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(Plus all the volunteer
help we can get)

STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

PROPOSED RULES

STATE REGISTER FILING

AGENCY Tax Department of West Virginia

CONTACT PERSON Dale W. Steager PHONE 348 -3356

TYPE OF RULE Legislative

TITLE OF RULE Business and Occupation Tax Regulations

W. Va. Leg. Reg. (BOT) 11-10, Series XIII [1974]

CHAPTER 11 ARTICLE 10 SERIES XIII

AUTHORITY W. Va. Code § 11-10-5(a)

CHECK APPLICABLE ITEMS BELOW TO SHOW KIND OF ACTION BEING TAKEN

☐ NEW RULE

☒ NOTICE OF HEARING

☒ AMENDMENTS TO EXISTING RULE

☐ NOTICE OF AGENCY APPROVAL
(legislative rules only)

☐ REPEAL OF EXISTING RULE

☐ NOTICE OF AGENCY ADOPTION
(interpretive & procedural
rules only)

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FILING OF RULES WHICH
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State Tax Department
of West Virginia

Charleston 25305

ARCH A. MOORE, JR.
GOVERNOR

MICHAEL E. CARYL
COMMISSIONER

November 1, 1985

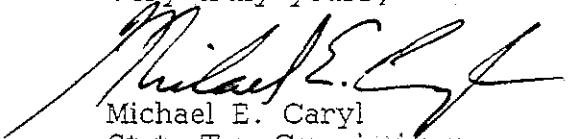
Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, WV 25305

Dear Mr. Hechler:

Attached are one copy of proposed amendments to existing legislative regulations pertaining to the West Virginia business and occupation tax, W. Va. Leg. Reg. (BOT) 11-10, Series XIII (1973), a fiscal note and Notice of Public Comment Period relative thereto.

These proposed legislative amendments relate to the 1982 amendments to W. Va. Code §§ 11-13-2a and 11-13-2b regarding the taxation of producers of timber and manufacturers of timber products.

Very truly yours,


Michael E. Caryl
State Tax Commissioner

MEC/rrs

Attachments

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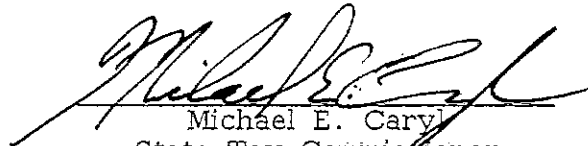
NOTICE OF COMMENT PERIOD ON PROPOSED RULE

AGENCY: State Tax Department of West Virginia
RULE TYPE: Legislative
RULE TITLE: Business and Occupation Tax Regulations
W. Va. Leg. Reg. (BOT) 11-10 Series XIII (1973)

A COMMENT PERIOD ON THE ABOVE PROPOSED RULE HAS BEEN
SCHEDULED AND WILL END ON DECEMBER 16 AT 4:30. WRITTEN
COMMENTS ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Michael E. Caryl
State Tax Commissioner
State Capitol Building, WW-300
Charleston, WV 25305

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THE PROPOSED
RULE.


Michael E. Caryl
State Tax Commissioner

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SECRETARY OF STATE

FISCAL NOTE FOR PROPOSED RULES

RULE NO.: _____ SUBJECT: _____
TYPE OF RULE: LEGISLATIVE X INTERPRETIVE ____ PROCEDURAL ____
AGENCY: Tax Department ADDRESS: Capitol Building, Charleston
AUTHORIZED REPRESENTATIVE: Dale W. Steager PHONE: 348-3556

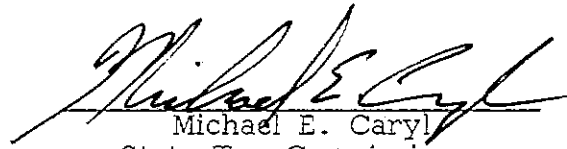
	ANNUAL	FISCAL YEAR		
1. Effect of Proposed Rule:	Increase	Decrease	Current	Next Thereafter

Estimated Total Cost	\$	\$	\$	\$	\$
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Personal Services	
Current Expense	
Repairs and Alterations	N O N E
Equipment	
Others	

2. Explanation of above estimates: These legislative rules merely explain and clarify statutory amendments.

3. Date: November 1, 1985 Agency: Tax Department


Michael E. Caryl
State Tax Commissioner

MEC/rrs

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PROPOSED AMENDMENTS
WEST VIRGINIA ADMINISTRATIVE REGULATIONS
STATE TAX DEPARTMENT
LEGISLATIVE
Chapter 11-10
Series XIII
(1973)

Subject: Business and Occupation Tax

Section 1. General.

1.01. Type of Regulations -- These regulations are "legislature rules" as defined in West Virginia Code § 29A-1-2(d) [1982].

1.02. Scope -- These regulations explain and clarify the West Virginia business and occupation tax, West Virginia Code § 11-13-1 et seq. The proposed amendments implement, explain and clarify the 1982 amendments to W. Va. Code §§ 11-13-2a and 11-13-2b, relating to the tax liability of producers of timber and manufacturers of timber products.

1.03. Authority -- These regulations are issued under authority of West Virginia Code § 11-10-5(a).

1.04. Effective Date -- These regulations became effective on July 1, 1974. These proposed amendments take effect on

1.05. Filing Date -- These regulations were promulgated on June 1, 1974 and filed on June 1, 1974 in the office of the Secretary of State. In compliance with West Virginia Code § 29A-2-5 [1982], these regulations were refiled with the Secretary of State on December 29, 1982. These proposed amendments were filed in the State register

on November 4, 1985.

1.06. Citation -- These regulations may be cited as W. Va. Leg. Reg. (BOT) 11-10, Series XIII, § _____, page _____ [1974].

1.07. Proposed Amendments -- In the case of proposed amendments to these regulations, strike-throughs indicate language that would be stricken and underscoring indicates language that would be added.

1.08. Summary of Proposed Amendments.

(a) Proposed amendments to these regulations were filed November 1, 1985, to implement, explain and clarify the 1982 amendments to W. Va. Code §§ 11-13-2a and 11-13-2b, relating to the business and occupation tax liability of producers of timber and manufacturers of timber products.

(1) Section 2a.07(i), Example 7, beginning at page 79, relating to determination of business and occupation tax liability of producers of timber, would be deleted.

(2) Section 2a.07(j), Example 8, at page 84 would be re-designated Example 7.

(3) Section 2a.08, at page 86, is new. It provides rules by which a producer of timber determines his business and occupation tax liability under W. Va. Code § 11-13-2a.

(4) Section 2b.08, at page 124.1 is new. It provides rules by which a manufacturer of timber products determines his business

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and occupation tax liability under W. Va. Code § 11-13-2b.

These proposed amendments to legislative rules and regulations will not take full force and effect until after the legislature has by law, granted authority for the Tax Commissioner to promulgate these proposed amendments in conformity with W. Va. Code § 29A-3-13 [1982]. W. Va. Code § 29A-3-9.

2a.07. Problems and Solutions Relating to the Production of Natural Resources.

(a) Presented below are several examples, problems and solutions thereto regarding the proper taxation of natural resource production. For certain problems and examples, there are prepared tax returns attached hereto to further clarify the situations which may arise.

(b) Even though these problems and examples deal primarily with coal production, the principles and rules stated in these situations are equally applicable to producers of all other natural resource products. Producers of timber must follow sections 2a.08 of these regulations.

(c) Example 1.

(1) A owns land within West Virginia from which he mines coal. A sells his produced natural resources to B Power Company. A must report the value of such natural resources, as determined by the gross proceeds of sale, under the coal production classification of the business and occupation tax form. Therefore, A reports the full amount received from B under production and computes his tax liability thereon.

(2) A is not required to report income under either the retail or wholesale classifications even though the sale to B may be deemed a wholesale sale for purposes of definition only. It is provided

that any person who is a producer and makes sale of his produced natural resources to other producers, wholesalers, jobbers, retailers, manufacturers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed under the wholesale or retail classifications. See page 125 of these rules and regulations.

(d) Example 2.

(1) A owns land within West Virginia and produces coal therefrom. In 1972, A produced 55,000 tons of which 40,000 tons were sold to B Power Company at ten dollars (\$10.00) per ton and 12,000 tons were transported without sale to a coal broker (or selling agent) without the State. The broker does not take title to the natural resource product and consequently has no ownership therein. The remaining 3,000 tons were sold, at the mine, to individuals for home consumption at twelve dollars (\$12.00) per ton. The coal broker subsequently, and before the close of the taxable year 1972, makes sale of the coal at thirteen (\$13.00) per ton.

(2) A, on the 1972 business and occupation tax return, must report the gross proceeds of the sale (40,000 tons @ \$10.00/ton = \$400,000) to B under the coal production classification.

(3) A must also report the amount of the sale made by the broker (12,000 tons @ \$13.00/ton = \$156,000) under the production classification. Inasmuch as the fee or commission retained by

the broker is an expense of doing business to A, A receives no deduction or exclusion from gross income for the amount retained by the broker.

(4) In the transactions described in the previous two paragraphs of this example, A is not required to report the gross income accruing therefrom under either the retail or wholesale classification on the business and occupation tax return.

(5) The sales of coal made by A to individuals for household consumption are deemed to be sales at retail. Therefore, under the production classification, A must report gross income of \$36,000 (3,000 tons @ \$12.00/ton = \$36,000); for the amount of the tax under the production classification shall be equal to the value of the articles produced as shown by the gross proceeds derived by the sale thereof by the producer. A must also report this amount (\$36,000) under the retail classification; for the statute provides that any person taxable under the production classification and engaging in the business of selling his natural resources at retail in this State shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed by the retail classification for the privilege of engaging in the business of selling such natural resources at retail in this State. In other words, A is engaging in multiple "business" activities (production and sales at retail) and is taxable under each.

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(6) A complete 1972 business and occupation tax return for A under this example, would reflect gross income of \$592,000 under production ($\$400,000 + \$156,000 + \$36,000 = \$592,000$) and \$36,000 under the retail classification.

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(e) Example 3.

(1) X, a manufacturer of chemicals, owns land within West Virginia which contains coal deposits. X contracts for the production of such coal with B. The contract between X and B provides that B will produce the coal and deliver the same to X and in payment for such service, X will pay B one dollar (\$1.00) per ton.

(2) In the year 1972, B mines and delivers to X 750,000 tons of coal of which X consumes 700,000 tons in its manufacturing process. Of the remaining tonnage, X sells 40,000 tons to a wholesaler at \$12.00 per ton and sell 10,000 tons to an affiliated company at \$3.00 per ton. X pays B \$750,000 for the service performed by B in 1972.

(3) X is the producer of the natural resource product, and B is a contract miner; for X owns the coal in place and is entitled to immediate possession upon extraction thereof by B, whereas B has no economic interest in the mineral and may only sever for X and deliver the product to X for a stipulated fee. Therefore, X must report the gross income of the coal under the production classification, and B must report his fee under the service classification.

(4) Since X is a producer of a natural resource product which he uses or consumes in his business, he must determine the value of said production (700,000 tons) under the applicable rule set forth in § 2 of these rules and report the same as taxable income

under the coal production classification on the business and occupation tax form. (See pages 43 through 50 of these rules.) The provision of section 2 of these rules which applies to the determination of value of natural resource products used or consumed by the producer provides that such rules shall be applied in the order stated. Rule (1), page 49, cannot be used by X under this example since the selling price at the place of use is unknown; therefore, to determine the value of the 700,000 consumed tons of coal, X may apply rule (2) on page 49. Said rule makes use of the average prices at which sales are made to customers during the year. To average price in this instance would be based on the sale of the 40,000 tons made to the wholesaler which was at \$12.00 per ton. Therefore, for the used or consumed natural resource products, X must report \$8,400,000 ($\$12.00 \times 700,000 = \$8,400,000$) as the value thereof under the coal production classification on the business and occupation tax return.

(5) The 10,000 tons sold to an affiliate must also be reported under the production class. However, the selling price (\$3.00/ton) was not indicative of the true value of the products. Therefore, X must apply the applicable rule set forth in § 2 of these rules. (See pages 47 and 48 herein.) Since the selling price to the affiliate was not at true value, this sale was not used in determining the value of the products used or consumed by X (see the preceding paragraph). In order to determine the proper value of the products

sold to the affiliate, X will apply rule (1) on page 47. Said rule provides that whenever sales are made to affiliates, the value shall correspond to the 'gross proceeds from sales to nonrelated purchasers of similar products of like quality and character. In this example, a sale was made to a nonrelated purchaser (the wholesaler) at \$12.00 per ton. Therefore, X must place a value of \$12.00/ton on that tonnage sold to the affiliate and report the resultant amount (10,000 tons @ \$12.00/ton = \$120,000) under the coal production classification.

(6) The gross proceeds of sale derived from the sale to the wholesaler (40,000 tons @ \$12.00/ton = \$480,000) will also be included under the production classification.

(7) For purposes of this example, the 1972 business and occupation tax return of X will reflect taxable income of \$9,000,000 under the coal production classification. This taxable amount (\$9,000,000) is a total of the value of consumed products (\$8,400,000), the value of the products sold to the affiliate (\$120,000) and the gross proceeds of the sale to the wholesaler (\$480,000).

(8) B, who performed services for X, is a contract miner and will report his fee (\$750,000) under the service classification.

(f) Example 4.

(1) A, the owner of land, leases said land to B who desires to mine the coal therefrom. B agrees to pay A a royalty of

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.30¢ on each ton of coal mined by B.

(2) In the year 1972, B extracts 50,000 tons of coal and pay A his royalty of \$15,000 (50,000 tons @ .30¢/ton = \$15,000). B sells the tonnage to a manufacturer for \$450,000.

(3) Inasmuch as B is producing natural resource products under a lease which gives him the exclusive right to sever or mine the mineral deposits and which obligates him to pay to the owner of the deposits in place a royalty after severance, B is the producer of the natural resources and is not a contract miner. Therefore, B must report the gross proceeds of sale (\$450,000) under the production classification on the tax return.

(4) A, the royalty recipient, must report his income (\$15,000) under the royalty and rental classification.

(5) If at a later date, B subleases to C and C agrees to pay B a royalty of .40¢ per ton, C becomes the producer and reports accordingly and A and B are royalty recipients liable under the royalty classification.

(6) If at a later date, C contracts with D whereby D will mine the coal and deliver it to C at a stipulated fee per ton, C remains the producer; A and B remain as royalty recipients and D becomes a contract miner who will report his fee under the service classification.

(g) Example 5.

(1) CB, a coal broker, purchases from P, a producer, 500,000 tons of coal. The gross proceeds derived from this sale are not, of course, reported by P under either the retail or wholesale classes inasmuch as this was a sale made by a producer to a jobber, CB.

(2) CB sells one-half of the tonnage to XY, who is also a jobber or wholesaler. CB must report the gross proceeds from such sale under the wholesale classification.

(3) The remainder of CB's tonnage is screened, graded, washed and oiled by MN for a fee paid by CB. MN will report his fee under the service classification for he is preparing products for sale which are owned by another. CB, however, has become a manufacturer for this prepared portion of his tonnage and upon sale thereof at wholesale, he will be required to report the gross proceeds derived therefrom under the manufacturing classification. If CB sells this manufacturing tonnage to affiliates, ships it without the State without sale thereof or consumes it in his business, he must determine the value of said tonnage in accordance with § 2 of these rules as any other manufacturer would.

(h) Example 6.

(1) A, a landowner, leases his land to B for the purpose of drilling for oil. The lease provides that B will pay A a

one-eighth royalty in cash or in kind.

(2) The well is successful and produces 80,000 barrels of oil. B is a 'producer; therefore, he must pay business and occupation tax under the oil production classification on the gross proceeds of sale or value of the entire production. B receives no deduction for any amount in cash or in kind paid to A as a royalty. A, of course, reports his royalty under the royalty classification.

(3) If at a later date, A makes sale of his royalty in kind (barrels of oil), he must report the gross proceeds from said sale under the retail or wholesale classification, depending on whether the sale was at retail or wholesale.

(4) Example-7:

(1) A owns timber on the stump and cuts and sells the same to a manufacturer for \$500,000.

(2) A person who owns timber on the stump and who produces by cutting the timber and who sells the same at wholesale, e.g. to a manufacturer, shall report the entire gross proceeds derived from such wholesale sale only under the timber production classification of the business and occupation tax form, regardless of whether such timber is sold on the ground or delivered to the mill.

(3) Another section of standing timber which was also owned by A was cut by him for his own use. This timber is prepared for sale by A by his sawing, cutting, etc., it himself into lumber. A

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person who owns timber on the stump and who produces by cutting the timber and who manufactures or prepares for sale the timber by cutting it into lumber shall report the gross proceeds derived from the sale of such lumber under the manufacturing classification on the business and occupation tax form. If it is not possible to ascertain the gross proceeds from the sale of the lumber, A must refer to § 2 of these rules and determine the value of such lumber in accordance therewith.

(4) The value of the timber on the ground after severance which was consumed by A in the manufacture of lumber must also be valued in accordance with § 2 and reported under the timber production classification of the business and occupation tax form.

(5) If A severs and uses his own timber in the manufacture of pulp, the rules as stated hereinbefore are equally applicable.

(6) For purposes of this example, we will assume that A values the timber on the ground (which he later consumes in the manufacture of lumber), in accordance with the applicable rule set forth in § 2, at \$60,000. A later sells the manufactured lumber, at wholesale, for \$150,000.

(7) For a payment of \$20,000, A agrees to cut timber owned by another. A never takes title to this section of timber but

only performs a service for the owner thereof by severing the same. Therefore, A shall report this payment under the service classification. The owner who hired A to sever this timber is the producer thereof.

(8) A also purchases severed timber and manufactures or prepares for sale such severed timber into lumber. A must report the gross proceeds derived from the sale of the lumber manufactured from purchased severed timber under the manufacturing classification. In this instance, A received \$40,000 from the sale of the lumber manufactured from purchased severed timber. A's prepared 1972 business and occupation tax return is presented at the pages immediately following.

(9) Under the timber production classification, A will report gross income of \$560,000: \$500,000 received for cutting and selling his own timber to a manufacturer, and \$60,000 as the value of his timber on the ground which he later consumed in his own manufacturing process.

(10) Under the manufacturing classification, A will report gross income of \$190,000: \$150,000 received from the wholesale sale of lumber which he manufactured from his own timber, and \$40,000 received from the wholesale sale of lumber which he manufactured from purchased severed timber.

(11) Under the service classification, A will report

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~~\$20,000,--the amount he received from another for severing timber
owned by another.~~

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(i) Example 8 7.

(1) AB is a producer of natural gas within West Virginia. The entire output of natural gas from AB's well is purchased at the well mouth by a public utility for \$25,000. On his business and occupation tax return, under the natural gas production classification, AB will report \$25,000 as gross income. The law permits, from natural gas production, an exemption or exclusion of \$5,000. Therefore, AB will report \$20,000 as taxable income under the natural gas production classification.

(2) Same situation as above except AB is required, in order to sell his gas, to construct a transmission line from his well to the purchaser's gathering system. Where the natural gas is delivered into the purchaser's system, the purchaser pays AB \$32,000 as delivered price. AB, to determine well-mouth value to be reported under the natural gas production classification, is permitted to deduct the \$5,000 exclusion and fifteen percent (15%) of the delivered price ($15\% \times \$32,000 = \$4,800$). Therefore, AB's deductions, which total \$9,800, are applied against his gross receipts to arrive at his taxable value ($\$32,000 \text{ less } \$9,800 = \$22,200$) to be reported under the natural gas production classification. However, AB must report the amount of this transmission deduction (\$4,800) under the service classification on the business and occupation tax return.

(3) For the purposes of the production of natural gas,

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multiple co-owners of natural gas in place, lessees thereof, or others being vested with title to part or all of the gas, as personal property, immediately after production, shall be deemed to be a "group or combination acting as a unit" and one "person." Therefore, this "person" shall be eligible for one \$5,000 exemption only.

2a.08. Business of Producing Timber.

(a) General. -- A person engaged in this State in the business of severing, reducing to possession and producing timber for sale, profit or commercial use is subject to business and occupation tax under the production of timber classification. A timber producer will also be taxable under other classifications of the business and occupation tax when the activity engaged in is not taxable under this classification. The privilege of producing timber ends once the tree is severed from its root structure and its limbs and top are removed. R. S. Burruss, d.b.a. R. S. Burrus Lumber Co., et. al. v. Tax Commissioner, W. Va., 297 S.E.2d 836, 839 (1982). All cuts thereafter are taxable under the manufacturing classification. W. Va. Code § 11-12-2a [1982]. Additionally, beginning April 1, 1982, the value taxed under this classification which is attributable to the production of timber privilege will not again be taxable to the producer of the timber under the manufacturing classification. W. Va. Code § 11-13-2b [1982]. Beginning April 13, 1985, however, manufacturers of timber products are required to report gross proceeds derived from wholesale sales made in West Virginia under the wholesale classification. W. Va. Code § 11-13-2c [1985].

(b) Tax rate. -- Beginning April 1, 1982, the tax rate is 2.5% of the gross value (taxable value) of the produced timber products as determined under subsection (c). For tax periods ending

prior to April 1, 1982, the tax rate is 2.2%.

(c) Taxable value. -- The measure of tax under this classification is the gross value of the timber at the point where the production privilege ends. This is an amount equal to the fair market value of the timber production at that point. When a sale occurs at that point, taxable value is gross proceeds of sale. In the absence of such a sale, taxable value is that amount which corresponds as nearly as possible to the gross proceeds from the sale of similar products of like quality or character determined under the following uniform and equitable rules. W. Va. Code § 11-13-2 [1985].

Rule 1.

(1) In the absence of sales at the point where the timber production privilege ends, gross value must be determined in light of the most reliable and accurate information available. Such factors as the following are to be given due consideration.

(A) Character and quality of the timber as determined by species, age, size, condition, etc.;

(B) The quantity of timber per acre, the total quantity under consideration, and the location of the timber in question with reference to other timber;

(C) Accessibility of the timber (location with reference to distance from a common carrier, the topography and other features of the ground upon which the timber stands and over which it must

be transported in process of exploitation, the probable cost of exploitation and the climate and the state of industrial development of the locality); and

(D) The freight rates charged by common carriers to important markets.

The timber in each particular case will be valued on its own merits. The Tax Commissioner will give weight and consideration to any and all facts and evidence having a bearing on the market value such as cost, actual sales and transfers of similar timber products, the margin between cost of production and the price realized for timber products, and royalties and rentals paid to the owner of the standing timber. The taxpayer bears the burden of keeping such records as may be necessary to prove the fair market of his timber at the point where production ends. In the absence of such substantiation, fair market value shall be determined under Rule 2 of this subsection.

Rule 2.

(2) At the election of the taxpayer, or in the absence of books and records to substantiate fair market value determined under Rule 1, above, the following rule shall be used to determine the gross value of timber at the point where production ends.

(A) A person who produces timber and sells his logs, and byproducts of timber production and bucking operations, on the

ground, either where the trees were felled in the forest or at a central collection point, shall report seventy-five percent (75%) of the gross proceeds of sale under the timber production classification and the remaining twenty-five percent (25%) shall be reported under the manufacturing classification. Additionally, one hundred percent (100%) of gross proceeds of sales shall be reported under the appropriate sales classification after April 13, 1985.

(B) A person who produces timber, sells and delivers his timber products, in the same condition that they leave the forest, to a saw mill, other manufacturer or consumer shall report fifty percent (50%) of his gross proceeds of sale under the timber production classification and fifty percent (50%) under the manufacturing classification, regardless of whether the sale is made within or without this State. Additionally, if the sale is made in this State, one hundred percent (100%) of the gross proceeds of sales shall be reported under its appropriate sales classification after April 13, 1985.

(C) A person who produces timber and further saws, mills or otherwise manufactures the same into lumber, cross ties, timbers, veneer and other products for sale, profit or commercial use shall report twenty-five percent (25%) of his gross proceeds of sale under the timber production classification and seventy-five percent (75%) under the manufacturing classification. Where no sale is made, the fair market value of lumber, cross ties, timbers, veneer or other

products must nevertheless be determined as provided in section 2.03(d) and twenty-five percent (25%) of that amount shall be reported under the production classification. Additionally, if a sale is made in this State, one hundred percent (100%) of gross proceeds of sales shall be reported under the appropriate sales classification after April 13, 1985.

(d) Who is the producer. -- Whenever standing timber is cut, someone is the producer of that timber for purposes of the business and occupation tax. Not every person who cuts timber from the stump, however, is the producer of that timber. Under the business and occupation tax law, the person who owns the timber immediately after its severance is the producer.

(1) A person who hires another to cut timber for him is generally the producer of that timber.

(2) A person who cuts timber for another, to which he does not take title, reports the gross income from his cutting activity under the service classification. See, Section 2h. of these regulations.

(e) Taxability of person who severs and uses or consumes timber in his business. -- A person exercising the privilege of producing timber who uses or consumes the same in his business is deemed to be engaged in the business of producing timber for sale, profit or commercial use and is required to make business and occupation tax returns on account of the production of the business showing the gross value of the timber production determined in

accordance with subsection (c). Source: W. Va. Code § 11-13-2 [1985]. See, Owens-Illinois Glass Company v. Battle, 151 W. Va. 655, 154 S.E.2d 854 (1967); Gilbert Imported Hardwoods, Inc. v. Dailey, W. Va., 280 S.E.2d 260 (1981).

(f) Contract Right to Cut. -- The holder of a contract right to cut timber, who has both the right to cut the timber and to use the products from the cutting for his own account, is the producer of that timber for purposes of the business and occupation tax. Comment. -- A quick test for differentiating between a holder of a contract right to cut and a logging contractor is that the former qualifies for depletion under section 631(a) of the Internal Revenue Code of 1954, as amended, whereas a logging contractor does not qualify.

(g) Logging Contractor.

(1) A logging contractor may have the right under a contract to cut certain timber, but is required to deliver the logs, that he never owned, to the mill or log yard designated by the owner of the timber. The contract in this instance is merely a service agreement. The logging contractor reports his gross income under the service classification of the business and occupation tax. See, Section 2h. of these regulations. The owner of the timber reports the gross value of the timber, at the point where production ends, under the production classification, and the balance under the manufacturing

classification. Additionally, one hundred percent (100%) of the gross proceeds of sale are reportable under the wholesale classification, if sale is made in this State after April 13, 1985.

(2) Although the base contract may not require the logger to deliver the logs to the owner, another contract entered into simultaneously may require it. If the two contracts are, in substance, part of one transaction, the logger has not acquired a contract right to cut and sell the timber in his own behalf.

(h) Wholesale sales. -- Prior to April 13, 1985, A producer who sells his timber products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial or industrial consumers for use or consumption in the purchaser's business is not required to pay tax again under the wholesale sales classification. W. Va. Code § 11-13-2 [1978]. Sales of timber products to the United States of America, its agencies and instrumentalities or to the State of West Virginia, its institutions or political subdivisions are also classified as wholesale sales and similarly treated. Beginning April 13, 1985, however, persons who manufacture timber or timber products are also required to report the gross proceeds of sale of wholesale sales made in West Virginia under the wholesale classification. W. Va. § 11-13-2 [1985].

(i) Retail sales. -- A timber producer who sells his timber products at retail in this State is required to report his gross value

of his timber products under the production classification and his gross proceeds of sale under the retail sales classification. W. Va. Code § 11-13-2 [1978].

(j) Definitions. -- As used in this regulation, the term:

(1) "Bucking" means the process of cutting the tree into log lengths which is generally, but not always, done prior to skidding.

(2) "Bumping" means the process of removing limbs from the trees after they have been severed. Depending upon the particular job, this is sometimes done at the place of severance, but is also often done after the tree has been removed to the collection and loading point.

(3) "Byproduct" means any additional product, other than the principal or intended product, which results from production or manufacturing activities and which has a market value, regardless of whether or not the additional product was an expected or intended result of the production or manufacturing activities.

(4) "Christmas trees" means evergreen trees commonly known as Christmas trees, including fir, hemlock, spruce and pine trees, which are sold for use as Christmas trees.

(5) "Commercial use" means the use or consumption of a produced or manufactured product, including any byproduct, in a business activity of the producer or manufacturer. "Commercial use"

also means the use or consumption of a product in a business activity of the purchaser.

(6) "Consumer" means any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of his business.

(7) "Contract right to cut". A contract right to cut timber is the right to cut timber under a binding contract and to sell the timber cut for the holder's own account or to use such cut timber in his trade or business. Not all cutting contracts give a contract right to cut. If the holder does not own the timber immediately after severance, then the cutting contract is a service contract under which the holder is performing services for compensation.

(8) "Fair market value of timber production" is the amount which would induce a willing seller to sell and a willing buyer to purchase timber products at the point where the timber production privilege ends.

(9) "Logs" refers to the section or sections of a tree which have been cut or sawed from the trunk after the same has been severed from the stump.

(10) "Orchard" means a systematic planting of fruit trees as opposed to individual plantings for ornamental purposes.

(11) "Owner of timber" means any person who owns an interest in timber, including a sublessor and an owner of a contract

right to cut timber. Such owner of timber must have a right to cut timber for sale on his own account or for use in his trade or business in order to own an interest in timber within the meaning of W. Va. Code § 11-13-2a.

(12) "Producing timber" includes the severing and bumping or delimbing of the tree. All cuts thereafter which ultimately result in a timber product are taxed under the manufacturing classification.

(13) "Pulpwood" means wood cut or prepared primarily to manufacture into wood pulp, for subsequent manufacture into paper, fiber board or other products, depending largely on the species cut and the pulping process.

(14) "Sapling" means young trees with trunks not over four inches in diameter.

(15) "Skidding" means to pull logs from the stump to the skidway, landing or sawmill.

(16) "Timber" means and includes trees of any marketable species, whether planted or of natural growth, standing or down, located on public or privately owned land, which are suitable for commercial or industrial use. The term "timber" does not include:

- (A) Trees marketed as Christmas trees,
- (B) Saplings, brush and undergrowth,

(C) Fruit trees planted in an orchard,

(D) Other trees which are usable only for firewood or for decoration, except when the wood of such is sold for a commercial or industrial use other than for use as fuel or decoration, or

(E) Trees lifted from the soil and sold with roots intact for transplanting.

(17) "Timber producer" means every person who from his own land or from the land of another under a right or license granted by lease or contract, either directly or by contracting with others for the necessary labor or mechanical services, fells, cuts and takes timber for sale, profit or commercial or industrial use. This does not include a person who under contract provides the necessary labor or mechanical services to a timber producer.

(18) "Timber products" includes tree tops, tree limbs, logs, wood chips and stumps, etc., produced from "timber".

(19) "Trees of marketable species" means those species of trees growing in West Virginia which have a commercial use.

(20) "Undergrowth" and "underbrush" include shrubs, bushes, small trees, etc., growing beneath standing timber having no commercial value.

2b.08. Business of Manufacturing Timber Products.

(a) General. -- A person engaged in this State in the business of manufacturing, compounding or preparing delimbed trees, logs or timber products for sale, profit or commercial use, either directly or through the activity of others, is subject to business and occupation tax under the manufacturing classification and shall determine his business and occupation tax liability in accordance with these regulations. He is also taxable under other classifications of the business and occupation tax when the activity engaged in is not taxable under the manufacturing classification.

(b) Tax rate. -- Prior to July 1, 1985, the tax rate was 0.88% of the taxable value of timber products as determined under subsection (c). After that date the rate is 0.80% of the taxable value.

(c) Measure of tax. -- The measure of tax under this classification is the adjusted gross value of all timber products, including byproducts, manufactured, compounded or prepared in this State for sale, profit or commercial use, regardless of place of sale or the fact that delivery may be made to points outside this State.

(d) Gross value. -- The term "gross value" means gross proceeds of sales in every instance where a bona-fide, arms-length sale of product(s) is made, regardless of whether the sale is at wholesale or retail. This amount shall include all subsidies and bonuses received with respect to the manufacture or sale of the timber

products. In the absence of a bona-fide, arms-length sale, gross value is that amount which corresponds as nearly as possible to gross proceeds from the sale of similar products of like quality or character in an arms-length transaction under similar circumstances and conditions. This gross value shall be determined under the rules set forth in Section 2.03 of these regulations.

(e) Adjusted gross value. -- The term "adjusted gross value" means "gross value" as determined under subsection (d) above, minus the following:

(1) The cost of timber or timber products which are used as ingredients, components or elements in the manufacture of timber products that are taxed under the manufacturing classification.

(A) Effective beginning April 1, 1982, taxable value of timber products manufactured in this State, which are sold or commercially used, does not include the cost of any timber or timber products purchased and used as an ingredient, component or element of a timber product manufactured in this State. Only the cost of timber or timber products that become a recognizable, integral part of the timber product is deductible. The following are examples of tangible personal property which are not deductible.

(i) A manufacturer of timber products purchases pallets. The pallets do not become an ingredient, component or element of the manufactured timber products. The cost of

the pallets is not deductible.

(ii) A manufacturer of timber products purchases paper cups, straws, napkins, plates, towels and toilet tissue. Their cost is not deductible.

(iii) A manufacturer of timber products purchases wooden crates, cardboard boxes, excelsion and wrapping materials for shipping his manufactured timber products. Their cost is not deductible.

(B) An integrated producer/manufacturer of timber products may deduct the gross value of the timber at the point where the production privilege ends. When the timber is produced in this State, the amount that may be deducted is the value of the timber reported under the production classification. See, Section 2a.08 of these regulations.

(i) Example 1. XYZ Lumber Company produces timber which it then manufactures into lumber in the State. The gross value of the timber at the point where the production privilege ended was \$2,500. The manufactured lumber was sold for \$10,000. The adjusted gross value of the manufactured timber products subject to the manufacturing tax is \$7,500.

(ii) Example 2. XYZ Lumber Company also purchases logs from other producers of timber for \$5,000. The timber products manufactured from the purchased logs is sold for \$15,000.

The adjusted gross value of the timber products subject to the manufacturing tax is \$10,000.

(iii) Example 3. L&M Lumber Company produces timber in Kentucky and manufactures it into lumber at its saw mill in the State. The lumber is sold for \$50,000. To determine the adjusted gross value of the lumber subject to the manufacturing tax, the taxpayer must first determine the gross value of its timber at the point when production ended. Following Regulation 2a(c)(2), this amount is determined to be \$30,000, and is allowable as a deduction from the \$50,000 selling price of the manufactured lumber to determine adjusted gross value in the example \$20,000. Adjusted gross value must then be apportioned since manufacturing began in Kentucky and ended in this State.

(2) Transportation charges actually paid by the manufacturer. In determining the adjusted gross value of timber products manufactured in the State, the manufacturer may deduct from "gross value" determined under paragraph 2b.08(d), the amount of out-going freight charges paid by him, from the point at which the shipment originates in this State to the point of delivery to the customer, to the extent included in gross value. Freight charges to be deductible, must actually be paid by the manufacturer. No deduction shall be allowed for expenses incurred by the manufacturer in transporting or delivering items manufactured to the purchaser, through the use of

his own equipment, regardless of whether the equipment is owned, borrowed or leased by him.

(3) Bad Debts. -- No deduction is allowed for bad debts because the measure of the tax is the value of the entire product manufactured, compounded or prepared for sale in this State.

(4) Cash Discounts. Cash discounts allowed and taken may be deducted.

(5) Returned Goods. -- The proceeds of sales which have been refunded, either in cash or by credits, upon return of the manufactured product may be deducted, if previously included in gross income.

(6) Trade-Ins -- The amount allowed as "trade-in value" for any article accepted as part payment for any manufactured product sold is not allowed as a deduction unless the article will be remanufactured in the State by the taxpayer for sale, profit or commercial use.

(7) Excise taxes.

(A) Excise taxes imposed by this State and paid by the taxpayer may be deducted.

(B) Excise taxes imposed by the Federal government which the manufacturer is required to collect from the customer and hold in trust may be deducted.

(f) Manufactured products sold at retail. -- A manufacturer who sells products manufactured in this State "at wholesale" reports

his adjusted gross proceeds of sale under the manufacturing classification, W. Va. Code § 11-13-2b, and gross proceeds of sale under the wholesale classification, W. Va. Code § 11-13-2c. See, W. Va. Code § 11-13-2 [1985]. A manufacturer who sells products "at retail" reports his adjusted gross proceeds of sale under the manufacturing classification, W. Va. Code § 11-13-2b, and gross proceeds of sale under the retail sales classification, W. Va. Code § 11-13-2c [1985]. See, W. Va. Code § 11-13-2. The term "selling at wholesale" is defined in W. Va. Code § 11-13-1 to mean and include:

(1) Sales of any tangible personal property for the purpose of resale in the form of tangible personal property.

(2) Sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity subject to business and occupation tax or the annual tax on incomes of certain carriers.

(3) Sales of tangible personal property to the United States of America including its agencies and instrumentalities, or to the State of West Virginia, including its agencies, institutions and political subdivisions.

All other sales are "sales at retail."

(g) Definitions. -- As used in this regulation, the term:

(1) "Byproduct" - means any additional product, other than the principal or intended product, which results from production

or manufacturing activities and which has a market value, regardless of whether or not the additional product was an expected or intended result of the production or manufacturing activities.

-- (2) "Chipboard" - is a timber product manufactured from small particles of waste wood.

(3) "Commercial use" - means the use or consumption of a produced or manufactured product, including any byproduct, in a business activity of the producer or manufacturer. "Commercial use" also means the use or consumption of a product in a business activity of the purchaser.

(4) "Fibreboard" - is a timber product manufactured from forest thinings and saw mill waste.

(5) "Manufacturer" - means a person engaged in the business of manufacturing, compounding or preparing or timber products for sale, profit or commercial use.

(6) "Manufacturer of timber products" - means a person who:

(A) bucks delimbed trees into log lengths;

(B) operates a sawmill for the sawing of logs into rough lumber in its various sizes and forms; or

(C) operates a cooperage mill, veneer mill, excelsior mill, paper mill, chipmill, plant or other industrial facility for the manufacture of timber products into other timber or products.

(7) "Paper, paper products, printing and publishing industry" is defined as the manufacture of pulp from wood, rags and other fibers; the conversion of such pulp into paper, paperboard and building board; the manufacture of paper, paperboard and building board; the manufacture of paper, paperboard, and pulp into bags, boxes, containers, tags, cards, envelopes, pressed and molded pulp goods, and all other converted paper products; the printing performed on the foregoing and on allied products; the printing or publishing of newspapers, books, periodicals, maps and music; and all manufacturing and service operations performed by typesetters, advertising typographers, electrotypers, stereotypers, photoengravers, steel and copper plate engravers, commercial printers, lithographers, gravure printers, private printing plants of concerns engaged in other businesses, binderies, and news syndicates.

(8) "Pulpwood" is generally manufactured from timber. It can also be manufactured from other products such as cotton and flax. Only the cost of timber and timber products used to manufacture wood pulp is deductible.

(9) "Seasoning" means to bring the wood into condition for use by exposure in open air or in kilns.

(10) "Timber products" include bark, billets, bolts, chemical wood, cooperate products, crating, cross ties, excelsior, fuelwood, logs, lumber, mine ties and props, piles, poles, ports,

pulpwood, shingles, switch ties, timber, wood and related materials, wood chips, wood flour, wooden furniture and fixtures, and all other products usually considered a timber product, but does not include any paper - or paper product, newspaper, books, magazines or periodicals.

(11) "Timber products industry" is defined as those industries which manufacture products from lumber, wood and related materials; and logging and wood preserving. It does not include any product or activity in the metal, machinery, transportation equipment and allied products industry; the jewelry and miscellaneous products manufacturing industry; the construction industry; or the paper, paper products, printing or publishing industry.

(12) "Veneer mill" means a mill which manufactures logs into very thin sheets of wood called veneer. Veneer is either used for making plywood or, if the wood has good grain and color, it is used for decorative purposes.

(13) "Wall panelling" may be composed of any material or combinations of materials including, but not limited to, solid wood, plywood, wood products, plastics, metals, etc., and may be textured, prefinished, partially finished, or unfinished. For example, a hard-board panel may have an imitation marble finish or a fiberboard panel may have an imitation burlap finish.

(h) Trees not wanted for their wood, "waste branches,"

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bark and saw dust can be used to extract oils, resins, tannin dyes and different chemicals which are important to other industries. The cost to the manufacturer of the trees, "waste branches", bark and saw dust is not deductible when determining the taxable value of oils, resins, tannin dyes and different chemicals which are extracted or manufactured from them. Similarly, the cost of oils, resins, tannin dyes and different chemicals extracted or manufactured from timber is not deductible when they are used or become an ingredient or component or element of a timber or forest product.

(i) Contractors. -- A contractor who builds houses, buildings and other structures using timber products may not deduct the cost of the timber products when determining his business and occupation tax liability.