this state on or after July 1, 2020, if the original use of the property commences with the taxpayer and commences after that date.

(23) "Original use" means the first use to which the property is put, whether or not the use corresponds to the use of the property by the taxpayer.

(24) "Partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, which is treated as a partnership for federal income tax purposes, and which is not a trust or estate, a corporation, or a sole proprietorship.

(25) "Partner" includes a member in such a syndicate, group, pool, joint venture, or other organization.

(26) "Person" includes any natural person, corporation, or partnership.

WV Legislature

(27) “Property purchased or leased for business expansion” —

(A) *Included property.* -– Except as provided in paragraph (B), the term “property purchased or leased for business expansion” means real property and improvements thereto, and tangible personal property, but only if the real or personal property was constructed, purchased, or leased and placed in service or use by the taxpayer, for use as a component part of a new or expanded downstream natural gas manufacturing facility as defined in this section, which is located within the State of West Virginia. This term includes only:

(i) Real property and improvements thereto having a useful life of four or more years, placed in service or use on or after July 1, 2020, by the taxpayer.

(ii) Real property and improvements thereto, acquired by written lease having a primary term of 10 or more years and placed in service or use by the taxpayer on or after July 1, 2020.

(iii) Tangible personal property placed in service or use by the taxpayer on or after July 1, 2020, with respect to which depreciation, or amortization in lieu of depreciation, is allowable in determining the personal or corporation net income tax liability of the business taxpayer under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code, and which has a useful life, at the time the property is placed in service or use in this state, of four or more years.

(iv) Tangible personal property acquired by written lease having a primary term of four years or longer, that commenced and was executed by the parties thereto on or after July 1, 2020, if used as a component part of a new or expanded downstream manufacturing business facility, shall be included within this definition.

(v) Tangible personal property owned or leased, and used by the taxpayer at a business location outside this state which is moved into the State of West Virginia on or after July 1, 2020, for use as a component part of a new or expanded downstream natural gas manufacturing facility located in this state: *Provided,* That if the property is owned, it must be depreciable or amortizable personal property for income tax purposes, and have a useful life of four or more years remaining at the time it is placed in service or use in this state, and if the property is leased, the primary term of the lease remaining at the time the leased property is placed in service or use in this state, must be four or more years.

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

(i) Property owned or leased by the taxpayer and for which the taxpayer was previously or is currently being allowed tax credit under §11-13D-1 *et seq.*, §11-13Q-1 *et seq.*, §11-13S-1 *et seq.*, or §11-13U-1 *et seq.* of this code.

(ii) Property owned or leased by the taxpayer and for which the seller, lessor, or other transferor, was previously or is currently being allowed tax credit under §11-13D-1 *et seq.*,

WVLegislature

§11-13Q-1 *et seq.*, §11-13S-1 *et seq.*, or §11-13U-1 *et seq.* of this code.

(iii) 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.

(iv) Airplanes and helicopters.

(v) Property which is primarily used outside this state, with use being determined based upon the amount of time the property is actually used both within and outside this state.

(vi) Property which is acquired incident to the purchase of the stock or assets of the seller, unless for good cause shown, the Tax Commissioner consents to waiving this requirement.

(vii) Natural resources in place.

(viii) Purchased or leased property, the cost or consideration for which cannot be quantified with any reasonable degree of accuracy at the time the property is placed in service or use: *Provided,* That when the contract of purchase or lease specifies a minimum purchase price or minimum annual rent the amount thereof shall be used to determine the qualified investment in the property under §11-13GG-6 of this code if the property otherwise qualifies as property purchased or leased for expansion of a downstream natural gas manufacturing facility.

(28) "Purchase" means any acquisition of property, but only if:

(A) The property 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.

(B) The property is not acquired by one component member of an affiliated or controlled group from another component member of the same affiliated or controlled group, as applicable. The Tax Commissioner may waive this requirement if the property was acquired from a related party for its then fair market value; and

(C) The basis of the property 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 property in the hands of the person from whom it was acquired; or

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

(29) "Qualified activity" means any downstream natural gas manufacturing business activity subject to any of the taxes imposed by §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code but does not include the activity of severance or production of natural resources.

WV Legislature

(30) "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 affiliated or controlled group as the taxpayer.

For purposes of this subdivision, control, with respect to a corporation, means 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.

(31) "Replacement downstream natural gas manufacturing facility" means any property (other than an expanded downstream natural gas manufacturing facility) that replaces or supersedes any other property located within this state that:

(A) The taxpayer or a related person used in or in connection with any downstream natural gas manufacturing facility for more than two years during the period of five consecutive years ending on the date the replacement or superseding property is placed in service by the taxpayer; or

(B) Is not used by the taxpayer or a related person in or in connection with any downstream natural gas manufacturing facility for a continuous period of one year or more commencing with the date the replacement or superseding property is placed in service by the taxpayer.

(32) "Taxpayer" means any person subject to any of the taxes imposed by §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code.

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

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

(35) "United States Internal Revenue Code" or "I.R.C." means the Internal Revenue Code as defined in §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code.

WV Legislature

(36) “Used property” means property acquired after June 30, 2020, that is not “new property”.

WV Legislature