

DEPARTMENT OF REVENUE

Taxation Division

INCOME TAX

1 CCR 201-2

Special Rule 9A. Apportionment of Income for Electricity Producers.

Basis and Purpose. The statutory bases for this rule are sections 39-21-112(1) and 39-22-303.6, C.R.S. The purpose of this rule is to prescribe the inclusion of certain receipts of electricity producers in the receipts factor. Notwithstanding section 39-22-303.6(1)(d), C.R.S., and pursuant to the authority granted in section 39-22-303.6(9)(a)(I), C.R.S., the Department has determined that the exclusion of certain hedging transactions from the receipts factor of electricity producers does not fairly represent the extent of an electricity producer's business activity in Colorado. Gains and losses on hedging transactions entered into to manage risks associated with the gross income electricity producers expect from their wholesale sales of electricity are best accounted for in the receipts factor as adjustments to the gross receipts from such sales. Therefore, the Department establishes the following rule prescribing the adjustment of receipts from such sales based on the income, gain, or loss from certain hedging transactions, as described in this rule.

- (1) **General Rule.** Except as provided in paragraph (3) of this rule, or as otherwise specifically allowed or required by the Executive Director pursuant to section 39-22-303.6(9), C.R.S., any income, gain, or loss from a transaction properly identified as a hedge under section 1221(b)(2)(A) or 475(c)(3) of the Internal Revenue Code shall be excluded from a taxpayer's receipts pursuant to section 39-22-303.6, C.R.S., for the purpose of apportionment.
- (2) **Definitions.** For purposes of this rule,
 - (a) "Hedging transaction" means any transaction that a taxpayer enters into in the normal course of the taxpayer's trade or business primarily to manage risk of price changes. The Department shall construe this term in a manner consistent with its use in section 1221(b)(2)(A)(i) of the Internal Revenue Code.
 - (b) "Electricity producer" means any taxpayer treated as a C corporation, S corporation, or partnership for Colorado income tax purposes, wherever resident or organized, primarily engaged in the generation and sale of electricity.
- (3) **Special Rule for Including Hedging Transactions in Receipts.**
 - (a) Except as provided in paragraph (3)(c) of this rule, any amount included in the receipts of an electricity producer pursuant to section 39-22-303.6(1)(d), C.R.S., from a wholesale sale of electricity shall be adjusted by the income, gain, or loss from a hedging transaction that hedged such wholesale sale of electricity if the identification requirements prescribed in this paragraph (3)(a) are satisfied. The identification requirements are met if the electricity producer's books and records clearly identify a hedging transaction as managing risk relating to a particular sale or sales of electricity, including anticipated sales, that must be included in the electricity producer's receipts pursuant to section 39-22-303.6(1)(d), C.R.S. The identification requirements are met only if identification is made at the time and in the manner consistent with 26 CFR 1.1221-2(f) and (g) (as in effect September 2021) and the taxpayer's books and records

include the information necessary to determine the applicable adjustment prescribed by this paragraph (3).

(b) The adjustment prescribed by this paragraph (3) shall be made with respect to the calculation of both the numerator and the denominator of the apportionment fraction pursuant to section 39-22-303.6(4), C.R.S. The numerator shall be adjusted to the extent that the receipts of the wholesale sale of electricity that was hedged were in Colorado as determined by section 39-22-303.6, C.R.S., and the rules thereunder.

(c) In the case of a taxpayer filing a combined return pursuant to section 39-22-303, C.R.S., a consolidated return pursuant to section 39-22-305, C.R.S., or both, the adjustment to the receipts factor required by this paragraph (3) shall not apply unless both the income from the wholesale sale and the gain or loss from the hedging transaction that hedged that wholesale sale are included in the taxpayers' combined, consolidated, or combined and consolidated federal taxable income.

(4) **Incorporation by Reference.** 26 CFR 1.1221-2(f) and (g) incorporated by reference in paragraph (3)(a) of this rule includes only the version that was in effect as of September 2021, and no later amendments to the incorporated federal regulation. The regulation incorporated by reference is available for public inspection during regular business hours at the Department of Revenue, 1881 Pierce Street, Lakewood, CO 80214. A copy of this regulation is also available for a reasonable charge from the Department of Revenue, 1881 Pierce Street, Lakewood, CO 80214, 303-866-5627, and is available online at <https://www.govinfo.gov/content/pkg/CFR-2020-title26-vol13/pdf/CFR-2020-title26-vol13.pdf> beginning on page 276 of the linked volume of the Code of Federal Regulations.

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