WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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1991 AUG -9 PM 12: 17

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: STATE TAX DIVISION TITLE NUMBER: 110

CITE AUTHORITY W. VA. CODE §§11-10-5 AND 11-13A-23(b)

AMENDMENT TO AN EXISTING RULE: YES x NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 13A

TITLE OF RULE BEING AMENDED: SEVERANCE TAX

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

L. Frederick Williams

L. FREDERICK WILLIAMS, JR.
STATE TAX COMMISSIONER

State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

L. FREDERICK WILLIAMS, JR.
SECRETARY

STATEMENT OF CIRCUMSTANCE

Other than making technical corrections, the amendments clarify the court ordered changes in the distribution of the additional tax in coal and discuss successor liability for taxes.

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1991 AUG -9 PM 12: 17

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Severance Tax

Type of Rule: X Legislative ____ Interpretive ____ Procedural

Agency: State Tax Division Address: State Capitol; Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL Increase	ANNUAL Decrease	FISCAL YEAR Current	FISCAL YEAR Next	FISCAL YEAR Thereafter
Estimated Total Cost	$	$	$	$	$
Personal Services	-0-	-0-	-0-	-0-	-0-
Current Expense	-0-	-0-	-0-	-0-	-0-
Repairs and Alterations	-0-	-0-	-0-	-0-	-0-
Equipment	-0-	-0-	-0-	-0-	-0-
Other	-0-	-0-	-0-	-0-	-0-

2. Explanation of above estimates:

There should be no fiscal impact on Departmental expenses.

3. Objectives of these rules:

The regulations explain and clarify the Severance Tax imposed by W. Va. Code § 11-13A-1 et. seq.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

There should be no economic impact.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

The economic impact will vary between the counties depending upon in which county the coal is embedded prior to severance.

GASTON CAPERTON
GOVERNOR

State of West Virginia
Department of Tax and Revenue

Charleston 25305

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

L. FREDERICK WILLIAMS, JR.
SECRETARY

CONSENT TO FILE RULE

August 2, 1991

To Whom It May Concern:

Title of Rule: Serverance Tax

Title Number: 110

Series Number: 13A

Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this 2nd day of August, 1991.

L. Frederick Williams

L. Frederick Williams, Jr.
Secretary, Tax and Revenue

C. Economic Impact on Citizens/Public at Large.

There should be no economic impact.

Date: August 2, 1991

Signature of Agency Head or Authorized Representative

L. Frederick Williams, Jr.
State Tax Commissioner
Department of Tax and Revenue

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SECRETARY OF STATE

State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

L. FREDERICK WILLIAMS, JR.
SECRETARY

August 9, 1991

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: STATE TAX DIVISION

LEGISLATIVE RULE TITLE: SEVERANCE TAX

1. Authorizing statute(s) citation: W. Va. Code §§ 11-10-5 and 11-13A-23(b)

2. a. Date filed in State Register with Notice of Public Comment Period: July 1, 1991

   b. What other notice, including advertising, did you give of the hearing? Regulations mailing list attached

   c. Date of public comment period: July 1, 1991 through August 1, 1991

   d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

      Attached X No comments received

   e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact) August 9, 1991

   f. Name and phone number of agency person to contact for additional information: John Montgomery - 348-5330
      Robert Wilson - 348-5330

3. If the statute under which you promulgated the submitted rules requires certain findings and determination to be made as a condition precedent to their promulgation:

   a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

      N/A

b. Date of hearing: _____

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor? _____

d. Attach findings and determinations and reasons:

Attached: _____

SEVERANCE TAX REGULATIONS
MAILED 7/10/91

Gary White, President
West Virginia Coal Association
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Charleston, West Virginia 25301

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COMMENTS AND RESPONSES TO
SEVERANCE TAX REGULATIONS

COMMENT 1:

GENERAL: Objection to characterization of proposed changes as technical corrections. Changes are viewed as "new" interpretations, which contradict settled interpretations and statements of current law, designed to bolster litigating positions.

RESPONSE: The Department has attempted to make minor corrections to clarify the policy it has announced and followed since the imposition of the Severance Tax in place of the old business and occupation tax. The changes relate to positions which have already been adopted in letter rulings and published technical assistance advisories and simply attempt to clarify the pre-existing regulatory interpretation.

COMMENT 2:

110 C.S.R. 13A, § 2a.5.2: Objection to clarification of the use of the term resale as including both the initial sale or resale of coal severed in another state and processed in West Virginia.

RESPONSE: The Department is attempting to clarify the intent of the Legislature in enacting W.Va. Code § 11-13A-2(b)(13). To adopt their interpretation would render the statute meaningless as it references the situation of the taxpayer severing outside the State for further processing inside the State. Clearly, resale must encompass an initial sale or there would be no need to reference the taxpayer who brings his own coal into the State for further processing activities and subsequent sales which are subject to severance tax.

COMMENT 3:

110 C.S.R. 13A, § 4.1.1: Objection to the addition of "blending" in the regulatory definition of those treatment processes considered as mining under W. Va. Code § 11-13A-4(a)(1).

RESPONSE: All the commentators characterize this addition as being new to the regulation, when in fact the regulations have always included a provision in 110 C.S.R. 13A, § 5.1.1.2 stating that a coal broker, who blends coal with other purchased coal and loads and freeze treats the coal, is subject to severance tax on the value added by his activities. The purpose of enacting the severance tax was to replace, using a value added basis, the taxation of natural resources under the production and manufacturing classifications of the business and occupation tax. Blending of coal was an activity taxed under these business and occupation tax classifications and the Department has continued to tax such activity. The commentators have also taken the position

that mine owners are the only entities subject to severance tax on the value added by the treatment processes considered as mining. The commentators further attempt to limit the application of the severance tax unless all of the activities listed as mining are conducted at the same time in the same vicinity of the actual severance activity, being fully aware that all those activities are seldom performed together. Taking this position completely ignores the general tenor of the tax clearly expressed by the Legislature in West Virginia Code §§ 11-13A-3(c) and 11-13A-2(b). Further, the position of the commentators is contrary to the way in which the Department has administered the severance tax since its inception. See attached Technical Assistance Advisory No. 90-003.

COMMENT 4:

110 C.S.R. 13A, § 4.7: Objection to the clarification that "outgoing freight charges include only those transportation costs incurred subsequent to the completion of all treatment processes considered as mining under the severance tax act and those treatment processes necessary or incidental thereto." The commentator interprets this to mean the Department would disallow a transportation deduction where a producer sells coal to a third party processor FOB at the processor's plant.

RESPONSE: This is not the intention of the inclusion of this provision. It is meant to clarify that integrated producers/processors are not allowed to deduct transportation expenses incurred prior to point of sale of the coal they produce. The Department has modified the regulation to provide that outgoing freight charges include only those transportation costs incurred by the taxpayer subsequent to the completion of all treatment processes conducted by such taxpayer considered as mining under the severance tax.

COMMENT 5:

110 C.S.R. 13A, § 3.6: Objection to new allocation provisions designed to ascertain that portion of production activities occurring in West Virginia which is taxable pursuant to W. Va. Code § 11-13A-2(b)(13) as being vague and offering no guidance.

RESPONSE: The Department has added this section to provide that severance tax must be determined in a reasonable manner based upon the facts and circumstances of the particular situation. The rule is designed to give notice to taxpayers engaging in severance activities across state lines that a portion of those activities will be taxed. Given the great variety in circumstances under which this situation occurs, it is not practical to elaborate a hard and fast rule.

COMMENT 6:

The Department has received numerous comments regarding the successor liability provisions.

RESPONSE: As a result of the comments received regarding successor liability provisions, the Department has deleted the successor liability provisions in section 110 C.S.R. 13A, § 23 from the Severance Tax Regulations for further development.

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1990 JUL -5 PM 2:12

State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

CHARLES O. LORENSEN
SECRETARY

TECHNICAL ASSISTANCE ADVISORY
No. 90-003

Re: COAL PURCHASED OUTSIDE OF WEST VIRGINIA SUBJECT TO SEVERANCE TAX ON VALUE ADDED BY TREATMENT PROCESSES CONDUCTED IN WEST VIRGINIA

Recently this Office received a letter requesting a technical assistance advisory as to whether taxpayer's post production treatment process activities are subject to West Virginia Severance Tax when the taxpayer performs such activities on coal taken from the ground in another state and purchased by the taxpayer to be loaded for shipment in West Virginia. The taxpayer washes a small percentage of the coal and runs all the coal through a crusher where it is blended and then loaded for shipment by barge, rail or truck. The request for a technical assistance advisory was properly verified and otherwise in conformance with the requirements for such requests. See W. Va. Code § 11-10-5r and TAA 86-001.

Taxpayer's letter provides the following statement of facts:

> X, Inc. is a Delaware corporation that has its principal office in Morgantown, West Virginia. X, Inc. is engaged in the business of buying and selling coal and does not itself own or operate coal mines, either directly or through contract miners. In connection with its business, X, Inc. owns and operates the X, Inc. Rail and River Terminal (Terminal) located in Monongalia County at which it receives coal purchased from third parties and loads coal into rail and river transportation facilities for sale and shipment to its customers. Occasionally, coal is transported by truck from the Terminal when the river or rail facilities are not available.
>
> At the Terminal, the coal purchased by X, Inc. is sampled and analyzed. Less than 10% of the purchased coal is washed at a small preparation plant located at the Terminal. All of the coal is loaded for

> shipment by means of three feed bins and a conveyor system that moves the coal from the stockpiles to the barge, rail car or truck. The three feed bins are used to combine the appropriate portions of different quality coal to meet the specifications of X, Inc.'s customers. The conveyor system from the feed bins contains a built-in crusher so that the coal passes through the crusher whether it needs to be crushed or not. On occasion, during extremely cold weather, a freeze-proofing process is applied to the coal as it is loaded for shipment.
>
> Most of the coal purchased by X, Inc. is purchased FOB the mine, and X, Inc. pays for having the coal hauled to the Terminal. X, Inc. does not own or operate any facility other than the Terminal for the purpose of receiving, handling and shipping coal to its customers.

West Virginia Code § 11-13A-4 provides in part as follows:

> (a) Treatment processes considered as mining.-The following treatment processes (and the treatment processes necessary or incidental thereto) when applied by the mine owner or operator to natural resources mined in this state shall be considered as mining and part of the privilege taxed under this article. (Emphasis supplied).
>
> (1) Coal.-In the case of coal: Cleaning, breaking, sizing, dust allaying, treatment to prevent freezing and loading for shipment.

The taxpayer contends that it is not subject to severance tax when engaged in the treatment processes considered as mining because those treatment processes were not applied by the mine owner or operator.

The West Virginia Department of Tax and Revenue determines that the Legislature did not intend to exclude such treatment processes from severance tax by its use of the phrase "when applied by the mine owner or operator to natural resources mined in this State" in setting forth those activities subject to the privilege for which the severance tax is imposed.

The severance tax is imposed by the provisions of W. Va. Code § 11-13A-3(a) which states:

> Upon every person exercising the privilege of engaging or continuing within this state in severing, extracting, reducing to possession and producing for sale, profit or commercial use any natural resource product or products, there is hereby imposed a tax in the amount to be determined by the application of rates against the gross value of the articles produced, as shown by the gross proceeds derived from the sale thereof by the producer, except as otherwise provided, multiplied by the rates, in the classifications and according to the effective dates in subsection (b) of this section.

Subsection (c) of W. Va. Code § 11-13A-3 provides as follows:

> (c) Tax in addition to other taxes.-The taxes imposed by this article shall apply to all persons severing or processing (or both severing and processing) natural resources in this state and shall be in addition to all other taxes imposed by law.

The Legislature's use of the conjunction "or" clearly indicates that the processing of natural resources in this State is subject to the severance tax even though such natural resources may not have been severed in West Virginia. Further evidence of the Legislature's intent to tax treatment processes by all taxpayers (and not just when applied by the mine owner and operator) is found in the following definition of "gross value" under W. Va. Code § 11-13A-2(b)(6):

> (6) "Gross value" in the case of natural resources means the market value of the natural resource product, in the immediate vicinity, where severed, determined after application of post production processing generally applied by the industry to obtain commercially marketable or usable natural resource products. For all natural resources, "gross value" is to be reported as follows:
>
> * * *
>
> (D) If severed natural resources are purchased for the purpose of processing and resale, the gross value is the amount received or receivable during the reporting period reduced by the amount paid or payable

> to the taxpayer actually severing the natural resource. If natural resources are severed outside the state of West Virginia and brought into the state of West Virginia by the taxpayer for the purpose of processing and resale, the gross value is the amount received or receivable during the reporting period reduced by the fair market value of the natural resources of similar grade and quality and in the same condition immediately preceding the processing of the natural resources in this state.

Clearly the Legislature would not have included the provisions in W. Va. Code § 11-13A-2(b)(6)(D) if it did not intend that activities such as those the taxpayer engages in were to be subject to West Virginia Severance Tax upon the value added through those treatment processes made subject to the privilege taxed pursuant to W. Va. Code § 11-13A-4(a)(1).

This Department rejects the taxpayer's contention that the processing activity referred to in W. Va. Code § 11-13A-2(b)(6)(D) applies only to the situation where a mine owner or operator purchases severed coal from another operator and processes the coal for resale. No such limitation is expressed in the terms of gross value provisions of W. Va. Code § 11-13A-2(b)(6)(D) and such an interpretation would result in a determination that the Legislature intended to limit the provisions of W. Va. Code § 11-13A-4(a) in a fashion that would violate other taxpayers' rights to equal protection under the United States Constitution.

After examination of the statutory language involved it cannot be found as a matter of law that the phrase "when applied by the owner or operator" was meant to limit the application of W. Va. Code § 11-13A-4 as opposed to merely clarifying that such class was specifically to be included in its application. Therefore the Legislative regulations promulgated by this Department which address this issue are controlling. Severance Tax Regulations 110 C.S.R. 13A, § 3.5 provide as follows:

> 3.5 Processing When Not Severed By Taxpayer.-When natural resource products are purchased from an unrelated party, or are severed outside this State either by the taxpayer, or by another person from whom the taxpayer purchases such products, for the purpose of processing such products in activities which are deemed to be the exercise of a privilege subject to the severance tax pursuant to Section 5 of these regulations, the taxpayer must report the

gross value of such processing according to the following rules:

3.5.1 When the natural resource products are purchased from an unrelated party to be processed for resale, the gross value subject to tax shall be the amount received by the taxpayer from the sale of the processed natural resource product, reduced by the amount paid or payable to the person actually severing the natural resource.

3.5.2 When the natural resource product is severed by the taxpayer or a related party outside of the State of West Virginia, to be processed in West Virginia for resale, the gross value subject to the tax shall be the amount received by the taxpayer from the sale of the processed natural resource product, reduced by the gross value of the unprocessed natural resource product as determined under Section 3.5 of these regulations.

3.5.3 When the taxpayer purchases natural resource products or severs natural resource products outside of the State of West Virginia and imports those products, to be processed in West Virginia for the purpose of sale to related parties or to be used or consumed in the taxpayers business, the values determined under Section 3.5 of these regulations shall be substituted for the amount received from the sale of the processed natural resource product under Subsections 3.4.1 and 3.4.2.

3.5.4 In no case may the taxpayer owning natural resource products purchased or brought into the State of West Virginia for processing activities subject to the severance tax pursuant to Section 5 of these regulations take a deduction or allowance from gross value for amounts paid to an independent contractor to perform the processing services.

For the foregoing reasons, taxpayers who process natural resources which where severed by the taxpayer or another party outside of this State, must pay West Virginia Severance Tax upon the value added to the natural resources by such processing activities. When coal is purchased outside of the State and brought into the State and subjected to "cleaning, breaking,

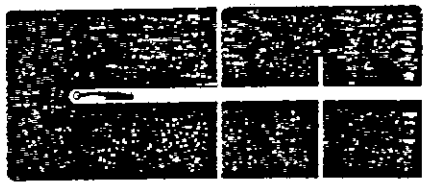
sizing, dust allaying, treatment to prevent freezing and loading for shipment," severance tax is due upon the difference in value of the coal as determined by reducing the amount received by the taxpayer from the sale of the processed coal by the amount paid or payable to the person actually severing the coal.

State Tax Commissioner Charles O. Lorensen has delegated authority to issue this Technical Assistance Advisory to General Counsel Dale W. Steager.

Dale W Steager

Dale W. Steager
General Counsel

Date: 6-3-90



WEST VIRGINIA COAL ASSOCIATION

July 31, 1991

RECEIVED
1991 AUG -1 AM 10:00
STATE TAX DEPARTMENT
LEGAL DIVISION

Honorable L. Frederick Williams, Jr.
Secretary of Tax and Revenue
State Tax Commissioner
Room WW-300
State Capitol Building
Charleston, West Virginia 25305

Re: 1991 Proposed Severance Tax Regulations

Dear Secretary Williams:

This letter contains our written comments relating to the proposed Severance Tax Regulations (Title 110, Series 13A) filed in the State Register on July 1, 1991. These comments first summarize our general concerns respecting the proposed Regulations. Next, we will comment upon the specific changes of most concern to the West Virginia Coal Association.

A. General Comments

While we appreciate the Department's efforts to prospectively announce new interpretations of the Severance Tax laws via proposed Regulations, the Association is concerned with the Department's use of rulemaking to bolster what appear to be litigating positions in areas of evolving disputes with particular taxpayers. The proposed Regulations do not implement or explain any recent statutory change--and there have been numerous significant statutory changes of late affecting members of the Association. Instead, the proposed Regulations announce new interpretations respecting a statute that is now six years old, and that has been the subject of several prior sets of legislative regulations.

We disagree with your apparent characterization of the circumstances under which the proposed Regulations were filed. In the Department's summary of the proposal filed with the proposed Regulations pursuant to West Virginia Code § 29A-3-4(b), the Department states as follows:

1301 Laidley Tower • Charleston, West Virginia 25301 • Telephone (304) 342-4153

STATEMENT OF CIRCUMSTANCES

> Other than making technical corrections, the amendments clarify the distribution of the tax on coal which is a result from a court order and discusses successor liability for taxes.

Many of the specific concerns of the Association expressed below relate neither to the distribution of the tax on coal nor to successor liability. In our view, the proposed Regulations attempt to expand the application of the Severance Tax to various activities not currently subject to the tax under the terms of the statue and current regulations. Accordingly, while the Department characterizes several potentially significant new interpretations of the Severance Tax Act as "technical corrections," we view these interpretations as substantive changes--inconsistent with settled interpretations and statements of the current law.

B. Specific Items of Concern

We now turn to specific items of concern to the Association regarding the proposed Regulations.

(1) 110-13A-2a.5.2: New Gross Value Determinations.

The proposed Regulations redefine the term "gross value". The underlying statute, West Virginia Code section 11-13A-2(b)(6)(D), in relevant part provides as follows:

> If natural resources are severed outside the State of West Virginia and brought into the State of West Virginia by the taxpayer for the purpose of processing and resale, the gross value is the amount received or receivable during the reporting period reduced by the fair market value of the natural resources of similar grade and quality and in the same condition immediately preceding the processing of the natural resources in this State. (emphasis supplied)

The proposed Regulations reformulate this statutory provision in relevant part as follows:

> When the natural resource product is severed by the taxpayer or a related party outside the State of West Virginia, to be processed in West Virginia for sale or resale, the gross value subject to the tax shall be the amount received by the taxpayer from the sale of the processed natural resource product, reduced by the gross value of the unprocessed natural resource product as defined under Section 2a.6 of these regulations.

Prop. Reg. § 110-13A-2a.5.2 (1991). The reformulation of the statute and the insertion of the phrase "sale or" in the proposed Regulations constitutes a clear departure from, and has no support under, the statutory language. In essence, the Department now interprets the terms "resale" and "sale" interchangeably, an interpretation that is refuted by the statutory definition of "sale" in the Severance Tax Act. W.Va. Code § 11-13A-2(b)(13). The term "resale" does not mean "sale or resale" and we recommend that you amend the proposed Regulations to restore the current language.

(2) 110-13A-4.1.1: Including Blending in Production.

The proposed Regulations also revise the regulatory definition of the term "the production of coal." The relevant portion of the underlying statute reads as follows:

> The following treatment processes (and the treatment processes necessary or incidental thereto) when applied by the mine owner or operator to natural resources mined in this State shall constitute as mining and part of the privilege taxed under this article.
>
> (1) Coal.--In the case of coal: Cleaning, breaking, sizing, dust allaying, treating to prevent freezing and loading for shipment.

W.Va. Code § 11-13A-4(a)(1). The proposed Regulations add to the list of treatment processes considered as mining:

> The following treatment processes . . . when applied by the mine owner or operator to natural resources mined in this State shall be considered as mining and part of the privilege taxed:
>
> 4.1.1 Coal.-In the case of coal, the term "production of coal" shall include all activities and values arising from the severance or extraction of coal and/or the ordinary processing activities including crushing, working, cleaning, drying, sorting, sizing, blending[,] dust alloying [sic], loading for shipment and freeze treatment. When any of the activities are performed, the value added to the coal shall be considered gross value attributable to the owner of the coal taxable under the severance tax.

Prop. Reg. § 110-13A-4.1.1 (1991). The insertion of the term "blending" in the proposed Regulations again constitutes a departure from past regulations. Moreover, this new provision, if retained, also conflicts on its face with West Virginia Code section 11-13A-4(b) and proposed Regulation § 110-13A-4.2.8, both of which expressly exclude blending from the activities covered by the privilege of producing coal. Accordingly, we again recommend that the current Regulations be retained and that the new proposal be abandoned as being confusing and inconsistent with the statute.

(3) 110-13A-4.7: New Outgoing Freight Deduction Limit.

The proposed Regulations also attempt to limit the long-standing transportation deduction without any relevant statutory change, as follows:

> In certain instances, producers of natural resource products are permitted to deduct outgoing freight charges from the gross proceeds of sale or value to arrive at taxable value under the severance tax. Outgoing freight charges include only those transportation costs incurred subsequent to the completion of all treatment processes considered as mining under the severance tax act and those treatment processes necessary or incidental thereto.

Prop. Reg. § 110-13A-4.7 (1991). The effect of the new amendment is to disallow a transportation deduction where a producer (typically a small producer) sells coal to a third party processor FOB at the processor's plant. Under current law (and under the law predating the adoption of the Severance Tax), outgoing freight charges were an allowable deduction to the producer. Now, this proposed Regulation reverses the Department's long-standing interpretation. Because the new restriction constitutes a major reversal without any underlying legislative change, we suggest that the Department strike the new language and retain its long-standing interpretation.

(4) 110-13A-3.6: New Allocation Provision.

The proposed Regulations add the following new language:

> In those instances in which the same person partially produces coal within West Virginia and partially produces coal without West Virginia, a portion of the gross proceeds of sale are taxable under the severance tax.

Prop. Reg. § 110-13A-3.6 (1991). Again, this new language is not contained in the statute nor is it necessarily implied. The current law provides explicit guidance regarding multi-jurisdictional issues, but does not extend the imposition of the tax to the kind of activities set forth in the proposed Regulation. Moreover, this new rule provides no concrete guidance other than stating that "a portion . . . is taxable." Such a vague statement is of little practical use in determining the reasonableness of the Department's apparently expansive view of the Severance Tax let alone in aiding taxpayer compliance.

(5) 110-13A-23: Expansion of Successor Liability.

Furthermore, we would like to address the Department's successor liability announcement embodied in the proposed Severance Tax Regulations as well as several other proposed regulation filings this summer. Prop. Reg. § 110-13A-23 (1991) (Severance Tax); see also Prop. Reg. § 110-15-4.9 (1991) (Consumers Sales and Service Tax and Use Tax); Prop. Reg. § 110-24-25 (1991) (Corporation Net Income Tax); Prop. Reg. § 110-23-11.3 (1991) (Business Franchise Tax); and § 110-19-15 (1991) (Soft Drinks Tax). From a technical standpoint, we question the wisdom of scattering the interpretation of a

single statutory provision (W.Va. Code § 11-10-11(f)) throughout five or more exhaustive sets of regulations. Chances for inconsistent amendments are high and complexity created by the numerous provisions is in stark contrast to the legislative background accompanying the 1978 adoption of the West Virginia Tax Procedure and Administration Act. See W.Va. Code § 11-10-1.

Perhaps more importantly, from a substantive standpoint, the successor liability provisions introduce new ambiguities that could make it increasingly difficult and costly to transfer a business or business assets in West Virginia.

The amount of successor liability triggered by West Virginia Code section 11-10-11(f) is not specified in the statute. The proposed Regulations, however, extensively set forth the Department's view of the amount of successor liability, in the following new section:

> 23.9 The liability of a successor extends to taxes incurred in the course of operation of the business by the former owner and any successor liability of the former owner. The liability may include any liability of the former owner for tax, interest, additions to tax, and penalties that is due and payable, and any such liability that is not due and payable because the former owner has not filed tax returns at the time required by law. The liability includes all taxes, penalties, interest, and additions to tax, whether assessed or unassessed against the former owner, without regard to whether a tax lien has been issued or perfected against the former owner. If any former owner is given a certificate from the Tax Department stating that no taxes are due from his former owner, then the successor shall only be liable for the tax liability of his former owner not covered by the said certificate.

> 23.9.1 The liability of a successor includes taxes that are required by law to be paid prior to the sale or transfer of the business, business assets, or stock of goods, even if the liability of the former owner is not determined at the time of the sale or transfer. However, if an audit conducted after the sale or transfer shows a deficiency for periods prior to the sale or transfer, the deficiency is a liability of the former owner and a liability of the successor.

Prop. Reg. § 110-13A-23.9 (1991). Accordingly, the proposed Regulations broadly impose successor liability on amounts "not determined at the time of the sale." If the Department fails to limit the open-ended amount of potential successor liability set forth in the proposed Regulations, all informed purchasers and sellers of businesses in West Virginia will be forced to apply for pre-closing clearance from the State Tax Department. The delay caused by such application processing will increase transaction costs and reduce the value of business properties in the State. If the Department is forced to audit all selling businesses, it will further strain (and result in a questionable deployment of) the Department's limited auditing resources. Accordingly, the unnecessarily broad successor liability provision is in our view of dubious merit from the standpoint of compliance and administration.

The statute could be reasonably interpreted to apply only to taxes remaining unpaid on the date of the sale or transfer that are disclosed in a final assessment and on tax returns filed by the seller. We believe that this is the proper interpretation of section 11-10-11(f), especially since the Code contemplates that the purchaser may protect itself by withholding so much of the consideration as will satisfy the tax, additions and interest due. If (as under the proposed Regulations) this withholding amount cannot be fixed or reasonably estimated by a purchaser, the statutory withholding alternative is completely superfluous.

Further, in our opinion, the statute should be viewed in light of general tax principles. Under federal income tax law, if a corporation sells or transfers its assets to another corporation, the successor is not liable for the debts, including tax debts, of the seller. See Atlas Tool Co. Commissioner, 614 F.2d 860 (3rd Cir. 1980). There are four

limited exceptions to this general rule: (1) the purchaser agrees to assume the transferor's debts, (2) the transaction amounts to a consolidation or merger, (3) the purchasing corporation is merely a continuation of the selling corporation and (4) the transaction is a fraudulent attempt to escape the liability for the seller's debts. See M. Saltzman, IRS Practice & Procedure ¶ 17.05 (2d. ed. 1991). We are unaware of any states that would impose successor liability as broadly as the proposed Regulations would, and we believe the IRS and other states (like West Virginia in the past) have not suffered unduly because of a reasonably limited view of successor liability. In summary, we believe the costs far outweigh the potential benefits associated with proposed Regulation § 110-13A-23.9.

In addition to our concerns respecting the amount of successor liability, we believe that some other successor liability provisions could benefit by clarifying amendment. For instance, the proposed Regulations define the term "successor" (the party that incurs liability under § 11-10-11(f)) to include a person who "indirectly" purchases or succeeds to a business. Prop. Reg. § 110-13A-23.2 (1991). We assume that the term "indirectly" relates to the type of consideration utilized in the transaction (e.g., money, property and assumption of liabilities) and not the form of ownership of the enterprise. In other words, we assume the term "indirectly" as used in the proposed Regulations is not intended to pierce the corporate veil by imposing extraordinary liability on shareholders or limited partners not otherwise imposed under current tax laws. To clarify the proposed Regulation, we recommend that the phrase "directly or indirectly" be stricken and that the Department take any other steps necessary to limit and otherwise clarify § 110-13A-23.2.

Another area of confusion involves the proposed Regulation's treatment of business asset acquisitions. Section 11-10-11(f) expressly applies only to a person selling out his or its "business or stock of goods, or ceases doing business." However, the proposed Regulations expand the types of transactions resulting in successor liability to include certain sales of "business assets." The proposed Regulations broadly define "business assets" to include any asset of a corporation. Prop. Reg. § 110-13A-23.4 (1991). The proposed Regulations seemingly limit successor liability in connection with the acquisition of business assets as follows:

> A person who purchases or acquires a portion of . . . business assets, . . . may become liable as a successor where he purchases or acquires substantially all of the business assets or stock of goods of such business. If two or more persons purchase or acquire a business or stock of goods, their liability as successor is in proportion to the value of the business assets or stock of goods acquired by such person.

Prop. Reg. § 110-13A-23.3. We assume that the only way a successor could become liable under section 11-10-11(f) by virtue of buying business assets of a company that ceases thereafter to engage in that business is where the successor acquires "substantially all" of the business assets. If this assumption is correct, the proposed Regulation should be clarified to explicitly so provide. If this assumption is incorrect, the proposed Regulation, in our view, is extending successor liability to asset purchases completely beyond the scope of the statute.

Finally, we believe that some confusion respecting proposed Regulation § 110-13A-23.11 could result absent a minor modification. Currently, the section provides:

> 23.11 The liability of a successor is determined by law and cannot be avoided or altered by contracts or agreements between the former owner and successor. Thus, a contract or other agreement, providing that the purchaser, transferee, seller, or transferor is or is not responsible for the tax liability of the former owner, or that the former owner has no tax liability does not alter the liability of the successor.

Prop. Reg. § 110-13A-23.11 (1991). While the intent of the provision is clear--agreements among the parties do not bind the State in its collection efforts--the language is overbroad. We assume the proposed Regulation is not intended to alter contractual arrangements between buyers and sellers of businesses. Accordingly, the Department may wish to add the following language to the end of § 110-13A-23.11:

Nothing in this Section 110-13A-23 is intended to affect buyers or sellers' rights to subrogation, indemnity or money damages arising because of the imposition of successor liability pursuant hereto.

We believe that each of the above-mentioned topics warrant your immediate attention. We thank you and appreciate this opportunity to provide written comments to these proposed Regulations. If you have any questions or desire any additional information, please feel free to contact me.

Very truly yours,

Mark Polen

MP/prb

cc: Richard E. Boyle, Esquire ✓

West Virginia Coal Association
1301 Laidley Tower
Charleston, WV 25301

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July 30, 1991

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TAX AND REVENUE

The Honorable L. Frederick Williams, Jr.
Secretary and State Tax Commissioner
c/o Legal Division
Department of Tax & Revenue
P.O. Box 1005
Charleston, WV 25324-1005

RE: COMMENTS ON PROPOSED LEGISLATIVE RULES REGARDING THE SEVERANCE TAX, CODE OF STATE REGULATIONS, TITLE 110, SERIES 13A

Dear Secretary Williams:

This is to respectfully provide comments on the proposed severance tax legislative rules filed by your Department with the Secretary of State on July 1, 1991. In the Statement of Circumstances which accompanied that filing, it was indicated that, except for provisions relating to distribution of the tax on coal to local governments and successor liability rules (neither of which are addressed here), the other changes proposed would make merely "technical corrections."

Despite that characterization of the matters upon which the following comments are made, important, substantive legal issues are presented by the proposed changes and by the context of the existing rules in which such changes would be made.

More particularly, the "technical" change found in new section 4.1.1, adding the term "blending" to the list of ordinary processing activities which are included in the production of coal, is directly inconsistent with the governing statute. As such, that proposed amendment also discloses other serious inconsistencies between the present regulations and the governing statute.

The governing statute (W.Va. Code §11-13A-4) provides that when the owner or operator of a coal mine also performs certain processing activities with respect to its own coal or to purchased coal, those activities and the values added by virtue thereof shall be subject to the severance tax. The treatment

processes identified by the Legislature as being included in coal production are "cleaning, breaking, sizing, dust allaying, treating to prevent freezing and loading for shipment."

The statute also allows the Tax Commissioner to add, by legislative rule, any other treatment process to that list "which, with respect to the particular ore or mineral, is not inconsistent with the preceding subdivisions of this subsection (a)." W. Va. Code §11-13A-4(a)(5).

In the apparent exercise of that authority, the Tax Commissioner has previously added to the foregoing list, by legislative rule, the treatment processes of crushing, working, drying and sorting. Now the Tax Commissioner would propose to add "blending" to that same list.

Such latter amendment, now pending, is, however, directly at odds with the governing statue for a number of reasons. First, it is directly contradictory to the second subsection of section 4 of the Code which provides, in pertinent part:

> Unless such processes are otherwise provided for in subsection (a), or are necessary or incidental to processes provided for in subsection (a), the following treatment processes shall not be considered as "mining": . . . .blending with other materials . . . . W. Va. Code §11-13A-4(b).

Webster's Unabridged Dictionary of the English Language defines the term "blending" to mean:

> . . . To mix (various sorts of grades) in order to obtain a particular kind or quality: blend a little red paint with the blue paint.

Moreover, since, as a practical matter, there is no known commercial application in which coal of one grade is blended with anything other than coal of another grade, the blending of coal of different grades and characteristics is clearly what the Legislature contemplated in applying the above quoted language to coal.

Therefore, and because such blending of one grade of coal with another grade of coal is not otherwise provided for in subsection (a) of the statute, it is only permitted, by subsection (b) of the statute, to be included as mining if it can be said to be necessary or incidental to the treatment processes provided for in subsection (a).

Whether any activity is necessary or incidental to the treatment processes described in subsection (a) depends on the status of the party applying that process, all as determined by the provisions of subsection (a). Specifically, the governing statute's language shows that the Legislature clearly intended that certain treatment processes conducted by the owner or operator of a coal mine would be included in the privilege taxable under the severance tax. What is equally clear is that the Legislature did not intend that any other party (not a mine owner or operator) which simply handled coal it owned, and which conducted some but not all of the enumerated treatment processes in the course of such handling, was engaged in the privilege subject to the severance tax.

These corollary conclusions arise naturally from a recognition of the Legislature's use of the limiting language "when applied by the mine owner or operator" in describing the status of parties which, when conducting the enumerated treatment processes, would be subject to the severance tax. It is to that same end that the Legislature used the conjunctive "and" to join the list of treatment processes provided in the statute as part of the privilege subject to the severance tax.

The use of such terminology admits of no other construction but that the Legislature intended the enumerated treatment processes to be included in the severance tax privilege when all of them were conducted by a mine owner or operator and not when some but not all were conducted by any other party in the course of handling its own coal. Therefore, whether blending is necessary or incidental to the treatment processes, which are included in the severance tax privilege, depends on the status of the person conducting such blending as provided in subsection (a).

Upon recognition of the Legislature's intent aforesaid, it becomes apparent that the context in which the presently pending amendment would be inserted has been at odds with the governing statute and the Legislature's intent all along. Specifically, the existing list of processing activities, included by the regulations as being in the severance tax privilege, is presently followed by the following sentence:

> . . . When <u>any</u> of the activities are performed, the value added to the coal shall be considered gross value attributable to the owner of the coal taxable under the severance tax. C.S.R. §110-13A-5.1.1 (emphasis added).

Additionally, Example 2. which follows in section 5.1.1.2 of the existing regulations, provides that a coal broker which blends coal with other purchased coal, loads and freeze treats that coal, is subject to the severance tax.

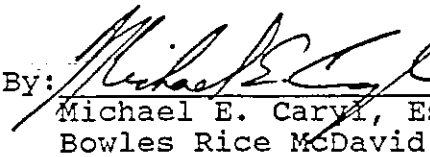
Both of these provisions of the present regulation would purport to impose the severance tax on many parties who simply handle their own coal but who are neither mine owners or operators nor engaged in the ordinary integrated series of coal processing activities which include crushing, working, cleaning, drying, sorting, sizing, dust allaying, loading for shipment and freeze treating produced or purchased coal. Rather, the governing statute provides that it is only a taxpayer performing all those activities, in such circumstances, that is subject to the severance tax.

Therefore, in order to bring the regulation into harmony with the governing statute, the proposed addition of the term "blending" to the list of treatment processes, includable in the privilege taxable under the severance tax, should only be permitted if the sentence after that listing, and the second example that follows, are themselves amended to clearly preclude the imposition of the severance tax on parties who simply handle their own coal and who are not the owners or operators of coal mines or persons engaged in the integrated series of treatment processes.

Attached to and made part of these comments is an excerpt of the subject portion of the proposed rules on which the necessary conforming amendments are shown. If the amendments proposed in the attachment are made, the amendment proposed by the Department of Tax and Revenue, to add "blending" to the list of treatment processes included in the severance tax privilege, would have the clarifying effect that the legislative rule-making processes is intended to foster. More importantly, however, it is only by making the amendments proposed in the attached excerpt that the subject regulation will be brought into harmony and compliance with the letter and intent of the governing statute.

Respectively submitted,

ANKER ENERGY CORPORATION

By: 

Michael E. Caryl, Esq. and
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& Love
105 W. Burke Street
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Attachment
2370340doc.91

~~§110-13A-5.~~ §110-13A-4. Treatment Processes as Production

~~5.1~~ 4.1 Treatment Processes Constituting Mining. - The following treatment processes listed in Subsections ~~5.1.1~~ 4.1.1 through ~~5.1.4~~ 4.1.4 (and the treatment processes necessary or incidental thereto) when applied by the mine owner or operator to natural resources mined in this State shall be considered as mining and part of the privilege taxed:

~~5.1.1~~ 4.1.1 Coal - In the case of coal, the term "production of coal" shall include all activities and values arising from the severance or extraction of coal and/or the ordinary processing activities including crushing, working, cleaning, drying, sorting, sizing, blending, dust ~~alloying~~ allaying, loading for shipment and freeze treatment. When ~~any~~ all of the activities are performed, the value added to the coal shall be considered gross value attributable to the owner of the coal taxable under the severance tax.

~~5.1.1.1~~ 4.1.1.1 Example - Company A, a coal producer, contracts with Company B to have B extract the coal and deliver it to Company C who crushes, cleans and loads the coal for shipment. In this instance, Company A would report the total gross value, without any deductions for payments made to B and C, under the severance tax.

~~5.1.1.2~~ 4.1.1.2 Example - Company A, a coal producer extracts the coal and sells the coal to Company B for $20.00 a ton who crushes, cleans and sells coal to Company C for $30.00 a ton. C, a coal broker, blends the coal with other purchased coal, loads and freeze treats the coal. The coal is ultimately sold for $35.00 a ton. Company A should report $20.00 a ton under the severance tax. Company B is required to report $10.00 a ton under the severance tax and C would not be required to report ~~$5.00 a ton~~ for severance tax purposes.

Production of coal will also include the severance, extraction and processing coal fines, gob piles, sludge ponds or other coal wastes or rejects which, when processed are sold as coal, as if such activities constituted the initial production activity.

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July 29, 1991

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SECRETARY OF
TAX AND REVENUE

Hon. L. Frederick Williams, Jr.
State Tax Commissioner
Legal Division
Department of Tax and Revenue
P. O. Box 1005
Charleston, WV 25324-1005

Re: Proposed Legislative Rule - Severance Tax

Dear Commissioner Williams:

The following comments are submitted on behalf of our client, Anker Energy Corporation, in connection with the Proposed Legislative Rules filed July 1, 1991, relating to **Severance Tax** and which will affect those regulations currently cited at 110 C.S.R. 13A, § 1, et seq. (1989). All subsequent cites to the Code of State Regulations will be to the Proposed Legislative Rules filed July 1, 1991.

These comments address the provisions of the Proposed Rules which define treatment processes constituting mining, found at 110 C.S.R. 13A, § 4.1.1, and prescribe the treatment of freight charges incurred by producers, found at 110 C.S.R. 13A, § 4.7.

1. Treatment Processes Constituting Mining

The Proposed Rules add "blending" to the regulatory list of "ordinary processing activities" considered to be within the term "production of coal." 110 C.S.R. 13 A, § 4.1.1 (formerly § 5.1.1). The existing regulation inexplicably overlooks the statutory reference to "treatment processes" and seeks to broaden the category to "ordinary processing." The word "treatment" is a significant part of the law and should not be overlooked. The inclusion of "blending" as a treatment process by regulation exceeds the statutory authority of the Tax Commissioner to promulgate rules and regulations since blending is not a coal treatment process specifically described in the statute. W. Va. Code § 11-13A-4(a)(1).

The law specifies that certain treatment processes when applied by the mine owner or operator to natural resources mined in West Virginia are part of the privilege taxed under Article 13A. In the case of coal, the treatment processes designated by statute are "cleaning, breaking, sizing, dust allaying, treating to prevent freezing and loading for shipment." The statute also provides that "treatment processes necessary or incidental" to the named treatment processes are considered part of the privilege subject to severance tax. Blending coal is not a treatment process. Blending results from the way coal is handled and loaded in a particular sequence for shipment to customers. Since the statute has designated only the addition of treatment processes necessary or incidental to the specified activities, blending does not fit that category and may not be properly included by regulation since it is not among the items described in the law.

The Tax Commissioner may make all needful rules and regulations for the severance tax as provided in the State Administrative Procedures Act. W. Va. Code § 11-10-5. However, the principle is well established in West Virginia that rule-making authority does not permit the promulgation of regulations that are inconsistent with or go beyond the statute to which they apply. Where a tax regulation is inconsistent with the statute, the regulation will be rejected. See Ballard's Farm Sausage Inc. v. Dailey, 162 W. Va. 10, 246 S.E.2d 265, 267-268 (1978).

We believe the Tax Commissioner has gone beyond the severance tax statute by designating "blending" as a treatment process. By the proposed amendment, the Tax Commissioner has broadened the list of taxable treatment processes beyond those designated and intended by the Legislature.

2. Freight Charges Incurred by Producers

The Proposed Rules continue to permit the producer to deduct outgoing freight charges but limit the deduction to those outgoing freight charges incurred subsequent to the completion of all treatment processes considered as mining under the Severance Tax Act and those treatment processes necessary or incidental thereto. 110 C.S.R. 13A, § 4.7. "Producer" is defined in the rules as "...every person who engages in the business of severing, extracting, mining, quarrying, reducing to his possession and producing for his sale, profit or commercial use any natural resource products from his own land or from the land of another under a right or license granted by lease or contract. ... A producer must have a direct interest in the minerals in place and

look solely to mineral sales proceeds for his income from the production." 110 C.S.R. 13A, § 2.13. Processors do not fall within the regulatory definition of "producer." The proposed changes are not only inconsistent with the statute, but are in conflict with other regulations.

a. The effect of the proposed amendment to Rule 4.7 is to capture within the severance tax base freight charges incurred between the point of coal severance or production and the point of coal treatment or processing. This result is inconsistent with the statute which provides that the severance tax is determined by the application of specified rates against the "gross value of the articles produced, as shown by the gross proceeds derived from the sale thereof by the producer, except as otherwise provided." W. Va. Code § 11-13A-3(a). In the case of natural resources, "gross value" is defined as the market value of the product "in the immediate vicinity, where severed, determined after application of post-production processing." This definition reflects a clear legislative intent that gross value for the producer actually severing the natural resource includes processing only when such processing occurs in the immediate vicinity where the natural resource is severed and not at a location remote from the place of severance and requiring separate transportation. The proposed regulation results in disregarding the "immediate vicinity" language in the law.

b. The proposed change to Rule 4.7 is inconsistent with Rules 4.7.4 and 4.7.5. Rule 4.7 would now prevent the "producer" from deducting outgoing freight charges when the producer extracts the natural resource and sells it to another party who applies the treatment processes and then resells the natural resource. Rules 4.7.4 and 4.7.5 permit the producer to deduct outgoing freight charges where the producer pays or absorbs the cost of transporting the natural resource to the purchaser (who could be a processor). Thus, the producer is entitled to deduct outgoing freight when selling to a processor, under §§ 4.7.4 and 4.7.5 which is inconsistent with the amendment to Rule 4.7.

c. To the extent that the Severance Tax Act imposes a tax on the privilege of severing natural resources and the tax is based on the value of the natural resource [see W. Va. Code § 11-13A-3(a)], the inability of a taxpayer to deduct outgoing freight results in an amount greater than the "value" of the natural resource being taxed. To illustrate, the proposed change to Rule 4.7 would not permit the producer to deduct outgoing freight unless the producer also processes the natural resource. Thus, if the

producer sells the raw natural resource to a processor and incurs outgoing freight costs, the producer cannot deduct his outgoing freight from the amount subject to severance tax since his freight expense did not occur "following the completion of all treatment processes considered as mining." This will have a significant detrimental impact upon small coal producers who do not have the financial capability of constructing or purchasing a preparation plant to process their coal and who must sell their coal to processors. The producer under the foregoing circumstance will be paying severance tax for an amount exceeding the value of its natural resource at the point where production ends.

d. The proposed amendment to Rule 4.7, governing treatment of freight charges incurred by producers, results in unequal treatment among taxpayers and violates the equal protection requirements of the Fourteenth Amendment to the Constitution of the United States and analogous provisions of the West Virginia Constitution. Under amended Rule 4.7, a producer who mines but does not process a natural resource and who sells the natural resource out-of-state is entitled to value the natural resource at the place where production ends and therefore is not required to include outgoing freight in the severance tax base. However, a producer who mines but does not process his natural resource and who sells the natural resource to a processor within the State of West Virginia at a delivered price, is required to include his outgoing freight expense in the severance tax base. The effect of this regulation is unequal treatment of taxpayers exercising the same business privilege. There is no rational basis for this different treatment, and the same clearly violates taxpayers' rights to equal and uniform treatment under the law. See Milnot Company v. Douglas, 452 F.Supp. 505 (1978); Department of Employment Security v. Manchin, 361 S.E.2d 474 (W. Va. 1987); and United Fuel Gas Company v. Battle, 153 W. Va. 222, 167 S.E.2d 890 (1969).

e. The proposed changes to Rule 4.7 are also inconsistent with the definition of "gross value" set forth in W. Va. Code § 11-13A-2(b)(6) and 110 C.S.R. 13A, §§ 2.7, 2a.1 et seq. Gross value is determined where production and post-production processing conducted in the immediate vicinity ends. This permits a producer to deduct outgoing freight from gross sales. 110 C.S.R. 13A, § 2.7. Proposed Rule 4.7 clearly is in conflict with this gross value definition since Rule 4.7 qualifies the ability of the producer to deduct freight only when the producer has also processed the natural resource. Gross value is further described as "..the amount received or receivable by the taxpayer." W. Va. Code § 11-13A-2(b)(6) and 110 C.S.R. 13A, § 2a.1. The amount

received or receivable by the producer, in the case where the producer incurs outgoing freight, is the sales price of the natural resource and would not include outgoing freight expense. Therefore, the proposed Legislative Rule 4.7 is inconsistent with the definition of gross value.

The State should not by regulation include in the severance tax base transportation between a coal producer and a separately established and operating independent coal processor. Both the coal producer and the coal processor should be permitted to deduct outgoing freight. The measure of the tax for the coal processor is as stated in Rule 4.1.1 "the value added to the coal" by the treatment processes determined to be part of coal production under the severance tax law. Further evidence that transportation between a producer and a processor who are separately engaged in business should not be part of the "gross value" or tax base is found in the provision of the law which states that if natural resources are severed outside West Virginia and transported into the state by a coal processor, the gross value is the amount received or receivable from the processed coal reduced by the fair market value of the coal immediately preceding processing. W. Va. Code § 11-13A-2(6)(D). The concept and purpose of the severance tax is served by eliminating the transportation cost between producer and processor so that the tax is based on the value or the value added by the taxable privilege exercised whether it be actual severing coal or applying the treatment processes to coal within the terms of the statute.

Conclusion

We respectfully request your consideration of the foregoing comments with the object of amending the Proposed Legislative Rules to make them consistent with the West Virginia Code and with other provisions of the Severance Tax regulations as proposed or which are currently in force. Our proposal is to amend the regulations to permit deduction of outgoing freight from the severance tax base for coal producers whether the producer is also engaged in treatment processes considered as mining under W. Va. Code § 11-13A-4(a)(1) or not. Such amendment must provide uniform exclusion of freight from the severance tax base whether paid by the producer or processor. Outgoing freight paid by a producer selling to a processor should not be part of the severance tax

[illegible] received or receivable by the taxpayer." W. Va.

base, and incoming freight paid by a processor purchasing from a producer should likewise be excluded from the severance tax base to arrive at the true value added by the processor.

Very truly yours,

G. Thomas Battle

GTB/BJP/klm

DEPARTMENT OF TAX AND REVENUE
OFFICE OF THE SECRETARY
L. FREDERICK WILLIAMS, JR.

DATE: July 31, 1991

LOG NO. _____ DUE DATE _____

TO: John Montgomery

PLEASE:

_____ Prepare a response for ☐ Gov. ☐ My ☐ Your signature with copy(s) to _____

X For Your Information

_____ Review and Comment

_____ Take Appropriate Action

_____ Revise

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REMARKS:

Thank you!

:)

Michelle

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SECRETARY OF STATE

AGENCY APPROVED
WEST VIRGINIA LEGISLATIVE REGULATIONS
STATE TAX DEPARTMENT
TITLE 110
SERIES 13A
1991

SEVERANCE TAX

§ 110-13A-1. General.

1.1 Type of Regulation. - These regulations are agency approved legislative regulations as defined in W. Va. Code § 29A-3-15.

1.2 Scope. - These agency approved legislative regulations explain and clarify the West Virginia Severance Taxes set forth at W. Va. Code § 11-13A-1 et seq.

1.3 Authority. - These agency approved legislative regulations are issued under the authority of W. Va. Code §§ 11-13A-23(b) and 11-10-5.

1.4 Filing date. -

1.5 Effective date. -

1.6 Citation. - These agency approved legislative regulations may be cited as 110 C.S.R. 13A, § _____ _____.

§ 110-13A-2. Definitions. - As used in these regulations and unless the context clearly requires a different meaning, the following terms shall have the meanings ascribed herein, and shall apply in the singular or in the plural.

2.1 Coal. - The term "coal" means and includes any material composed predominantly of a solid, brittle, stratified, combustible carbonaceous rock formed by the decomposition of vegetation, containing varying quantities of the elements of carbon, hydrogen, oxygen and nitrogen. "Coal" shall include but is not limited to peat, lignite, bituminous, anthracite and various intermediary forms of coal.

2.2 Contract Miner. - The term "contract miner" means a person engaged as an independent contractor in producing natural resource products which are owned by another or others, as tangible personal property, immediately after they are severed, extracted, reduced to possession and produced.

2.3 Delegate. - The term "delegate" in the phrase "or his delegate" when used in reference to the Tax Commissioner, means any officer or employee of the Tax Department duly authorized by the Tax Commissioner, directly or indirectly, by one or more redelegations of authority, to perform the function mentioned or described in the Severance Tax Act or these regulations.

2.4 Economic Interest. - The term "economic interest" for purposes of the Severance Tax Act is synonymous with the economic interest required by 26 U.S.C.

611 and in effect on December 31, 1985 which entitle the taxpayer to a depletion deduction for federal income tax purposes: Provided, That a person who only receives an arm's-length royalty shall not be considered as having an economic interest for purposes of the Severance Tax Act.

2.4.1 An economic interest, for federal income tax purposes, is possessed in every case in which a person has acquired by investment any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the extraction of the mineral or severance of the timber, to which he must look for a return of his capital. 'A person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because through a contractual relation he possesses a mere economic or pecuniary advantage derived from production. For example, an agreement between the owner of an economic interest and another entitling the latter to purchase or process the product upon production or entitling the latter to compensation for extraction or cutting does not convey a depletable economic interest.

2.5 Extraction of Ores or Minerals From the Ground. - The phrase "extraction of ores or minerals from the ground" includes extraction by mine owners or operators of ores or minerals from the waste or residue of prior mining.

2.5.1 Extraction of ores or minerals from the ground shall not include the removal of natural gas from underground storage facilities into which the natural gas has been mechanically injected following its initial removal from the earth: Provided, That the appropriate severance tax was reported and paid at the time the natural gas was produced, if such production occurred in West Virginia.

2.5.2 Extraction of ores or minerals from the ground shall not include "landfill gas technology" by which gas or gaseous compounds are extracted from sanitary landfill areas, which gas or compound was generated as a by-product of the materials composing the landfill.

2.5.3 Extraction of ores or minerals from the ground shall not include the production of gas or gaseous compounds by any biomass decomposition technologies.

2.5.4 Extraction of ores or minerals from the ground shall include the production of coalbed methane or coalbed gas.

2.6 Fiduciary. - The term "fiduciary" means and includes, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person.

2.7 Gross Value. - The term "gross value" in the case of natural resources means the market value of the natural resource product, in the immediate vicinity, where severed, determined after application of post production processing generally applied by the industry to obtain commercially marketable or usable natural resource products. The value of natural resource products produced shall be determined by the gross proceeds of sales in every instance in which a bona fide sale of such products is made at the point where production

ends, and whether sold at wholesale or retail. In determining the value of natural resource products delivered to purchasers there may be deducted from the gross proceeds of sales so much thereof as the taxpayer can prove to be actual outgoing freight charges (paid by him) from the point at which shipment originates in this State to the point of delivery. However, no deduction is permitted for expenses incurred by him through the use of his own equipment in transporting items produced. No deduction is permitted for expenses incurred to transport items from the point of severance to the processing plant (or loading facilities), when treatment processes are considered part of the production or mining taxable as such pursuant to W. Va. Code § 11-13A-4. Further, no deduction will be allowed for sales commissions, royalties, or other costs, expenses or fees incurred by a producer and ultimately paid to third parties. For a discussion of "gross value" see § 110-13A-3 of these regulations.

2.8 Mining. - The term "mining" includes not merely the extraction of ores or minerals from the ground but also those treatment processes considered as mining under the Severance Tax Act and those treatment processes necessary or incidental thereto.

2.9 Natural Resource. - The term "natural resource" 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.

2.10 Partnership or Partner. - The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which natural resources are severed, extracted, reduced to possession and produced or prepared in this State for sale, profit or commercial use. The term "partner" includes a member of such a syndicate, group, pool, joint venture or organization.

2.10.1 An unincorporated organization is a "partnership" under the Severance Tax Act even though, for Federal income tax purposes, the members of the unincorporated organization elect under I.R.C. § 761 to be excluded from treatment as a partnership.

2.11 Person or Company. - The terms "person" or "company" are herein used interchangeably and include any individual, firm, partnership, mining partnership, joint venture, association, corporation, trust or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is declared by the content.

2.12 Processed or Processing. - The terms "processed" or "processing" as applied in the Severance Tax Act, does not include in the case of:

2.12.1 limestone quarried or mined, any activity after the stone is severed and reduced to possession on the surface;

2.12.2 natural gas, any conversion or refining process;

2.12.3 oil, any conversion or refining process;

2.12.4 timber, any cuts after the tree is severed, topped and delimbed. See Burruss v. Hardesty, W. Va. 297 S.E.2d 836 (1981).

2.13 Producers. - For purposes of these regulations, the word "producer" shall mean and include, but not be limited to, every person who engages in the business of severing, extracting, mining, quarrying, reducing to his possession and producing for his sale, profit or commercial use any natural resource products 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. A person who produces natural resource products for use or consumption in his own business, whether located within or without the State, is a producer for the purposes of the severance tax - and taxed accordingly. A producer must have a direct interest in the minerals in place and look solely to mineral sales proceeds for his income from the production.

2.14 Related Parties. - The term "related parties" means two or more persons, organizations or businesses owned or controlled directly or indirectly by the same interests. Control exists if a contract or lease, either written or oral, is entered into whereby one party mines or processes natural resources owned or held by another party and the owner or lessor participates in the severing, processing or marketing of the natural resources or receives any value other than an arm's length passive royalty interest. In the case of related parties, the Tax Commissioner may apportion or allocate the receipts between or among such persons, organizations or businesses if he determines that such apportionment or allocation is necessary to more clearly reflect gross value.

2.15 Sale. - The term "sale" includes any transfer of the ownership or title to property, whether for money or in exchange for other property or services, or any combination thereof.

2.16 Severance Tax Act. - The term "Severance Tax Act" means the tax imposed by W. Va. Code § 11-13A-1 et seq.

2.17 Severing or Severed. - The terms "severing" or "severed" mean the physical removal of the natural resources from the earth or waters of this State by any means: Provided, ~~The activity of severing coal from an underground mine prior to processing is deemed to occur when the coal is reduced to possession at the portal of the mine.~~ Provided further, That "severing" or "severed" shall not include:

2.17.1 the removal of natural gas from underground storage facilities into which the natural gas has been mechanically injected following its initial removal from the earth;

2.17.2 any separation process for natural gas or oil commonly employed to obtain marketable natural resource products after the gas or oil is produced at the well-head;

2.17.3 any processing of limestone or sandstone that occurs after the privilege of producing stone by quarrying or mining ends;

2.17.4 any processing of timber that occurs after the privilege of producing timber ends.

2.18 Stock. - "Stock" includes shares in an association, joint-stock, company or corporation.

2.19 Tax Commissioner. - "Tax Commissioner" means the Tax Commissioner of the State of West Virginia, or his delegate.

2.20 Taxable Year. - "Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the severance tax liability is computed, and shall be the same as the taxpayer's taxable year federal income tax purposes. "Taxable year" means, in case of a return made for a fractional part of a year under the provisions of W. Va. Code § 11-13A-23, or under regulations promulgated by the Tax Commissioner, the period for which such return is made.

2.21 Taxpayer. - The term "taxpayer" means and includes any individual, partnership, joint venture, association, corporation, receiver, trustee, guardian, executor, administrator, fiduciary or representative of any kind engaged in the business of severing or processing (or both severing and processing) natural resources in this State for sale or use. In instances where contracts (either oral or written) are entered into whereby persons, organizations or businesses are engaged in the business of severing or processing (or both severing and processing) a natural resource but do not obtain title to or do not have an economic interest therein, the party who owns the natural resource immediately after its severance or has an economic interest therein (except a person who only receives an arms-length royalty) is the taxpayer.

2.22 This Code. - "This Code" means the Code of West Virginia, one thousand nine hundred thirty-one, as amended.

2.23 This State. - "This State" means the State of West Virginia.

~~§ 110-13A-3~~ § 110-13A-2a. Determination of Gross Value. - For all natural resources, "gross value" is to be reported as follows:

~~3.1~~ 2a.1 Gross Value Amount Received. - For natural resources severed or processed (or both severed and processed), except natural gas, oil, and limestone or sandstone quarried or mined, and sold during a reporting period, gross value is the amount received or receivable by the taxpayer.

~~3.1~~ 2a.1.1 Example. - 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, on the severance tax form. Therefore, A reports the full amount received from B and computes his tax liability thereon.

~~3.1.2~~ 2a.1.2 Example. - A owns land within West Virginia and produces coal therefrom. In 1988, 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 1988, makes sale of the coal at thirteen dollars ($13.00) per ton.

~~3-1-2-1~~ 2a.1.2.1 A, on the 1988 severance tax return, must report the gross proceeds of the sale to B. (40,000 tons @ $10.00 per ton = $400,000)

~~3-1-2-2~~ 2a.1.2.2 A must also report the amount of the sale made by the broker on A's severance tax return. (12,000 tons @ $13.00 per ton = $156,000.) 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.

~~3-1-2-3~~ 2a.1.2.3 A must also report the amount of the sales at the mine to individuals for household consumption. (3,000 tons @ $12.00 per ton = $36,000.)

~~3-2~~ 2a.2 Sale at Future Date. - When natural resources are severed for sale at a future date, payment of the tax with respect to the severed natural resource is delayed until the point in time when the taxpayer recognizes gross income under the taxpayer's method of accounting.

~~33~~ 2a.3 Transition rule for change in rate. - Whenever natural resources are severed prior to the date on which the rate at which production under the appropriate classification is subject to tax changes, but the taxpayer does not recognize gross income under the taxpayer's method of accounting until after the effective date of the new rate, the gross income so reported will be taxed at the rate in effect during the period in which the gross income is recognized and reported and not at the rate in effect at the time the natural resources were severed.

~~3-4~~ 2a.4 No Deduction of Expenses. - In all instances, the gross value shall not be reduced by any state or federal taxes, including federal black lung tax, federal and state reclamation taxes, royalties, sales commissions or any other expense. Amounts paid to an independent contractor as renumeration for the severing, extracting, producing or processing of natural resource products are not to be deducted from the determination of gross value by the producer.

~~3-4-1~~ 2a.4.1 Example. - 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. The well is successful and produces 80,000 barrels of oil. B is a producer; therefore, he must pay severance 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 is not liable for severance taxes upon the royalty he receives.

~~3-4-2~~ 2a.4.2 Example. - 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 $.30 on each ton of coal mined by B. In the year 1988, B extracts 50,000 tons

of coal and pays A his royalty of $15,000 (50,000 tons @ $.30 per ton = $15,000). B sells the tonnage to a manufacturer for $450,000.

~~3.4.2.1~~ 2a.4.2.1 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 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 on his severance tax return ($450,000). B may not deduct the amount of royalty paid to A as it is a cost of doing business. A is not liable for severance taxes upon the amount he receives for royalties.

~~3.4.2.2~~ 2a.4.2.2 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 not liable under the severance tax.

~~3.4.2.3~~ 2a.4.2.3 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 liable under the severance tax as the producer; A and B remain as royalty recipients and D becomes a contract miner. A, B and D would not be subject to severance tax liability.

~~3.5~~ 2a.5 Processing When Not Severed By Taxpayer. - When natural resource products are purchased from an unrelated party, or are severed outside this State either by the taxpayer, or by another person from whom the taxpayer purchases such products, for the purpose of processing such products in activities which are deemed to be the exercise of a privilege subject to the severance tax pursuant to Section 5 4 of these regulations, the taxpayer must report the gross value of such processing according to the following rules:

~~3.5.1~~ 2a.5.1 When the natural resource products are purchased from an unrelated party to be processed for resale, the gross value subject to tax shall be the amount received by the taxpayer from the sale of the processed natural resource product, reduced by the amount paid or payable to the person actually severing the natural resource.

~~3.5.2~~ 2a.5.2 When the natural resource product is severed by the taxpayer or a related party outside of the State of West Virginia, to be processed in West Virginia for sale or resale, the gross value subject to the tax shall be the amount received by the taxpayer from the sale of the processed natural resource product, reduced by the gross value of the unprocessed natural resource product as determined under Section ~~3.5~~ ~~3.6~~ 2a.6 of these regulations.

~~3.5.3~~ 2a.5.3 When the taxpayer purchases natural resource products or severs natural resource products outside of the State of West Virginia and imports those products, to be processed in West Virginia for the purpose of sale to related parties or to be used or consumed in the taxpayers business, the values determined under Section ~~3.5~~ ~~3.6~~ 2a.6 of these regulations shall be substituted for the amount received from the sale of the processed natural resource product under Subsections ~~3.5.1~~ 2a.5.1 and ~~3.5.2~~ 2a.5.2.

~~3.5.4~~ 2a.5.4 In no case may the taxpayer owning natural resource products purchased or brought into the State of West Virginia for processing activities subject to the severance tax pursuant to Section 5 4 of these regulations take a deduction or allowance from gross value for amounts paid to an independent contractor to perform the processing services.

~~3.6~~ 2a.6 Sales to Related Party or Used or Consumed By Taxpayer. - In a transaction involving related parties, or in the absence of a sale where the taxpayer produces the natural resource for consumption by the taxpayer in the taxpayer's business, gross value shall not be less than the fair market value for natural resources of similar grade and quality, and the gross value shall be further determined by applying regulations ~~3.5.1~~ 2a.5.1 through ~~3.5.3~~ 2a.5.3 in the order as follows:

~~3.6.1~~ 2a.6.1 The value of the natural resource product sold to a related party or consumed by the taxpayer shall be determined by applying the average prices at which sales of like kind, grade and quality are made by the taxpayer during the taxable year to non-related customers of the producer.

~~3.6.2~~ 2a.6.2 If there are no sales of similar products by the taxpayer to non-related customers of the taxpayer by which gross value may be determined, the gross value shall be determined according to the selling price at the place of use or consumption of similar products of like quality and character by other taxpayers. Under no circumstances, however, may the value ascertained under either of the two above discussed methods be less than the actual gross proceeds of sale or the actual total cost of producing the natural resources, whichever is greater.

~~3.6.3~~ 2a.6.3 In the absence of sales of similar natural resource products as a guide to value, such value may be determined by a cost basis. In such cases there shall be included every item of cost attributable to the particular natural resource product produced, including direct and indirect overhead costs. There shall be added to this total production cost the average mark-up realized by the taxpayer on all natural resource products produced and sold.

~~3.7~~ 2a.7 Take or Pay Contracts. - Under certain purchase contracts, "take or pay" clauses require purchasers of natural resource products to pay for certain quantities of the product whether or not they are actually taken by the purchaser at that time. Amounts paid to producers for such products not taken can be offset against future quantities of the product when actually taken by the purchaser. Producers receiving receipts from such "take or pay" contracts shall not be required to report such income under the severance tax until such natural resource products are delivered to the purchaser and the purchaser's account so credited. This treatment will only be afforded to taxpayers who maintain adequate records to accurately reflect the accounting procedures utilized by the taxpayer.

~~3.8~~ 2a.8 Example. - Company A, a Maryland Corporation, severs 1,000 tons of coal in Maryland and ships the coal to Company B in West Virginia to be cleaned and tippled for Company A. Company A retains ownership of the coal at all times and pays Company B $5.00 per ton to clean and tipple the coal. Company A makes other sales of unprocessed coal at its mine for $20 per ton to

unrelated customers. After the coal is cleaned and tippled by Company B, Company A sells the 1,000 tons of coal to an unrelated purchaser for $30 per ton. Company A would report the sale of the 1,000 tons of coal at the difference between the value of the processed coal and the value of the unprocessed coal or, $30.00/ton - $20.00/ton = $10.00/ton for a total of $10,000, as the gross value of the 1,000 tons of coal on Company A's severance tax form. See Subsections ~~3.4~~ 2a.4 and ~~5.1.1~~ 4.1.1 of these regulations. Company B would not be subject to the severance tax because it does not have an economic interest in the coal being processed. Company A is not permitted any allowance for the $5,000 paid to Company B to process the coal as it is a cost of doing business to the producer, Company A.

~~3.9~~ 2a.9 Example. - 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. In the year 1988, 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 an unrelated wholesaler at $12.00 per ton and sells 10,000 tons to an affiliated company at $3.00 per ton. X pays B $750,000 for the service performed by B in 1988.

~~3.9.1~~ 2a.9.1 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 from the sale and use of the coal on the severance tax return.

~~3.9.2~~ 2a.9.2 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 Subsection ~~3.5~~ 2a.5 of these regulations and report the same as taxable income on the severance tax form. The provision of Subsection ~~3.5~~ 2a.5 of these regulations which applies to the determination of value of natural resource products used or consumed by the producer provides that such regulations shall be applied in the order stated. Therefore under such circumstances, to determine the value of the 700,000 consumed tons of coal, X would apply regulation ~~3.5.1~~ 2a.5.1. Said regulation makes use of the average prices at which sales are made to customers during the year. The 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 X 700,000 = $8,400,000) as the value thereof on the severance tax return.

~~3.9.3~~ 2a.9.3 The 10,000 tons sold to an affiliate must also be reported on the severance tax return. However, the selling price ($3.00/ton) was not indicative of the true value of the products. Therefore, X must apply the applicable regulation set forth in Subsection ~~3.5~~ 2a.5 of these regulations. 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. In order to determine the proper value of the products sold to a related party, X will apply regulation ~~3.5.1~~ 2a.5.1. Said regulation provides that whenever

sales are made to related parties, 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/per ton on that tonnage sold to the affiliate and report the resultant amount (10,000 tons @ $12.00/ton = $120,000) on the severance tax return.

~~3.9.4~~ 2a.9.4 The gross proceeds of sale derived from the sale to the wholesaler (40,000 tons @ $12.00/ton = $480,000) will also be included on the severance tax return.

~~3.9.5~~ 2a.9.5 For purposes of this example, the 1988 severance tax return of X will reflect taxable income of $9,000,000. 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).

~~3.9.6~~ 2a.9.6 B, who performed services for X, is a contract miner and will not report his fee ($750,000) on the severance tax return.

~~3.10~~ 2a.10.1 Natural Gas. - For natural gas, gross value is the value of the natural gas at the well head immediately preceding transportation and transmission. To determine the value of the gas prior to transportation and transmission the producer shall apply Subsection ~~5.8~~ 4.8 of these regulations to calculate his transportation allowance.

~~3.10.1~~ 2a.10.1 Example. - A is a producer of natural gas within West Virginia. The entire output of natural gas from A's well is purchased at the well head by a public utility for $25,000. On his severance tax return, A will report $25,000 as gross income.

~~3.11~~ 2a.11 Limestone and Sandstone. - For limestone or sandstone quarried or mined, gross value is the value of such stone immediately upon severance from the earth.

~~§ 110-13A-4.~~ § 110-13A-3. Imposition of Tax.

~~4.1~~ 3.1 Imposition of Tax. - Upon every person exercising the privilege of engaging or continuing within this State in severing, extracting, reducing to possession and producing for sale, profit or commercial use any natural resource product or products, there is hereby imposed a tax in the amount to be determined by the application of rates against the gross value of the articles produced, as shown by the producer, except as otherwise provided, multiplied by the rates in the classifications and according to the effective dates as follows:

~~4.1.1~~ 3.1.1 On coal, and including the thirty-five one hundredths (.35) of one percent additional severance tax on such coal for the benefit of counties and municipalities, as provided in W. Va. Code § 11-13A-6, on

July 1, 1987 - three and eighty-five one hundredths (3.85) percent;
July 1, 1988 - three and eighty-eight one hundredths (3.88) percent;

and
March 1, 1989 - and thereafter - five (5.0) percent.

~~4-1-2~~ 3.1.2 On limestone or sandstone quarried or mined, on
July 1, 1987 - two and two-tenths (2.2) percent;
July 1, 1988 - two and fifty-six one hundredths (2.56) percent;
July 1, 1989 - two and ninety-two one hundredths (2.92) percent;
July 1, 1990 - three and twenty-eight one hundredth (3.28) percent;
July 1, 1991 - three and sixty-four one hundredths (3.64) percent;
July 1, 1992 - four (4.0) percent;
July 1, 1993 - four and fifty one hundredths (4.5) percent; and
July 1, 1994 - and thereafter - five (5.0) percent.

~~4-1-3~~ 3.1.3 On oil, on
July 1, 1987 - four and thirty-four one hundredths (4.34) percent;
July 1, 1988 - four and two hundred seventy-two one thousandths (4.272) percent; and
March 1, 1989 - and thereafter - five (5.0) percent.

~~4-1-4~~ 3.1.4 On natural gas, on
July 1, 1987 - six and five-tenths (6.5) percent;
July 1, 1988 - six (6.0) percent;
July 1, 1989 - five and five-tenths (5.5) percent; and
July 1, 1990 - and thereafter - five (5.0) percent.

~~4-1-5~~ 3.1.5 On natural gas produced from new wells drilled and placed in service on and after July 1, 1987, on
July 1, 1987 - four (4.0) percent; and
March 1, 1989 - and thereafter - five (5.0) percent.

~~4-1-6~~ 3.1.6 On sand, gravel or other mineral product not quarried or mined, on
July 1, 1987 - four and thirty-four one hundredths (4.34) percent;
July 1, 1988 - four and two hundred seventy-two one thousandths (4.272) percent;
March 1, 1989 - and thereafter - five (5.0) percent.

~~4-1-7~~ 3.1.7 On timber, on
July 1, 1987 - two and five-tenths (2.5) percent; and
March 1, 1989 - and thereafter - three and twenty-two hundredths (3.22) percent.

~~4-1-8~~ 3.1.8 On other natural resources, on
July 1, 1987 - two and eighty-six one hundredths (2.86) percent;
July 1, 1988 - three and eighty-eight one thousandths (3.088) percent;
July 1, 1989 - three and three hundred sixteen one thousandths (3.316) percent;
July 1, 1990 - three and five hundred forty-four one thousandths (3.544) percent;
July 1, 1991 - three and seven hundred seventy-two one thousandths (3.772) percent; and
July 1, 1992 - and thereafter - four (4.0) percent;
July 1, 1993 - four and fifty one hundredths (4.5) percent; and

July 1, 1994 - and thereafter - five (5.0) percent.

~~4.2~~ 3.2 Tax in Addition to All Other Taxes. - The severance taxes apply to all persons severing or processing (or both severing and processing) natural resources in this State and are in addition to all other taxes imposed by law.

~~4.3~~ 3.3 Tax Allocation Agreements Preserved. - Provisions of any contract entered into prior to July 8, 1985 and which related to the allocation, reimbursement, payment or assessment imposed by W. Va. Code § 11-13-2a prior to July 1, 1987, shall apply with full force and effect to the severance tax which is imposed on and after July 1, 1987.

~~4.4~~ 4.4 Producing Natural Resource Products for Others. - Persons performing under contract, either as prime contractors or subcontractors, the necessary labor or mechanical services for others who are engaged in the business of producing natural resources, are performing a service for the producer and therefore are not taxable as a producer of natural resources for purposes of severance taxes.

~~4.4.1~~ 3.4.1 The producer of the natural resource products that are extracted by the contract miner is taxable under the severance tax.

~~4.4.2~~ 3.4.2 Contribution to Capital. - When the contractor who is drilling the well receives a percentage of the working interest in the gross proceeds from the production from that well, such drilling is treated by the contractor as a contribution of capital to the enterprise and is not considered as income to the contractor derived from severing the natural resource. Once production begins, however, all income, received by the contractor for his working interest in such production, will be included in the gross income subject to the severance tax of the producing well or wells reporting as a joint venture, partnership or group or combination acting as a unit.

~~4.4.3~~ 3.4.3 Persons engaged in the business of drilling for natural resources, including water, who have no ownership or economic interest in such resources, shall also be treated as "contract miners" and not taxed under the severance tax.

~~4.4.4~~ 3.4.4 Well Servicing. - Similarly, persons engaged in the business of shooting, refracturing, and otherwise servicing oil and gas wells for a fee and who do not have an economic interest in the oil or gas are also not required to report their total gross income received from the producer under the severance tax.

~~4.5~~ 3.5 Determination of Producer and Contract Miner. - Generally, a producer is one who has ownership, title to or an economic interest in mineral deposits or standing timber, and a contract miner is one who does not possess an economic interest but performs services for producers by contract. The contractual form will not necessarily control the status of the parties in regard to severance tax liability. The status of the parties will be determined by the substance of their relationship. Accordingly, although an agreement may be referred to as a lease, where the true substance of the agreement does not convey ownership or the economic interest in the mineral, in place, such agreements will be construed as service contracts.

~~4-5-1~~ 3.5.1 Economic Interest. - The concept of critical importance in determining who is the producer is which party has a true economic interest in the mineral. In order to have an economic interest, the taxpayer must have a direct interest in the minerals in place. One must also have a direct interest in the income from the production of the minerals and look solely to mineral sales proceeds for his income. A taxpayer does not have an economic interest simply because a contract entitles him to an economic or monetary advantage in connection with production of the minerals. For example, a person who has no ownership, title in, or leasehold interest in the mineral deposit or standing timber does not possess an economic interest merely because through a contractual relationship he possesses an economic advantage derived from production. The pivotal question involves the ownership of the mineral immediately after it is severed. The owner at that point is the producer.

~~4-5-2~~ 3.5.2 If a dispute should arise as to which party is the producer and which is the contract miner, the Tax Department shall consider, in addition to the substance of the agreements, other factors which shall include, but not be limited to the following attributes which may indicate the presence of ownership or economic interest subjecting such person to the severance tax.

~~4-5-2-1~~ 3.5.2.1 An interest in the mineral in place.

~~4-5-2-2~~ 3.5.2.2 An investment which is recoverable through depletion not recoverable through depreciation.

~~4-5-2-3~~ 3.5.2.3 Contractual agreements which are not terminable without cause on short notice.

~~4-5-2-4~~ 3.5.2.4 Entitlement to claim a depletion allowance for federal income tax purposes.

~~4-5-2-5~~ 3.5.2.5 Obligation to pay royalties to another.

~~4-5-2-6~~ 3.5.2.6 Exclusive right to sever, mine, cut or extract the natural resource product.

~~4-5-2-7~~ 3.5.2.7 Income from the sale of mineral proceeds rather than from other sources.

~~4-5-2-8~~ 3.5.2.8 Control over the mineral from the time of extraction to sale.

~~4-5-3~~ 3.5.3 Interests Not Considered Production.

~~4-5-3-1~~ 3.5.3.1 Farm-Out. - A "farm-out" is an arrangement under which the owner of an operating or working interest (normally considered a "producer") assigns his interest to another person as a means of financing the costs of developing and operating the property. Farm-outs may be structured many different ways; the following is an example: The owner of the operating or economic interest in the mineral transfers (usually by assignment of the lease) his entire operating interest and retains a nonoperating interest in the property. The retained nonoperating interest usually takes the form of an

overriding royalty which operates much in the same way as an ordinary royalty, usually designated as a right to receive a specified share of gross income or production from the mineral property. The person who receives the working interest and assumes the entire burden of developing and operating the property should report the entire gross proceeds of sale of the natural resource product under the severance tax without any deduction for the overriding royalty or any other royalty payable to others.

~~4-5-3-1-a~~ 3.5.3.1.a Example. - A, a lessee, owns the entire operating interest in property W, an undeveloped lease which provides for 1/8 royalty to be paid to lessor R. In a farm-out arrangement, A transfers the entire operating or working interest in property W to D in exchange for D's obligation to drill a well on the property and 1/16 overriding royalty payment upon production. D drills a successful well and receives $16,000 upon sale of the product.

D is required to report the entire $16,000 under the severance tax (less any allowable transportation deductions).

Both R and A are not required to report under the severance tax.

~~4-5-3-2~~ 3.5.3.2 Fractional Interest Retained. - The owner of the operating interest may choose to transfer a fraction of his interest to another party who agrees to bear a disproportionate share of the development costs. In the event production is obtained, the two parties would report the proceeds in accordance with their respective shares of the operating interest.

~~4-5-3-2-a~~ 3.5.3.2.a Example. - F, a lessee, owns the entire operating interest in an undeveloped lease. F retains 25% of the operating interest on a farm-out of the property. G, acquires the remaining 75% of the operating interest from F in exchange for G's agreement to drill and equip a well on the property. The well production derives $10,000 gross proceeds. Although F would receive $2,500 of the income and G $7,500 of the income, the tax for severance tax purpose should be reported and paid under a single account as a group or combination acting as a unit as prescribed in Subsection 6.1 of these regulations.

~~4-5-4~~ 3.5.4 Royalties Derived From Natural Resources. - Persons who receive payments, as royalties, from producers of natural resource products are not deemed to be producers thereof and are not required to file a severance tax return. The fact that the payment is called by a name other than royalty shall not alter the taxation of such payment if all the recipient thereof has done is to furnish real property which has a situs in this State and which includes minerals in place, or any interest therein, for hire, loan, lease or otherwise.

Lessees, sublessees or other denominated lessees, including persons to whom an operating interest has been assigned or farmed-out, are producers of all the natural resources produced, regardless of any payment, in kind or otherwise, to lessors, sublessors or other denominated lessors of a part of such natural resources as rent or royalties.

For the purposes of taxation, royalties will include, but not be limited to, ordinary royalties, overriding royalties, lease bonus, delay rental, advance royalty, minimum royalty, shut-in royalty, payment for exploration rights, and the reimbursement by the lessee of lessor's property taxes. In no instance may a producer of natural resources deduct such payments from gross value.

3.6 Partially Producing Coal Within and Without this State. - In those instances in which the same person partially produces coal within West Virginia and partially produces coal without West Virginia, a portion of the gross proceeds of sale are taxable under the severance tax. The portion of the gross proceeds of the sale that are taxable under the severance tax shall be determined in a reasonable manner based upon the facts and circumstances of the particular situation.

~~§ 110-13A-5.~~ § 110-13A-4. Treatment Processes as Production.

~~5.1~~ 4.1 Treatment Processes Constituting Mining. - The following treatment processes listed in Subsections ~~5.1.1~~ 4.1.1 through ~~5.1.4~~ 4.1.4 (and the treatment processes necessary or incidental thereto) when applied by the mine owner or operator to natural resources mined in this State shall be considered as mining and part of the privilege taxed:

~~5.1.1~~ 4.1.1 Coal. - In the case of coal, the term "production of coal" shall include all activities and values arising from the severance or extraction of coal and/or the ordinary processing activities including crushing, working, cleaning, drying, sorting, sizing, blending dust alloying, loading for shipment and freeze treatment. When any of the activities are performed, the value added to the coal shall be considered gross value attributable to the owner of the coal taxable under the severance tax.

~~5.1.1.1~~ 4.1.1.1 Example - Company A, a coal producer, contracts with Company B to have B extract the coal and deliver it to Company C who crushes, cleans and loads the coal for shipment. In this instance, Company A would report the total gross value, without any deductions for payments made to B and C, under the severance tax.

~~5.1.1.2~~ 4.1.1.2 Example - Company A, a coal producer extracts the coal and sells the coal to Company B for $20.00 a ton who crushes, cleans and sells coal to Company C for $30.00 a ton. C, a coal broker, blends the coal with other purchased coal, loads and freeze treats the coal. The coal is ultimately sold for $35.00 a ton. Company A should report $20.00 a ton under the severance tax. Company B is required to report $10.00 a ton under the severance tax and C would be required to report $5.00 a ton for severance tax purposes.

4.1.1.3 Production of coal will also include the severance, extraction and processing of coal fines, gob piles, sludge ponds or other coal wastes or rejects which, when processed are sold as coal, as if such activities constituted the initial production activity.

~~5.1.2~~ 4.1.2 Minerals Customarily Sold in Crude Form. - In the case of other minerals which are customarily sold in crude form, sorting,

concentrating, sintering and essentially equivalent processes to bring them to shipping grade and form, and loading for shipment shall be part of the privilege taxed.

~~5.1.3~~ 4.1.3 Minerals Not Customarily Sold in Crude Form. - In the case of other minerals which are not customarily sold in the form of the crude mineral products, crushing, grinding and beneficiation by concentration (gravity, flotation, amalgamation or electrostatic or magnetic), cyanidation, leaching, crystallization, precipitation (but not including electrolytic deposition, roasting, thermal or electric smelting or refining), or substantially equivalent processes or combinations of processes used in the separation or extraction of the product or products from the ore or the mineral or minerals from other material from the mine or other natural deposit shall be part of the privilege taxed.

~~5.1.4~~ 4.1.4 Oil Shale. - In the case of oil shale, extraction from the ground, crushing, loading into the retort and retorting, but not hydrogenation, refining or any other process subsequent to retorting shall be part of the privilege taxed.

~~5.2~~ 4.2 Treatment Processes Not Part of Mining. - Except as provided in Subsection ~~5.1~~ 4.1 the following treatment processes listed in Subsections ~~5.2.1~~ 4.2.1 through ~~5.2.11~~ 4.2.11 shall not be considered as "mining" and, thus, not part of the privilege taxed under [W. Va. Code 11-13A]:

~~5.2.1~~	4.2.1	Electrolytic deposition
~~5.2.2~~	4.2.2	Roasting
~~5.2.3~~	4.2.3	Calcining
~~5.2.4~~	4.2.4	Thermal or electric smelting
~~5.2.5~~	4.2.5	Refining
~~5.2.6~~	4.2.6	Polishing
~~5.2.7~~	4.2.7	Fine Pulverization
~~5.2.8~~	4.2.8	Blending with other materials
~~5.2.9~~	4.2.9	Treatment effecting a chemical change
~~5.2.10~~	4.2.10	Thermal action
~~5.2.11~~	4.2.11	Molding or shaping

~~5.3~~ 4.3 Treatment Processes Considered Part of Production of Oil, Natural Gas and Natural Gas Liquids. - The privileges of severing and producing oil and natural gas shall not include any conversion or refining process. Oil and natural gas will be valued at the well-mouth in conformance with Subsection ~~5.8~~ 4.8.

~~5.4~~ 4.4 Timber Production Privilege. - 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 where the tree is severed and delimbed. 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.

~~5.4.1~~ 4.4.1 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.

~~5.4.1.1~~ 4.4.1.1 Character and quality of the timber as determined by species, age, size, condition, etc.;

~~5.4.1.2~~ 4.4.1.2 The quantity of timber per acre, the total quantity under consideration, and the location of the timber in question with reference to other timber;

~~5.4.1.3~~ 4.4.1.3 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 the process of exploitation), the probable cost of exploitation and the climate and state of industrial development of the locality; and

~~5.4.1.4~~ 4.4.1.4 The freight rates charged by common carriers to important markets.

~~5.4.1.5~~ 4.4.1.5 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 value of his timber at the point where production ends. In the absence of such substantiation, fair market value shall be determined under Subsection 5.4.2.

~~5.4.2~~ 4.4.2 At the election of the taxpayer, or in the absence of books and records to substantiate fair market value determined under Subsection ~~5.4.1~~ 4.4.1, above, the following rule shall be used to determine the gross value of timber at the point where production ends.

~~5.4.2.1~~ 4.4.2.1 A person who produces timber and sells his logs, and by-products 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 severance tax.

~~5.4.2.2~~ 4.4.2.2 A person who produces timber, and sells and delivers his timber products, in the same condition as when those products leave the forest, to a saw mill, other manufacturer or consumer, shall report fifty percent (50%) of his gross proceeds of sale under the severance tax.

~~5.4.2.3~~ 4.4.2.3 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 of commercial use shall report twenty-five percent (25%) of his gross proceeds of sale under the severance tax. 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 ~~3~~ 2a of these regulations and twenty-five percent (25%) of that amount shall be reported under the severance tax.

5.5 Limestone and Sandstone Quarried or Mined Production Privilege. - The privilege of severing and producing limestone and sandstone by quarrying or mining shall end once the limestone or sandstone is severed from the earth. In the case of limestone or sandstone mined, the measure shall be the value at the point the product is reduced to possession at the portal of an underground mine. In the case of limestone or sandstone quarried, the measure shall be the value at the point the product is severed from the wall of the open quarry .

~~5.5.1~~ 4.5.1 All activities from the point the product is first reduced to possession up to the point where it is readied and placed into its mode of transportation to the processing plant, or the first (primary) crusher, are not to be included in the value of the privilege taxed. Related cost or expenses are not to be included in the production value.

~~5.6~~ 4.6 Transportation Allowance. - A person who produces natural resource products and does not make sale of the same, but uses or consumes said resources in his business, shall report the value of such resources on the severance tax return. In determining the value of the natural resource products, the taxpayer must adhere to the requirements of Section 3 of these regulations and apply such requirements to make appropriate determinations of value at the point where production ends. When the natural resource product is transported to a distant place for use, consumption or further processing, the cost of transporting the natural resource product to the place of consumption shall not be included in the value of product taxed provided that the natural resources are transported by common carrier. No adjustment to value will be permitted for the cost of transporting such natural resource from the point of severance to the processing facilities in the case of natural resources, the processing of which, is included in the privilege subject to the tax imposed by ~~[11-13A]~~ W. Va. Code § 11-13A-1 et seq.

~~5.6.1~~ 4.6.1 Where the relationship between the producer of the natural resource products and the purchaser thereof is such that the gross proceeds derived from the sale are not indicative of the true value of the natural resources, the taxpayer shall determine value by application of Section ~~3~~ 2a of these regulations.

~~5.7~~ 4.7 Treatment of Freight Charges Incurred by Producers. - In certain instances, producers of natural resource products are permitted to deduct outgoing freight charges from the gross proceeds of sale or value to arrive at

taxable value under the severance tax. Outgoing freight charges include only those transportation costs incurred by the taxpayer subsequent to the completion of all treatment processes conducted by such taxpayer considered as mining under the Severance Tax Act and those treatment processes necessary or incidental thereto.

~~5.7.1~~ 4.7.1 In order to determine the value within the State and at the place where production ends, there may be deducted from gross proceeds of sales certain outgoing freight charges actually paid by the producer, but no deduction will be allowed for expenses incurred by him through the use of his own equipment in transporting items produced.

~~5.7.2~~ 4.7.2 In all instances where products are used or consumed by the producer at a point distant from the place of production, outgoing freight charges paid by the producer or costs incurred by him will not be allowed as a deduction, unless due consideration has been given to such charges or costs in the method by which the production values were determined. Accordingly, when a natural resource product is consumed (except in a further processing or preparing for sale activity treated as production by an integrated producer/processor), transportation costs paid to a common carrier by the producer to deliver the product to the location where the products are used or consumed shall not be included in the value of the natural resource product taxed.

~~5.7.3~~ 4.7.3 Generally, in order to be deductible from gross proceeds of sales, freight charges must be paid by the producer to a common carrier for the delivery of natural resources to a bona fide purchaser. To illustrate: Coal, at the place where production ends, has a value of ten dollars ($10.00) per ton. If a purchaser buys the coal at the mine for said price, the producer will report under the coal production classification the gross proceeds of sale, $10.00. However, if the purchaser buys the same coal delivered at eleven dollars ($11.00) per ton, and the producer pays a common carrier to make such delivery, the producer may deduct such freight charges ($1.00) from the gross proceeds of sale.

~~5.7.4~~ 4.7.4 If the producer of natural resource products sells his products to a purchaser and agrees to deliver such products in his own equipment for a fee, said fee may be deducted from the gross proceeds of sale in arriving at taxable value for severance tax purposes.

~~5.7.5~~ 4.7.5 If hauling or transportation charges are incurred by the producer or have been absorbed by the producer, such charges are outgoing freight charges and are deductible from gross proceeds of sale to arrive at taxable value.

~~5.8~~ 4.8 Transportation and Transmission Allowance for Natural Gas Producers. - The severance and production of natural gas shall be valued at the well-mouth immediately preceding transportation and transmission. In order to arrive at the well-mouth value of such severance and production, transportation or transmission expenses incurred by producers of natural gas before its sale shall be allowed as a deduction from the gross proceeds of the sale of such gas. For these purposes, subject to the discretion expressly reserved to the Tax Commissioner hereunder one of the following alternative methods shall be

selected by the taxpayer for obtaining the well-mouth value of the severance and production of natural gas. No transportation and transmission allowance is permitted for natural gas purchased from the producer at the well-mouth.

~~5-8-1~~ 4.8.1 From the gross proceeds of the sale of the production of natural gas, there shall be allowed a deduction in the amount of the costs of transportation or transmission of such gas through the system of the producer from the well-mouth point of severance and production to the point of sale. The deduction shall be limited to actual costs of transportation or transmission incurred without reference to items unrelated to such transportation or transmission such as general administration, overhead, or return on investment. Such deduction must be supported by schedules and statements of cost by the producer and will be subject to review and audit, and possible assessment or refund as a result of such audit, by the Tax Department.

~~5-8-2~~ 4.8.2 As an alternative to the method presented in Subsection ~~5-8-1~~ 4.8.1 supra, producers who are subject to regulation by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act of 1978 may determine the well-mouth value of their production which is subject to such regulation by utilizing the first sale ceiling price as determined, adjusted and published by the FERC pursuant to Section 2(21) of the said Natural Gas Policy Act. Producers subject to regulation of the FERC shall report as the value of their gas production which is subject to such regulation an amount equal to their Purchased Gas Adjustment (PGA) as filed bi-annually with the FERC plus any reimbursement of personal property taxes and business and occupation taxes or other severance taxes received upon the sale of affected gas if such reimbursements are made by the purchaser and included in the PGA costs. This method shall only apply to production of natural gas defined as new gas by the Natural Gas Act of 1978.

~~5-8-3~~ 4.8.3 As an alternative to the method presented at Subsections ~~4-8-1~~ 3.8.1 and ~~4-8-2~~ 3.8.2 supra, the well-mouth value of such severance and production may be determined by the average purchase price of natural gas from the same pool or field, or, in the event no gas is purchased from the same pool or field, by the average purchase price of natural gas from the most proximate pool or field and of the same quality and characteristics as that severed and produced; Provided, That in either case such purchase price accurately represents the well-mouth value of the gas severed and produced. This determination shall be supported by a statement of the pool or field from which the gas severed and produced is obtained, and shall be subject to review and audit, and possible assessment or refund as a result of audit, by the Tax Department. The Tax Commissioner reserves the right to disallow the application of this method for valuing the production of natural gas at the well-mouth when it can be established that the "average purchase price" does not accurately represent the current well-mouth value of the gas severed and produced when compared to the ultimate selling price under present market conditions.

In order to facilitate the establishment of a reasonable and accurate current market value, producers utilizing this method will be required to predicate their production value on current market prices negotiated by independent arms-length transaction agreed to and entered into during the subject taxable years.

~~5.8.4~~ 4.8.4 As an alternative to the methods presented at Subsections ~~5.8.1~~ 4.8.4 through ~~5.8.3~~ 4.8.3 supra, the well-mouth value of such severance and production of natural gas not sold at the well-mouth may be determined by a deduction of transportation and transmission costs in the amount of 15% of the gross proceeds of the natural gas severed and produced. This deduction shall be supported by a statement of the gross proceeds of sale of the natural gas severed and produced, and a computation of the deduction therefrom, and shall be subject to review and audit, and possible assessment or refund as a result of audit, by the Tax Department. The Tax Commissioner also reserves the right to disallow the application of this method of valuing the production of natural gas at the well-mouth when it can be established that a 15% transportation deduction does not accurately represent the well-mouth value of the gas severed, produced and sold.

~~§ 110-13A-6.~~ § 110-13A-5. Oil and Gas Operating Unit.

~~6.1~~ 5.1 Oil and Gas Operating Unit. - For purposes of the production of oil classification and the production of natural gas classification, as set forth in the severance tax imposed pursuant to W. Va. Code § 11-13A-1 et seq., multiple co-owners of oil or natural gas in place, lessees thereof, or others being vested with title and ownership to part or all of the oil and gas, as personal property, immediately after its severance, extraction, reduction to possession and production (except royalty recipients in kind) shall be deemed to be a "group or combination acting as a unit" and one "person" as defined in Section 2 of these regulations, if not otherwise defined herein, whenever engaged in the producing of oil or natural gas through common use (by joint or separately executed contracts) of the same operator's services or independent contract driller's services, where the independent contract driller acts as the operator (herein after included as an operator); and notwithstanding provisions of private contracts for separate deposit of gross receipts in separate members' accounts or for members of such group or combination to take in kind any proportionate part of such natural resources, the "group or combination acting as a unit" shall report the entire gross value on a single severance tax return. The operator shall file the severance tax return for the "group or combination acting as a unit." The operator shall obtain a business registration certificate for each "group or combination acting as a unit" as provided in W. Va. Code § 11-12-1 et seq. The application for business registration certificate must include a list identifying those persons comprising the "group or combination acting as a unit" and those persons shall not be required to obtain a separate business registration certificate unless they are engaging in business in West Virginia in any other capacity than as a participant in that "group or combination acting as a unit:" Provided, That nothing in this section shall relieve an operator from having to obtain a separate business registration certificate to engage in any other business in West Virginia.

For purposes of this section the term "operator" (including a contract driller acting in the capacity of an operator) with respect to a jointly owned oil or gas operating unit means the person charged with consent of non-operating parties with the managerial responsibility for the overall operation of the drilling operation which generally includes the provision and advance payment of all necessary development and maintenance costs and expenses, the keeping of all pertinent records, the billing of non-operating parties for their proportionate share of all costs and expenses respective to their ownership and the dispensing

of income to the non-operating owners in their proportionate share upon sale if such income is not directly paid to the non-operating owners by the purchaser.

~~6.2~~ 5.2 Lessees Considered Producers. - Lessees, sublessees or other denominated lessees are considered to be producers of all of the oil or natural gas produced, regardless of any payment, in kind, to lessors, sublessors or other denominated lessors of a part of such natural resources as rents or royalties.

~~§ 110-13A-7.~~ § 110-13A-6. Additional Tax for Benefit of Counties.

~~7.1~~ 6.1 Additional Tax on Production of Coal for Benefit of Counties. - The additional tax on the severance, extraction and production of coal, dedicated for the benefit of counties and municipalities pursuant to W. Va. Code § 11-13A-6 has already been included in the listed rates under W. Va. Code § 11-13A-3 and Section 4 of these regulations. The Tax Department will perform all necessary calculations to insure that the thirty-five one hundredths of one percent additional tax imposed pursuant to W. Va. Code § 11-13A-6 will be segregated from the overall tax liability calculated in W. Va. Code § 11-13A-3 and the revenues distributed according to the provisions of W. Va. Code § 11-13A-6.

The fund for the additional tax on production of coal for benefit of counties shall be calculated based upon thirty-five one hundredths of one percent of the overall severance tax liabilities of coal producers prior to application of credits to which the taxpayer is entitled. The shortfall in severance tax collections under W. Va. Code § 11-13A-3 attributable to available credits shall be made up out of the State's share of actual severance tax collections after application of all available credits. Thus, the total additional tax on production of coal for benefit of counties will be thirty-five one hundredths of one percent of the coal producers gross proceeds of sale subject to severance tax. Seventy-five percent of the total additional tax on production of coal shall be deposited in the "county coal revenue fund" with the remaining twenty-five percent to be deposited in the "all counties and municipalities fund."

When calculating the distribution of the additional tax on the production of coal for benefit of counties, the credits taken by producers shall not be taken into account. The share a county is entitled to from the "county coal revenue fund" under W. Va. Code § 11-13A-6(f) shall be determined by: 1) Dividing the total amount in the "county coal revenue fund" then available for distribution by the total number of tons of coal mined in this State during the preceding quarter; and 2) multiplying the quotient thus obtained by the number of tons of coal removed from the ground in such county during the preceding quarter, without regard to whether the mining of the coal in each county resulted in severance tax collections from such mining.

Pursuant to the Court Order issued by Charles E. King, Jr., Circuit Judge, Thirteenth Judicial Circuit in Civil Action No. 88-C-660, producers of coal shall report the number of tons of coal mined in each county based on the location of the coal in place prior to removal. For the purpose of determining the distribution of the "county coal revenue fund" to individual counties pursuant to W. Va. Code § 11-13A-6(f) coal shall be deemed to be severed from

the seam in which it was embedded, in or under such counties after April 1, 1991, without regard to where said coal is brought to the surface or portaled.

~~7.2~~ 6.2 Errors in Distribution of Additional Tax for Benefit of Counties. - In those instances where an error occurs in the distribution of the additional tax for the benefit of counties, whether the error is the result of erroneous reporting by the coal producer of the county in which the coal is severed or is the result of a miscalculation in the quarterly distribution of the county coal severance funds, the State Tax Commissioner shall have full and complete authority to require full restitution of any overage erroneously distributed to one county and transfer the amount of overage so erroneously distributed to the county which was entitled to those funds.

In ordering the repayment of funds wrongfully distributed the Tax Commissioner shall allow repayment to occur over the same number of quarters as those in which the error in distribution continued, with the repayment to begin in the quarter next following that in which the county receives written notice of overpayment. Repayment may be made by withholding the amount due from current distributions due the county during each of these quarters, where the distributions are sufficient to meet the repayment schedule.

Nothing in this section shall prevent the counties involved from entering a written agreement to accomplish a mutually agreed upon redistribution of funds to correct the error, as an alternative to the Tax Commissioner's repayment plan.

~~§ 110-13A-8.~~ § 110-13A-7. Accounting.

~~8.1~~ 7.1 Accounting Periods. - For purposes of the severance tax imposed by W. Va. Code § 11-13A-1 et seq., a taxpayer's taxable year shall be the same as for federal income tax purposes. If a taxpayer's taxable year is changed for federal income tax purposes, it shall be similarly changed for purposes of the severance tax. The taxpayer shall provide a copy of the authorization for such change from the Internal Revenue Service, with the taxpayer's annual return.

~~8.2~~ 7.2 Method of Accounting. - A taxpayer's method of accounting under the severance tax shall be the same as taxpayer's method of accounting for federal income tax purposes. In the absence of any method of accounting for federal income tax purposes, the accrual method of accounting shall be used unless the Tax Commissioner, in writing, consents to use of another method. If a taxpayer's method of accounting for purposes of the federal income tax are changed, the severance tax shall similarly be changed. The taxpayer shall provide a copy of the authorization for such change from the Internal Revenue Service, with its annual severance tax return for the taxable year.

~~§ 110-13A-10.~~ § 110-13A-8. Annual Return.

~~10.1~~ 8.1 Filing Date for Calendar Year Taxpayers. - Calendar year taxpayers shall file the annual return with the Tax Commissioner on or before the end of the first month after the end of the taxable year.

~~10-2~~ 8.2 Filing Date for Fiscal Year Taxpayers. - Fiscal year taxpayers shall file the annual return with the Tax Commissioner on or before the end of the first month after the end of the fiscal year.

~~10-3~~ 8.3 Payment of Tax. - It shall be the duty of every taxpayer required to pay the severance tax due by the date fixed for filing the return (determined without regard to any extension of time for filing such return).

~~10-4~~ 8.4 Tax Due Without Assessment. - It is the duty of every taxpayer required to pay severance tax due pursuant to file the return and pay the tax due even though no assessment, notice or demand is received by the taxpayer.

~~10-5~~ 8.5 Credit. - Every taxpayer subject to the severance tax is allowed an annual credit of five hundred dollars against taxes due to be applied at the rate of forty-one dollars and sixty-seven cents per month for each month the taxpayer was engaged in business in this State.

§ 110-13A-9. Estimated Taxes.

9.1 Tax of More Than $1,000 Per Month. - For taxpayers whose estimated severance tax liability exceeds one thousand dollars per month, the tax shall be due and payable in monthly installments on or before the last day of the month following the month in which the tax accrued:

9.1.1 Estimated Tax. - Each such taxpayer shall, on or before the last day of each month, make out an estimate of the tax for which the taxpayer is liable for the preceding month, sign the same and mail it together with a remittance, in the form prescribed by the Tax Commissioner, of the amount of tax due to the office of the Tax Commissioner.

9.1.2 Deductions From Estimated Tax. - In estimating the tax due for each month, the taxpayer may deduct one twelfth of any applicable tax credits allowable for the taxable year, and one twelfth of any annual exemption allowed for such year.

9.2 Tax of Less Than $1,000 Per Month. - For taxpayers whose estimated severance tax liability is one thousand dollars per month or less, the tax shall be due and payable in quarterly installments on or before the last day of the month following the quarter in which the tax accrued:

9.2.1 Estimated Tax. - Each such taxpayer shall, on or before the last day of the fourth, seventh and tenth months of the taxable year, make out an estimate of the tax for which the taxpayer is liable for the preceding quarter, sign the same and mail it together with a remittance, in the form prescribed by the Tax Commissioner, of the amount of tax due to the office of the Tax Commissioner.

9.2.2 Deductions From Estimated Tax. - In estimating the amount of tax due for each quarter, the taxpayer may deduct one fourth of any applicable tax credits allowable for the taxable year and one fourth of any annual exemption allowed for such year.

9.3 Exception. - The Tax Commissioner, if he deems it necessary to insure payment of the tax, may require the return and payment under this Section for periods of shorter duration than those prescribed in Subsections 9.1 and 9.2 of these regulations.

~~§ 110-13A-11.~~ § 110-13A-10a. Development Investment Credits.

~~11.1~~ 10a.1 Tax Credit. - There shall be allowed as a credit against the severance taxes imposed for the taxable year, the amount determined under W. Va. Code §§ 11-13C-1 et seq., 11-13D-1 et seq., and 11-13E-1 et seq. relating to:

~~11.1.1~~ 10a.1.1 Tax credit for business investment and jobs expansion;

~~11.1.2~~ 10a.1.2 Tax credit for industrial expansion and revitalization and eligible research and development projects;

~~11.1.3~~ 10a.1.3 Tax credit for coal loading facilities.

~~11.2~~ 10a.2 Regulations for Implementing Credit. - The Tax Commissioner shall prescribe all necessary regulations to carry out the purposes of the tax credits outlined in Subsection 10a.1 of these regulations. No taxpayer may take a credit for a certified project under W. Va. Code § 11-13C-1 et seq. without first obtaining certification of eligibility from the Tax Commissioner.

~~11.3~~ 10a.3 Credit for Consumers Sales and Service Tax and Use Tax Paid. - The severance tax shall be subject to the credits set forth in W. Va. Code § 11-15-9b and W. Va. Code § 11-15A-3b.

~~11.4~~ 10a.4 Credit for Minimum Severance Tax on Coal. - There shall be allowed as a credit against the severance taxes imposed for the taxable year on coal by W. Va. Code § 11-13a-3 but not including the additional severance tax on coal imposed by W. Va. Code § 11-13A-6, the amount of annual minimum severance tax on coal imposed by W. Va. Code § 11-12B-3(a). The credit allowed by W. Va. Code § 11-12B-3(b) shall not exceed the severance tax liability exclusive of the additional tax on coal after application of all credits to which the taxpayer may be entitled except any credit for installment payments of estimated tax or for overpayment of tax.

~~§ 110-13A-12.~~ § 110-13A-1. Filing Extensions.

~~12.1~~ 11.1 Time Extension for Filing. - If the taxpayer can show good cause to the satisfaction of the Tax Commissioner, the Tax Commissioner may, upon written request received on or prior to the due date of the annual or any periodic estimate, grant a reasonable extension of time for filing any return or other document. Such extension shall be granted upon such terms as the Tax Commissioner may by regulation prescribe or by contract require.

~~12.2~~ 11.2 Extension for Filing Not Extension for Payment. - The granting of a time extension under Subsection ~~12.1~~ 11.1 of these regulations shall not alone be deemed to extend the due date for payment of the tax.

~~§ 110-13A-13.~~ § 110-13A-12. Remittance Extensions.

~~13.1~~ 12.1 Extension of Time for Payment of Tax Due on Amount Determined on Return. - The Tax Commissioner may extend the time for payment of the amount of severance tax shown on any return for a reasonable period not to exceed six months from the date fixed for payment thereof.

~~13.2~~ 12.2 Extension of Time for Payment of Tax Due on Amount Determined as Deficiency. - The Tax Commissioner may extend the time for payment of the amount determined as a deficiency for a period not to exceed eighteen months from the date fixed for payment of the deficiency (or for a further period of twelve months in exceptional cases) where it is shown to the satisfaction of the Tax Commissioner that payment of a deficiency upon the date fixed for payment thereof will result in undue hardship to the taxpayer.

~~13.3~~ 12.3 No Extension for Certain Deficiencies. - No extension shall be granted under W. Va. Code § 11-13A-12 for any deficiency which is due to negligence, to intentional disregard of regulations, or to fraud with intent to evade tax.

~~§ 110-13A-14.~~ § 110-13A-13. Filing and Payment.

~~14.1~~ 13.1 Place for Filing Returns and Other Documents. - Tax returns, statements, or other documents, or copies thereof, shall be filed with the Tax Commissioner by delivery, in person or by mail, to his office in Charleston, West Virginia. The Tax Commissioner may, by regulation, designate any place for filing such returns, statements, or other documents, or copies thereof.

§ 110-13A-14. Payment.

14.1 Time and Place for Paying Tax Shown on Returns. - Taxpayers required to make the annual return of severance taxes shall, without assessment or notice or demand from the Tax Commissioner, pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return). Any extension of time for payment of such severance taxes may be granted upon such terms as the Tax Commissioner may by regulation prescribe or by contract require.

§ 110-13A-15. Signature and Verification.

15.1 Signing of Returns. - Any return, statement or other document required to be made under the provisions of W. Va. Code § 11-13A-1 et seq. shall be signed in accordance with instructions or regulations prescribed by the Tax Commissioner.

15.1.1 Signing of Corporation Returns. - The return of a corporation shall be signed by the president, vice president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized so to act. In the case of a return made for a corporation by a fiduciary, such fiduciary shall sign the return. The fact that an individuals name is signed on the return shall be prima facie evidence that such individual is authorized to sign the return on behalf of the corporation.

15.1.2 Signing of Partnership Returns. - The return of a partnership shall be signed by any one of the partners. The fact that a

partner's name is signed on the return shall be prima facie evidence that such partner is authorized to sign the return on behalf of the partnership.

15.2 Signature Presumed Authentic. - The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement or other document was actually signed by him.

15.3 Verification. - Except as otherwise provided by the Tax Commissioner, any return, declaration or other document required to be made under Article thirteen-a, Chapter eleven of the Code, shall contain or be verified by a written declaration that it is made under the penalties of perjury.

§ 110-13A-16. Bond.

16.1 When Bond Required. - Whenever it is deemed necessary to ensure compliance with W. Va. Code § 11-13A-1 et seq. the Tax Commissioner may require any taxpayer to post a cash or corporate surety bond.

16.2 Amount of Bond. - The amount of the bond shall be fixed by the Tax Commissioner, but shall not be greater than three times the average quarterly liability of taxpayers filing returns for quarterly periods, five times the average monthly liability of taxpayers required to file returns for monthly periods, or two times the average periodic liability of taxpayers permitted or required to file returns for other than monthly or quarterly reports, provided that notwithstanding the foregoing limitation no bond required under this Section shall be less than five hundred dollars.

16.2.1 Increase or Decrease in Amount of Bond. - The amount of the bond required pursuant to Subsection 16.2 of these regulations may be increased or decreased by the Tax Commissioner at any time subject to the limitations provided in Subsection 16.2 of these regulations.

16.3 Restraining Order Until Bond Posted. - The Tax Commissioner may bring an action, in the Circuit Court of Kanawha County or in the circuit court of any county having jurisdiction over the taxpayer, for a restraining order, or a temporary or permanent injunction to restrain or enjoin the operation of a taxpayer's business until the bond is posted and any delinquent tax (including applicable interest and additions to tax) has been paid.

§ 110-13A-17. Special Rules for Remittance.

17.1 Agreement for Processor to Pay Tax. - In the case of natural resources (except natural gas) where the Tax Commissioner finds that it would facilitate and expedite the collection of the severance taxes, the Tax Commissioner may authorize the taxpayer processing the natural resource to report and pay the tax which would be due from the taxpayer severing the natural resources. The agreement shall be as the Tax Commissioner may prescribe. The agreement must be signed: by the owners, if the taxpayers are natural persons; in the case of a partnership or association, by a partner or member; in the case of a corporation, by an executive officer or some person specifically authorized by the corporation to sign the application. The agreement may be terminated by any party to the agreement upon giving thirty days written notice to the other

parties to the agreement: Provided, That the Tax Commissioner may terminate the agreement immediately upon written notice to the other parties when either the taxpayer processing the natural resource or the taxpayer severing the natural resource fails to comply with the terms of the agreement.

17.2 Collection of Tax on Severance of Natural Gas. - On or before the last day of the month following each taxable calendar month, each person first purchasing natural gas after it has been severed (or in the event it has been severed and processed, after it has been severed and processed) shall be liable for the tax imposed under W. Va. Code § 11-13A-1 et seq. The first purchaser of natural gas shall collect the tax imposed from the person severing (or severing and processing) the natural gas and remit the taxes to the Tax Commissioner. The first purchaser of the natural gas shall report purchases of natural gas during the taxable month, showing the quantities of gas purchased, the price paid, the date of purchase, and any other information deemed necessary by the Tax Commissioner on forms prescribed by the Tax Commissioner.

17.2.1 Report by Person Severing Natural Gas. - On or before the last day of the month following each taxable calendar month, each person severing (or severing and processing) natural gas, shall report the sales of natural gas, showing the name and address of the person to whom sold, the quantity of gas sold, the date of sale, and the sales price on forms prescribed by the Tax Commissioner.

17.2.2 Exception to Method of Collecting Tax Upon Producing Natural Gas. - Where the Tax Commissioner determines that the collection of severance taxes due would be accomplished in a more efficient and effective manner, the Tax Commissioner may require the severor to remit the taxes. Notwithstanding the provisions of Subsection 17.2 the severor shall continue to remit the severance tax until further notice from the Tax Commissioner.

17.2.3 Where the person severing (or both severing and processing) the natural gas will sell the gas to the ultimate consumer, the Tax Commissioner shall require the severor (or severor and processor) to remit the taxes.

§ 110-13A-18. Records Retention.

18.1 Records Required. - Every taxpayer liable for reporting or paying the severance taxes shall keep such records, receipts, invoices, and other pertinent papers in such forms as the Tax Commissioner may require.

18.2 Record Retention. - Every taxpayer shall keep such records for not less than three years after the annual severance tax return is filed, unless the Tax Commissioner in writing authorizes their earlier destruction. An extension of time for making an assessment or claim for refund shall automatically extend the time period for keeping the records for all years subject to audit covered in the agreement for extension of time.

§ 110-13A-19. Procedure and Administration.

19.1 Tax Subject to "West Virginia Tax Procedure and Administration Act". - Each and every provision of the "West Virginia Tax Procedure And Administration Act" set forth in W. Va. Code § 11-10-1 et seq. shall apply to

the taxes imposed by W. Va. Code § 11-13A-1 et seq. with like effect as if said Act were set forth in extenso in said Article 13A.

§ 110-13A-20. Crimes and Penalties.

20.1 Tax Subject to "West Virginia Tax Crimes and Penalties Act". - Each and every provision of the "West Virginia Tax Crimes And Penalties Act" set forth in W. Va. Code § 11-9-1 et seq. shall apply to the taxes imposed by W. Va. Code § 11-13A-1 et seq. with like effect as if said Act were set forth in extenso in said Article 13A.

§ 110-13A-21 Severability.

21.1 If any provision of these regulations or the application thereof shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgement shall not affect, impair, or invalidate the remainder of these regulations, but shall be confined in its operation to the provisions thereof directly involved in the controversy in which such judgement shall have been rendered, and the applicability of such provision to other persons or circumstances shall not be affected thereby.

~~§ 110-13A-21.~~ § 110-13A-22. Short Taxable Year.

~~21.1~~ 22.1 Short Taxable Year. - If the taxpayer's taxable year under W. Va. Code § 11-13A-1 et seq. is on any basis other than the State's fiscal year, then the taxpayer's first taxable year for the severance taxes shall be a short taxable year and shall cover the period beginning the first day of July, one thousand nine hundred eighty-seven, and ending with the taxpayer's then current fiscal or tax year for federal income tax purposes.

§ 110-13A-23 Reserved for future use.

§ 110-13A-24 Priority of Tax in Distributions of Property and Estates.

24.1 In the distribution, voluntary or compulsory, in receivership, bankruptcy or otherwise, of the property or estate of any person, all taxes due and unpaid under W. Va. Code § 11-13A-1 et seq. shall be paid from the first money available for distribution in priority to all claims and liens except taxes and debts due the United States which under federal law are given priority over the debts and liens created by W. Va. Code § 11-13A-1 et seq. Any person charged with the administration or distribution of any such property or estate who shall violate the provisions of this section shall be personally liable for any taxes accrued and unpaid under this article which are chargeable against the person whose property or estate is in administration or distribution.

24.2 There is a priority for all unpaid severance tax in distributions of the property or estate of any person, and the tax must be paid from the first money available for distribution in priority to all other claims and liens, except taxes and debts due the United States.

24.2.1 The distribution of property subject to federal tax liens is subject to the priority of such liens provided in the Internal Revenue Code.

24.2.2 The distribution of property in federal bankruptcy proceedings is subject to the priorities of debts and liens provided in the United States Bankruptcy Code.

24.2.3 This priority applies to the amount of tax, interest, additions to tax, and penalties.

24.3 The priority applies to all distributions of the property or estate of any person. A "distribution" of property or an estate is the sale or transfer of the property, or the disbursement of money resulting from the sale or transfer of the property or estate of any person. Distributions include, but are not limited to, the transfer of property or disbursement of proceeds of sales of property by any executor, administrator, receiver, trustee, fiduciary, special commissioner, or any public officer under judicial process; and distributions in any proceedings such as bulk sale, liquidation sale, estate sale, assignment for the benefit of creditors, interpleader action, and administrative or judicial proceeding for the dissolution of a partnership or corporation.

24.4 The priority does not apply to transactions that do not constitute distributions of property. These transactions include the sale, transfer or liquidation of less than a substantial part of the property of any person; the sale or transfer of property in the ordinary course of the business of the owner of the property; sales or transfers of any property by the owner or for consideration payable to the owner by the purchaser or transferee.

24.5 This priority applies to the distribution of all property, including but not limited to real property or any interest therein; tangible personal property, including fixtures, equipment, machinery, furniture and vehicles; intangible property, including accounts receivable, contract rights, bank accounts, stocks, bonds; and the proceeds from the sale or liquidation of any such property.

24.6 This priority requires payment of the tax from the first money that is available for distribution to lienors, creditors, beneficiaries, or any other person, after payment of costs, commissions, fees and any other expenses incurred in the preservation, storage, liquidation, or transportation of the property or estate.

24.7 The debt or claim for taxes has priority over all claims and liens, except debts due the United States.

24.7.1 Claims subject to this priority include any debt or obligation, liquidated or unliquidated, that does not constitute a lien upon the property or estate.

24.7.2 Liens subject to this priority include any charge or encumbrance on the property or estate for payment of any claims, debt or obligation, such as a deed of trust, judgment lien, security interest, vendors lien, execution lien, tax lien, mechanics lien, landlords lien and municipal lien.

24.7.3 The priority of the severance tax debt in such distributions is not determined by the presence or absence of a perfected notice of tax lien,

by the presence or absence of a perfected lien securing any competing claim or debt, or by the order in which any such competing liens were perfected.