

2009 Legislative Developments Affecting State and Local Taxation

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Income Tax

Tax credits for new job expansion. Income tax credits are available under the new Colorado Job Growth Act. See the full discussion under the sub-heading for Economic Development under HB 09-1001, below.

Requirements for collecting donations by non-qualified entities. HB 09-1052 amends C.R.S. § 6-16-105.5, effective August 5, 2009, to adopt a new subsection (b)(l). This new section requires that any non-501(c)(3) entity that places receptacles to collect discarded personal property, to place a legend upon the receptacle that clearly informs persons placing articles in the receptacle that the donated items do not qualify for a charitable tax deduction. This requirement does not apply if the owner of the receptacle gives all of the property to a qualified charity or sells any of the discarded items and gives all of the proceeds to a qualified charity.

Tax credits for donation of water rights. HB 09-1067 adopts C.R.S. § 39-22-533, effective August 5, 2009, that allows a tax credit to be authorized by the Colorado Water Conservation Board. The credit is available to donors of water rights who reach an agreement with the Board for the allowance of discretionary donations of such water rights to the Board. Water rights associated with property already subject to a conservation easement or already decreed for irrigation, do not qualify. The maximum credit available to an owner of water rights is 50% of the fair market value of the rights. The exact amount of the credit, subject to the maximum limitation, is awarded by the Board through negotiation with the donor and depends upon factors listed in the authorizing statute and regulations to be promulgated by the Executive Director of Revenue.

The program will sunset on December 31, 2014. Credits are only available for payment in years in which tax revenues grow by 6% over the prior fiscal year. Credits awarded, but not yet payable due to revenue limitations, may be carried forward to a qualified year. Total credits awarded but not yet payable cannot exceed \$2,000,000.00. Awarded credits that exceed the owner's present

tax liability, result in tax refunds for the balance. This is an unusual feature for such programs.

Requirements for corporations to report investments in listed tax-shelter transactions or in captive REITs or Regulated Investment Companies. See the discussion of HB 09-1093 under the subheading, Tax Administration, below.

Tax credits for individual investments in qualified small business activities. See the discussion of HB 09-1105 under the subheading, Economic Development, below.

Sourcing of sales of mutual fund companies modified. HB 09-1311 amends C.R.S. § 39-22-303.7, effective immediately, to source gross receipts arising from mutual fund sales for the purpose of apportioning income for taxation, in proportion to shares held by residents domiciled in Colorado.

Tax credits for fuel and contaminant efficient vehicles. HB 09-1331 adopts a number of income tax credits for qualified expenditures made between January 1, 2010 and December 31, 2016. Qualified purchases include alternative fuel vehicles, plug-in hybrid vehicles, modification costs to vehicles modified to utilize idling reduction technology, or alternative fuel engine exchanges. The amount of credit depends upon the class of vehicle, its capacity, age and weight among other factors. The act also contains some overall maximum credits allowed per fiscal year.

Qualified capital gains treatment eliminated. HB 09-1366 amends C.R.S. § 39-22-518 to eliminate the exemption for capital gains on qualified Colorado real or personal property effective with tax year 2010 and after.

Tax return check offs. Income tax form voluntary donation-checkoffs are authorized or extended for the following charitable programs:

1. Make-A-Wish Foundation by HB 09-1043 adopts C.R.S. §§ 39-22-3601-3604 for tax years 2010 through 2011.
2. Easter Seals Disability Fund donations extended by HB 09-1050 through 2011.
3. Multiple Sclerosis Fund donations extended through 2011 by SB 09-126.
4. Special Olympics Colorado Fund extended through 2011 by SB 09-287.

Property Taxes

Special improvement districts within a special district authorized. HB 09-1005 adopts a new subsection under the provisions of the Colorado Subdivision Act, C.R.S. § 32-1-1101 (g), effective immediately. Under this provision, a county or municipality that authorized a special district can approve a new special district located within specific geographic boundaries entirely within the existing district. This new sub-district can propose and finance a new improvement within the sub-district upon unanimous approval of all property owners, or by majority voter approval at a special election to approve the district's expenditure proposal. The board of the new sub-district may adopt the manner in which the assessment for the improvements' costs will be apportioned to the property owners.

Creation of library districts authorized. HB 09-1072 authorizes the creation of library districts pursuant to C.R.S. § 24-90-107, effective August 5, 2009. Districts can be authorized by a single governmental entity or by inter-governmental cooperation between multiple agencies. Each such district will have the power to adopt a property tax levy to pay for its operations levied upon the property located within its defined area as established by the governing body during formation of the district.

Disclosure reports to assessors required for advertised, furnished, residential rental property. HB 09-1110 adopts a new provision, C.R.S. § 39-5-108.5, that requires those listing property for rent to provide certain information to the assessor upon request, effective August 5, 2009. This bill was amended during the session to weaken its effect and make its provisions less onerous to listing agencies.

Furniture, fixtures and appliances in residential property are exempt from personal property taxation unless the property (house, condo or apartment) is used to generate any rental income (gross, not net). If a residential property is used for rental purposes, then the owner must report and pay personal property taxes on its contents. Many such owners, particularly individuals and small businesses, apparently do not do so.

This new provision authorizes assessors to send requests, no more than two per year, to listing agents, brokers, property managers and advertising media providers requesting information (owner's name and address) on properties listed for rent in their county. Owners will be notified by the assessor of their obligation to report and pay taxes; or, the assessor may issue "best-information-available" assessments.

An interesting feature of the new law limits the assessor's authority to assess omitted property. But for the new law, assessors have no statute of limitation to assess in arrears any omitted property. The new law amends C.R.S.

§ 39-5-125 to limit an assessor's power to assess property to the current tax year for any assessment arising from a disclosure by a listing or advertising agent. This provision does not insulate owners from assessments generated from information learned by the assessor from other sources. Creative lawyers may see opportunities for planning or to proffer litigation defenses to retroactive omitted property assessments.

Time shortened to provide information by oil and gas producers. HB 09-1161 amends C.R.S. § 39-7-101(3)(a) to reduce from 45 to 30 days the time allowed to file an information report required by subsection (1) of the that section. Such reports require information on the assets utilized upon and the production received from a well site. The bill is effective August 5, 2009. The reporting due date is triggered by an information request notice from the assessor to the owner/operator of the well.

Interest on tax refunds paid in error on exempt property limited to two years. HB 09-1265 amends C.R.S. § 39-10-114, effective August 5, 2009, to limit interest on refunds of property taxes paid in error upon property entitled to tax exemption pursuant to §§ 39-3-106 to 113 to two years from date of payment.

Residential assessment ratio redetermined. HB 09-1360 amends C.R.S. § 39-1-104.2 to set the assessment ratio for residential real property for the current biennium period of 2009-2010 at 7.96 per cent.

Minor modification in definition of a qualified charitable exemption. SB 09-42 amends C.R.S. § 39-1-102 (8.5) to expand the definition of "not for gain or profit" to allow an entity organized for the purpose of qualifying for tax credits under 26 U.S.C. § 46 D to qualify. Such an entity will be required to make a payment in lieu of the property tax otherwise due on such property to the school district where the property is located. The bill also amended § 39-3-137 to allow the State Board of Equalization to authorize the Property Tax Administrator to reestablish the tax exempt status for charitable properties whose exemption lapsed, usually due to technical violations in reporting.

Task force to study the personal property tax. Senator Mark Scheffel, a corporate and tax attorney, came closer than any previous legislator to eliminating the personal property tax. However, the bill ultimately stalled due to the impact on the state budget and upon some counties where the personal property tax constitutes a significant portion of the budget. SB 09-085 adopted C.R.S. § 2-2-1501 to create a legislative task force to examine the issues and propose alternative solutions to the next legislative assembly. The Committee will consist of five senators, five house members, the Property Tax Administrator, a representative of the Municipal League and of the Colorado Counties, Inc., a chamber of commerce member, a representative from a small business and a large business and a citizen with expertise in tax policy.

The committee may not use the services of either legislative staff or legislative legal services. Members receive no compensation and no reimbursement for expenses. The committee must meet at least five times, the first prior to August 1, 2009. A final report is due by November 1, 2009.

Special valuation procedures for solar energy generating facilities. SB 09-177 amends C.R.S. §§ 39-4-101 and 102, effective immediately, to define and provide that the actual value of solar facilities shall only be valued for property tax purposes by use of the income approach. The bill also amends § 39-5-104.7 to limit the residual value of personal property in a solar facility that is not actively generating power.

Temporary elimination of the partial property tax exemption for senior's residences. SB 09-276 amends C.R.S. § 39-3-203 for property tax year 2009 to eliminate the property tax exemption available to qualified seniors on a portion of the value for a qualified owner-occupied residence.

Sales and Use Tax

Conditional sales and use tax refunds for qualified clean energy and medical device projects. HB 09-1035 amends C.R.S. §§ 39-26-401 through 403 to expand the existing "biotechnology" state sales and use tax refund provisions to add "clean technology" and "medical device" industries as potential qualified taxpayers entitled to the refunds, effective August 5, 2009.

Clean technology is defined as:

- a. renewable energy generation,
- b. products and technologies used in renewable energy,
- c. products and technologies that enhance efficient storage, distribution or consumption of energy, or
- d. products and technologies that mitigate human impact on the environment.

Medical device is defined as a therapeutic or diagnostic machine or tool that improves human or animal health.

A qualified taxpayer must employ at least fifty full time employees. A tax refund application must be submitted between January 1 and April 1 of the year following the year in which the taxes were incurred on the purchase of personal property used in these operations. The refunds are limited to no more than \$50,000 per year per taxpayer.

These refunds are conditioned on annual excess tax proceeds being available under C.R.S. § 24-75-201.1 [now requires a 6% annual growth in tax revenues] and the Department of Revenue must post on its website by January 1

of each year whether proceeds for tax refunds are available. Refunds earned, but not payable due to budget limitations, can be carried forward for to a year in which such funds are available. The program will sunset July 1, 2014.

Clarification of penalty authority. HB 09-1101 amends C.R.S. § 39-26-118(20(a), effective immediately, to make it clear that the Executive Director of Revenue has the authority to add a penalty and penalty interest if a sales or use taxpayer fails to file a timely report, pay taxes due or fails to accurately report taxable transactions. The penalties were not changed. The bill clarifies ambiguities, not add new provisions.

Exemption for components of solar thermal energy systems. HB 09-1126 adopts a state sales and use tax exemption by amending C.R.S. § 39-26-724(a). While the act is effective immediately, the tax exemption only applies to system components installed between July 1, 2009 and prior to June 30, 2017. Qualified components include solar collectors, tanks for associated gases or liquids, pumps, impellers and fans, heat exchangers, support structures, and any other system components including pipes, valves, gauges, fittings, insulation and controls. For AC electrical generators using solar capacity power, system components do not include equipment after the first step-up transformer.

Sales tax exemption for cigarettes eliminated. HB 09-1342 amends C.R.S. § 39-26-706 to eliminate the state sales tax exemption on the sale of cigarettes for the period July 1, 2009 through June 30, 2011. However, the bill prohibits the taxation of cigarettes by counties, municipalities and special districts specified with in the act (state collected, not home rule entities).

Retail vendor's fee reduced. SB 09-212 amends C.R.S. § 39-26-105(1)(f)(II) for the period between March 1, 2009 and December 31, 2011 to reduce the fee a retailer is entitled to retain to collect, report and remit state sales tax from 3.33% to 1.35% for retailers who file less than monthly returns. SB 09-275 amends C.R.S. § 39-26-105(1)(f)(I) to eliminate the vendor's fee for state sales tax for monthly filers for the period July 1, 2009 through June 30, 2011. The bill also contains a provision that if general fund revenues are forecasted to exceed a 6% annual growth for fiscal year 2010-2011, the vendor fee will be reinstated in full in October, 2010.

Other Taxes

Strengthen provisions for collection of tobacco excise taxes. HB 09-1173 amends several sections of the tobacco excise tax law effective August 5, 2009. The act authorizes a transfer of proceeds for the 2009-2010 fiscal year from the tobacco litigation fund to the general fund to defray the expenses of the new enforcement provisions to collect delinquent tobacco excise taxes.

The Executive Director of Revenue is now required to publish lists of licensed Colorado tobacco wholesalers and distributors. If the Director seizes any tobacco products upon which Colorado excise taxes have not been paid, the Director may levy a penalty up to \$.25 per cigarette. Any person in possession of tobacco products obtained from any wholesaler or distributor not listed by the Director, and upon which no Colorado excise tax has been paid, is also liable for payment of the tobacco excise tax upon such products. If the party owing such tax does not pay the tax within 30 days of notice, he may be liable for up to an additional 500% penalty levied by the Executive Director.

Blending of tax exempt diesel fuel with biodiesel fuels permitted. SB 09-098 amends C.R.S. § 39-27-102.5 to allow federally licensed blenders to blend tax exempt diesel fuel with biodiesel fuels produced from plant or animal waste. The bill is effective August 5, 2009. The blended fuel will still qualify for the exemption from the state fuel excise tax pursuant to § 39-27-104. Fines are provided for the unauthorized blending of such fuels, \$5,000 for the first violation and \$10,000 for subsequent violations. The bill also allows for revocation of a blender's license for repeated violations.

Tax Administration

Additional oversight for conservation easements. The Colorado Division of Real Estate is authorized to accept gifts, grants and donations to monitor the compliance with existing requirements to monitor appraisal performance under C.R.S. § 12-61-701 et seq. pursuant to HB 09-1014. The bill also eliminated the \$600 cap on fees charged for submitting appraisal reports under C.R.S. § 12-61-719(8) and the \$5,800 cap on fees charged to qualified nonprofit entities authorized to hold conservation easements pursuant to C.R.S. § 12-61-720(3). The bill also eliminated the three year certification limitation provision contained in § 12-61-720(9).

Requirements for corporations to report investments in listed tax-shelter transactions or in captive REITs or Regulated Investment Companies. HB 09-1093 adopts the Colorado Reportable Transactions Act as C.R.S. § 39-21-651 et seq., effective immediately. The law defines captive real estate investment trusts and regulated investment companies. The essential test is ownership of more than 50% of the entity's shares. Insurance companies are exempt. "Listed transactions" are those transactions listed by the IRS pursuant to Section 6011 of the Internal Revenue Code (tax shelters) or transactions between a taxpayer and its captive REIT or RIC. Such listed transactions must be disclosed by corporate taxpayers in its annual report to the Department of Revenue. Material advisors to listed transaction promoters, as defined in 26 U.S.C. § 6111, are also required to file disclosure reports. Failure to file the disclosures or reports required under the Act may result in penalties. The Executive Director may waive penalties.

Penalties are set as follows:

- a. taxpayer reportable transactions, \$15,000 per transaction;
- b. taxpayer listed transactions, \$50,000 per transaction;
- c. Material Advisors, \$20,000 per transaction;
- d. Material Advisors, \$10,000 per day, beginning 21 days after notice by the Director to list a transaction or its parties, until a transaction is reported.

Intergovernmental agreements with counties authorized to collect sales taxes. HB 09-1130 amends C.R.S. §§ 29-2-106 and 39-26-122.5 to authorize counties and the Department of Revenue to enter into intergovernmental agreements to foster sales tax reporting and collection. The act is effective August 5, 2009. The act has no substantive provisions so the terms of mutual cooperation would be left up to the agreements themselves.

Coordination of gambling winnings and tax refunds to intercept proceeds to pay outstanding obligations. HB 09-1137 creates a separate registry within the judicial department to collect information on criminals, gamblers and taxpayers in order to facilitate the interception of tax refunds, lottery winnings and gambling earnings in order to satisfy criminal restitution debts, child support and tax debts. The bill is effective September 1, 2009. It amends a number of sections within each segment of the law impacted by the bill. The minimum debt allowed to be registered is \$300.00. A fee of \$25 per debt is added to the debt amount to offset costs of administering the registry.

Sharing of information on mineral severance taxes. HB 09-1148 amends C.R.S. § 39-29-113 (18), effective August 5, 2009, to authorize the Department of Revenue to provide taxpayer information to the Department of Local Affairs. Such information must remain confidential and may only be used by Local Affairs to verify severance data reports and confirm the methods of distributing severance taxes.

Uniform Power of Attorney Act. HB 09-1198 adopts C.R.S. § 15-14-701 et seq., effective January 1, 2010, the Uniform Power of Attorney Act, with modifications. This new law will be discussed in detail by the author of the Estate and Gift Tax Section but is referenced here due to its potential applicability to tax practitioners.

Interest on overpaid sales, use and income tax obligations. HB 09-1219 amends C.R.S. § 39-21-110 to add a new subsection addressing concerns that taxpayers overpay potential state tax liabilities as an investment opportunity. The new law, effectively immediately, provides that the state is not obligated to pay any interest on overpayments “not made incident to a bona fide and orderly discharge of actual liability”. If an overpayment is less than twice the actual liability, the Department bears the burden of proof that such payments were not

bona fide. If the payments are more than twice the tax due, the taxpayer bears the burden of proof on bona fide payments.

The law also sets explicit time periods of between 14 and 45 days (depending on time of filing the tax return) allowed by the Department to make applicable income tax refunds pursuant to § 39-22-622(2).

State revenue and tax database transparency. HB 09-1288 adopts C.R.S. §§ 24-72.4-101 through 103 to codify the Executive Order 07-09 issued April 2, 2009. The act requires the State Information Officer to create and maintain a web-based portal providing access to state taxes and spending in accordance with the parameters of the act. Confidential taxpayer information is excluded. The data will begin with 2009-2010 fiscal year data. Information must be listed as current within five days of any change. In the future, up to ten years of data shall be available on the website. The data must be in a downloadable structured data application format.

Economic Development

Income tax credits for qualified new projects. HB 09-1001 adopts a new section, C.R.S. § 39-22-531, the Colorado Job Growth Incentive Tax Credit law. The law becomes effective August 5, 2009 and applies to tax periods from January 1, 2009 through December 31, 2014. Tax credits earned during this period can be carried forward for up to ten years after being earned.

Any business entity, but not an individual, may apply to the Colorado Economic Development Commission for approval of a new proposed business project. A qualified project must create either:

- a. Twenty or more full time jobs with a salary of 110 % of the average annual salary in the county where the project is located, or,
- b. Five full time jobs if located in an enhanced rural enterprise zone at 110% of the average annual salary in that zone.

Any new job must last at least one year to earn an income tax credit.

Granting of the credits is discretionary with the Commission. Factors to be considered by the Commission include:

- a. The number of new jobs created,
- b. The project encourages, promotes or stimulates development in “key economic sectors”,
- c. Consideration of cost differentials for labor, utilities, taxes and other costs if the project were located in another state,
- d. The project could reasonably be located in another state and at least one other state is being considered for the project,

- e. The project would likely not be located in Colorado but for the tax credits allowed by the Commission;
- d. In making a decision to award the credits the Commission shall consider the economic health of the state, the viability of the new jobs, the economic benefit to the state and the maximum amount of credit necessary to attract these new jobs to the state.

Credits that are earned under the program are generated annually for a period of five years. The maximum credit that can be awarded for a project is determined by multiplying the number of projected new jobs times one half of the estimated federal excise taxes due on the employees holding the new jobs pursuant to 26 U.S.C. § 3111(a) [the 6.2% employer's share due under FICA]. The Commission can elect to award less than the maximum allowable amount.

The Commission must report annually to the legislature and the Department of Revenue regarding information on the projects and credits actually earned. The Department also has audit power to confirm the facts regarding projects that are awarded credits under the program. Estimated credits awarded, but not actually earned, must be refunded with interest and penalty, if applicable.

Tax credits for individual investments in qualified small business activities. HB 09-1105 adopts C.R.S. § 24-48.5-112 to administer qualified investment tax credits defined and allowable under C.R.S. § 39-22-532, effective September 1, 2009. The program is administered by the Colorado Office of Economic Development ("COED"). A Qualified investment means an investment:

- a. Made during calendar year 2010, and;
- b. In exchange for common or preferred stock, interest in a partnership or limited liability company or a convertible (to equity) indenture, and;
- c. Be at least \$25,000.00, and;
- d. The investor shall not hold more than 30% of the voting control of the entity prior to the new investment.

A qualified investor must be an individual or an entity other than a "C" corporation as defined in § 39-22-103(2.5). A qualified small business means a corporation, LLC or partnership that:

- a. Has its principle place of business in Colorado, and;
- b. Has 50% of both its gross assets and number of employees in Colorado (including all assets and employees of affiliates), and;
- c. Has at least two full-time, non-administrative, employees who are residents of Colorado, and;
- d. Its principle business is research, development or manufacturing of new technology, products or processes, and;

- e. Been in operation for less than five years, and;
- f. Has total annual revenue of less than \$2,000,000 and assets of less than \$5,000,000, after the new investments.

A prospective investment recipient may, but is not required to, file an application with the COED to certify it as a Qualified Small Business. After making an investment in a Qualified Small Business, an investor makes application to COED for approval of the investment for the issuance of an investment income tax credit certificate. The COED has 90 days to approve or deny an application. Pass through entities must allocate awarded credits in proportion to the actual ownership interests.

Credits are allowable up to 15% of the new investment, up to a limit of \$20,000 per investor. Credits are nontransferable and non-refundable. Credits are taken by attaching a credit certificate to the investor's return. Failure to attach the certificate voids the credit. Credits not claimed during tax year 2010 are forfeited. Unused credits, credits in excess of tax due, can be carried forward. Total credits available under the program are limited to \$750,000 and if the limit will be exceeded, the first in time to file and qualify, are allowed until such sum is fully exhausted.

Tax refunds and credits for qualified commercial truck purchases. HB 09-1298 adopts several sections of law providing incentives to purchase and operate in Colorado new commercial size trucks, effective immediately. Included is C.R.S. § 39-26-113.5 that provides for refund of sales and use taxes paid upon the purchase of a model year 2010 or newer truck tractor with a gross vehicle weight of 26,000 pounds or greater. The refund will be paid, 10% in the year of purchase, 15% in the second year of use and 25% in each of the following three years. The act does not appear to require the owner to continue to own said vehicle for each of the following years.

The act amends C.R.S. § 39-30-104 to authorize an income tax credit upon the purchase of a model year 2010 or newer commercial truck, truck tractor, tractor or semi-trailer with a gross weight of 16,000 pounds or greater and including associated parts purchased at the time of the vehicle. The vehicle must be registered and used in a trucking operation based in an enterprise zone located in Colorado and having at least one full time Colorado resident employee. The credit is equal to:

- a. .5 % of the qualified investment for tax year 2011,
- b. 1.0% of the qualified investment for tax year 2012,
- c. 1.5% of the qualified investment for tax year 2013,
- d. 2.0% of the qualified investment for tax year 2014,
- e. 3.0 % of the qualified investment for tax year 2015.

The tax credit program ends January 1, 2017.

The act also adopts the “Green Truck Grant Program” pursuant to C.R.S. § 42-1-3-1 et seq. The program has several separate provisions to reduce the need to idle trucks during operation and retire trucks made prior to 1990. The program is administered by the Governor’s Energy Officer and it permits grants to qualified recipients. A qualified recipient must be the registered owner of a commercial truck, tractor or semi trailer in Colorado and use it in inter or intra state commerce. Grants may be used to repay up to 25% of the costs incurred to purchase and install fuel efficient technologies and emission-control devices approved by the United States EPA Smartway Transport Program, not to exceed \$50,000 per recipient. Total grants authorized under this portion of the program may not exceed \$500,000 per fiscal year.

Grants may also be used, up to \$5,000 per recipient for the retirement and scraping of a 1989 model year or later truck. A qualified truck must have been driven at least 10,000 documented miles in the preceding year and be donated to a scrap metal recycler operating within EPA guidelines. Total grants authorized under this portion of the program may not exceed \$250,000 per fiscal year.

Study ordered to review enterprise zones. SB 09-234 adopts C.R.S. § 24-46-104.5, effective immediately, directing the Colorado Economic Development commission to review the boundaries and uses of enterprise zones and issue a report to the Legislature by March 31, 2010.

Miscellaneous Fees

Vehicle registration fees increased. HB 09-1036 amends C.R.S. 42-3-304(24) to increase from \$.25 to \$.60 the portion of annual registration fees required for Class A, B and C vehicles, effective July 1, 2009. SB 09-002 amends C.R.S. § 42-3-04(21) to increase the portion of the vehicle registration fee used to fund EMS services from 1 to 2 dollars, effective immediately.

Surcharge fee levied upon breast cancer awareness license plates. HB 09-1164 adopts a new fee of \$25 for the issuance of special breast cancer awareness license plates pursuant to C.R.S. § 42-3-217.5(3)(c). The fee is optional between now and June 30, 2012 and becomes mandatory after that date. The primary function of the bill is to allow Colorado to qualify for federal funds to operate a breast and cervical cancer screening program.