



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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7/22/2019 11:55:46 AM

Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Tax TITLE-SERIES: 110-13AC

RULE TYPE: Interpretive Amendment to Existing Rule: No Repeal of existing rule: No

RULE NAME: REDUCED SEVERANCE TAX RATES FOR
THERMAL OR STEAM COAL

CITE STATUTORY AUTHORITY: W. Va. Code §11-10-5

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 08/22/2019 10:00 AM

COMMENTS MAY BE MAILED OR EMAILED TO:

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PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

This interpretative rule deals with the July 1, 2019 reduction in the severance tax rate on the gross value of thermal or steam coal produced. It also discusses the distribution of funds to coal producing counties under W. Va. Code §11-13A-6a.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

H.B. 3142, from the 2019 Regular Legislative Session, reduced the severance tax rate on thermal or steam coal by 2%, incrementally, over a three-year period, so that by July 1, 2021 the severance tax rate on steam or thermal coal would be 3% of the gross value of the natural resource. This interpretive rule explains and clarifies the July 1, 2019 reduction in the severance tax rate on the gross value of thermal or steam coal produced. This rule defines terms, clarifies how the Tax Department will determine whether the proceeds of a sale are from the sale of thermal or steam coal, provides examples, and discusses record keeping.

H.B. 3142 also amended W. Va. Code §11-13A-6a. Under that section, 5% of the tax attributable to the severance of coal imposed by W. Va. Code §11-13A-3 is dedicated and distributed to and for the use and benefit of the coal producing counties. This bill adds a section stating that effective July 1, 2019, the dedicated amount cannot be less than the amount distributed pursuant to this subsection for the fiscal year beginning July 1, 2018. This interpretative rule clarifies the amount of that distribution and how it is to be determined.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

Additional costs to the Tax Department will be \$65,000 in FY2020 and \$35,000 each fiscal year thereafter.

B. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

Additional costs to the Tax Department will be \$65,000 in FY2020 and \$35,000 each fiscal year thereafter.

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2019 Increase/Decrease (use "-")	2020 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	65,000	35,000	35,000
Personal Services	20,000	20,000	20,000
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	45,000	15,000	15,000
2. Estimated Total Revenues	0	0	0

D. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

This legislative rule explains and clarifies the July 1, 2019 reduction in Severance Tax rates on the gross value of thermal or steam coal. The rule also clarifies the minimum amount that will be available each year for distribution to coal-producing counties.

Additional costs to the Tax Department will be \$65,000 in FY2020 and \$35,000 each fiscal year thereafter.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Allen R Prunty -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

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TITLE 110
INTERPRETIVE RULE
STATE TAX DEPARTMENT

SERIES 13AC
REDUCED SEVERANCE TAX RATES FOR THERMAL OR STEAM COAL

§110-13AC-1. General.

1.1. Scope. -- This interpretive rule explains and clarifies the July 1, 2019 reduction in the severance tax rate on the gross value of thermal or steam coal, as defined in W. Va. Code § 11-13A-3(c). This interpretive rule also clarifies the minimum amount that will be available each year for distribution to coal producing counties pursuant to §11-13A-6a of the West Virginia Code.

1.2. Authority. -- W. Va. Code §11-10-5.

1.3. Filing Date. --

1.4. Effective Date. --

§110-13AC-2. Interpretive Note.

This interpretive rule shall be read together with the Severance Tax statutes (W. Va. Code § 11-13A-1 et seq.) and legislative rules (W. Va. Code St. R. §110-13A-1, et seq.) previously promulgated by the Tax Commissioner. The definitions, policies and procedures provided in W. Va. Code St. R. §110-13A-1, et seq. are equally applicable to this interpretive rule. Should there be an inconsistency between the promulgated legislative rules and this interpretive rule, the legislative rules shall control, except to the extent the legislative rules do not reflect the amendment to the Severance Tax laws enacted in H.B. 3142, which is addressed in this or another rule promulgated by the Tax Commissioner as provided in § 29A-3-1, et seq. of the West Virginia Code.

§110-13AC-3. Definitions.

Unless a specific definition is provided in this section, terms used in this rule are defined as provided in W. Va. Code § 11-13A-1, et seq. and legislative rule W. Va. Code St. R. §110-13A-1, et seq., unless the context in which the term is used clearly requires a different meaning. The following terms shall have the meaning ascribed herein and shall apply in the singular as well as in the plural.

3.1. 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" includes but is not limited to peat, lignite, bituminous, anthracite and various intermediary forms of coal.

3.2. Thermal or steam coal. -- The term "thermal or steam coal" means coal sold for the purpose of generating electricity. For coal to qualify as thermal or steam coal, the coal must be sold by the taxpayer claiming the reduced severance tax rate either directly to an electric power company for the purpose of generating or producing electricity or by using services of a broker to sell the coal on the taxpayer's behalf

to an electric power company for the purpose of generating or producing electricity. When using the services of a broker, taxpayers will be eligible for the reduced severance tax rates for thermal or steam coal only if the broker does not take title or ownership of the coal.

3.3. Generating or producing electricity. – The term “generating or producing electricity” means the generation, production or sale of electric power engaged in by businesses subject to the business and occupation tax imposed by W. Va. Code §11-13-1, et seq., or any other electric power company; Provided That, the term “generating or producing electricity” shall not include generating steam, producing heat or coal gasification except to the extent those activities are included in the definition of generating or producing electricity.

3.4. Electric power company. -- The term “electric power company” means a company engaged in the business of manufacturing, generating, supplying, or manufacturing, generating and supplying electricity for light, heat, or power to consumers or for its own use.

3.5. 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.

3.6. Broker. -- A “broker” is an agent who sells goods or property for a principal, but does not acquire title to or ownership of the goods or property, or a person who functions as an intermediary between two parties in order to arrange or negotiate an agreement or contract. References in this Rule to sales of coal to an electric power company include sales by the producer of the coal made directly to the electric power company or to the electric power company through the services of a broker acting as agent for the producer of the coal.

§110-13AC-4. Reduction of Severance Tax Rates on Thermal or Steam Coal.

4.1. Effective July 1, 2019, the rate of tax imposed by W. Va. Code §11-13A-3 on the gross value of thermal or steam coal is reduced over the next three years for a total reduction of two percent by July 1, 2021:

4.1.1. On and after July 1, 2019, the tax rate is 4.3% of the gross value of thermal or steam coal produced;

4.1.2. On and after July 1, 2020, the rate is 3.7% of the gross value of thermal or steam coal produced; and,

4.1.3. On and after July 1, 2021, the rate is 3% of the gross value of thermal or steam coal produced.

4.2. The reduced tax rate includes the .35% Severance Tax imposed for the benefit of counties and municipalities under W. Va. Code §11-13A-6.

4.3. The severance tax attributable to thermal or steam coal is included in amounts of coal severance tax imposed under W. Va. Code §11-13A-3 that is reallocated and dedicated for the benefit of the coal producing counties under W. Va. Code §11-13A-6a.

4.4. The tax rates provided in Section 4.1 of this Rule do not apply to thin seam coal taxed under W.

Va. Code §11-13A-3(g) when it is sold to an electric power company. The applicable rate of tax will continue to be either 1% or 2% depending upon the thickness of the seam of coal from which the coal was produced.

4.5. Thermal and steam coal receiving the reduced rates in this section are subject to the annual minimum severance tax imposed under W. Va. Code §11-12B-3. However, thin seam coal taxed under W. Va. Code §11-13A-3(g) is not subject to the minimum severance tax.

§110-13AC-5. Accounting for Sales of Thermal or Steam Coal.

5.1. The determination of whether the gross proceeds of sale are considered to be from the sale of thermal or steam coal in order to qualify the gross proceeds of sale for a reduced rate of taxation will be made based upon the coal sales contract and whether the coal is sold to an electric power company for the purpose of generating or producing electricity.

5.1.1. Taxpayers eligible for the reduced severance tax rates for thermal or steam coal are those taxpayers who sell coal to an electric power company, either directly or through the services of a broker, for the purpose of generating or producing electricity. When using the services of a broker, taxpayers will be eligible for the reduced severance tax rates for thermal or steam coal only if the broker does not acquire title or ownership of the coal, although the broker may take physical possession of the coal. The sale to the electric power company must occur on or after July 1, 2019, in order to be eligible for the reduced rates.

5.1.2. If the coal is sold by the producer of the coal to a third-party seller, marketer, processor, blender, or any other entity, other than an electric power company, either directly or through the services of a broker, the coal is not eligible for the thermal or steam coal reduced rate even if the coal is ultimately sold to an electric power company and used to generate electric power. If the coal is sold by the producer of the coal to a broker who acquires title or ownership of the coal, the coal is not eligible for the thermal or steam coal reduced rate, even if the coal is ultimately sold to an electric power company and used to generate electric power.

5.1.3. In the case of coal, the term "production of coal" includes all activities and values arising from the severance or extraction of coal and ordinary processing activities, including cleaning, breaking, sizing, dust allaying, treating to prevent freezing and loading for shipment. When any of these 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.

Accordingly, if a taxpayer, such as a blender or processor, purchases raw coal and engages in the activities of cleaning, breaking, sizing, dust allaying, treating to prevent freezing, loading for shipment or such other activities that are defined as being production activities in W.Va. Code §11-13A-1, et seq. or the Legislative Rule, that taxpayer may be eligible for the reduced rate on steam or thermal coal if that taxpayer sells the coal to an electric power company, on or after July 1, 2019, either directly or through the services of a broker, for the purpose of generating or producing electricity. If the coal is sold to any other entity, other than an electric power company, the coal is not eligible for the thermal or steam coal reduced rate. The producer of the raw coal would not be eligible for the reduced rate of tax because the producer did not sell the coal to an electric power company.

5.1.4. Examples.

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5.1.4.a. Coal Company A produces bituminous coal which it sells to an electric power company, either directly or through the services of a broker, for the purpose of generating or producing electricity. When the sale is made after June 30, 2019, the gross value of the coal sold will be taxed at the reduced rate specified in section 110-13AC-4 of this rule.

5.1.4.b. Coal Company B produces bituminous coal which it sells to a third-party company that processes the coal and then sells the processed coal to an electric power company for use in generating electricity. Coal Company B pays severance tax computed at the 5% rate of tax on the gross value of the raw coal it sells to the processing company. The processing company pays severance tax on the value added to the coal by the coal processing process. The processed coal is sold after June 30, 2019 by the processing company to an electric power company for use in generating electricity. The value added to the coal by processing will be taxed at the reduced rate specified in section 110-13AC-4 of this rule.

5.1.4.c. Coal Company C produces thin seam bituminous coal that it sells to an electric power company for use in generating electric power. The tax rates provided in section 110-13AC-4 of this rule do not apply to this thin seam coal sold to an electric power company. The applicable rate of tax will continue to be either 1% or 2% depending upon the thickness of the seam of coal from which the coal was produced.

5.1.4.d. After July 1, 2019, Company D, a coal producer, contracts with Company E to have E extract the coal and deliver it to Company F who crushes, cleans and loads the coal for shipment. Company D then sells the coal to a third-party reseller, who later sells the coal to an electric power company. In this instance, Company D would report and pay tax at the rate of 5% on the total gross value of the coal produced, without any deductions for payments made to E and F.

5.1.4.e. Company G, a coal producer, extracts the coal and sells the coal to Company H for \$20.00 a ton. Company H crushes, cleans and sells the coal to Company I for \$30.00 a ton. Company I, a coal broker who has taken title or ownership of the coal, blends the coal with other purchased coal, loads and freeze treats the coal. The coal is ultimately sold on July 15, 2021 for \$35.00 a ton to an electric power company for purposes of generating or producing electricity. Company G reports and pays tax on \$20.00 a ton, under the 5% regular severance tax rate. Company H reports and pays tax on \$10.00 a ton, the value added by processing, under the 5% regular severance tax rate; and Company I reports and pays tax on \$5.00 a ton, at the reduced rate specified in section 110-13AC-4 of this rule.

5.1.4.f. Company J, a coal producer, extracts the coal and sells the coal to Company K for \$20.00 a ton. Company K crushes and cleans the coal. Company K then uses the services of a coal broker, Company L. Company L takes possession of the coal, but it does not take title or ownership of the coal. Company L blends the coal from Company K with other coal and negotiates a sale of the coal to an electric power company. The coal is ultimately sold on July 15, 2021 for \$35.00 a ton to an electric power company for purposes of generating or producing electricity. Company J reports and pays tax on \$20.00 a ton, under the 5% regular severance tax rate. Company K reports and pays tax on \$15.00 a ton, the value added by processing, at the reduced rate specified in section 110-13AC-4 of this rule without deduction for any payments made to Company L.

5.1.4.g. Company M, a coal producer, has a long-term sales contract with an electric power company that was negotiated in 2017. The sales contract provides for sales of thermal coal to the power company with deliveries in 2018 and 2019. Deliveries of coal made after June 30, 2019, will be eligible for

the reduced rate specified rate in section 110-13AC-4 of this rule.

5.2. When natural resources are severed for sale at a future date, payment of the severance 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.

5.2.1. Whenever coal is severed prior to the date on which the rate at which thermal or steam coal 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 coal was severed from the ground.

5.2.2. Example – Company A uses the cash method of accounting. Company A, a coal producer extracts coal in June 2019, but sells that coal to an electric power company for purposes of generating electricity on July 15, 2019, and, therefore, does not recognize gross income from that sale until after the 4.3% tax rate for thermal or steam coal becomes effective. That producer would be able to claim the 4.3% tax rate on the steam coal.

5.3. Thermal and steam coal receiving the reduced rates in this section are subject to the annual minimum severance tax imposed under W. Va. Code §11-12B-3.

5.3.1. Example – After July 1, 2019, Coal Company A produces coal and sells it to an electric power company for use in generating electric power. The producer will be able to claim the 4.3% tax rate on the steam coal. The coal is also subject to the minimum severance tax under W. Va. Code §11-12B-3. A producer who pays minimum tax is allowed that payment as a credit against the severance tax, but only after other allowable credits have been applied, and the credit cannot exceed the severance tax due. No credit is allowed against the additional severance tax imposed for the benefit of the counties and municipalities under W. Va. Code §11-13A-6.

5.3.2. Example -- Coal Company B produces thin seam bituminous coal that it sells to an electric power company for use in generating electric power. The tax rates provided in section 110-13AC-4 of this rule do not apply to this thin seam coal sold to an electric power company. The applicable rate of tax will continue to be either 1% or 2% depending upon the thickness of the seam of coal from which the coal was produced. Thin seam coal taxed under W. Va. Code §11-13A-3(g) is not subject to the minimum severance tax.

§110-13AC-6. Records.

6.1. Any person having a right or claim to the reduced rate on thermal or steam coal must maintain adequate records to show that the coal was sold to an electric power company for the purpose of generating or producing electricity. On audit, the taxpayer should be able to provide invoices, sales contracts, and bills of receipt documenting the vendor name, purchaser's name, the invoice date, and invoice amount. For purposes of determining whether certain coal is "thermal or steam coal" within the meaning of W.Va. Code § 11-13A-3, the taxpayer is not required to submit documentation with its severance tax return regarding sulfur content, ash content, or British thermal unit value, etc. for specific coal sales.

6.1.1. Where coal is sold directly to an electric power company for purposes of generating or

producing electricity, the taxpayer must retain in its records the bill of sale or invoice showing the tons sold and the sale price of the coal sold for the purpose of generating electricity.

6.1.2. Where coal is sold to an electric power company for purposes of generating or producing electricity by using the services of a broker, the taxpayer must retain in its records: (1) the bill of sale or invoice showing the tons sold and sale price from the taxpayer to an electric power company; and (2) an attestation from the broker or end user of the taxpayer's coal that the specific batch of coal for which the reduced severance rate is claimed was consumed in the generation or production of electricity. In the event the broker and coal producer are affiliates, the broker must provide documentation that the end user is in fact consuming the coal for the purposes of generating or producing electricity.

6.2. In order that the Tax Department may verify that the taxpayer was eligible for the reduced rate for steam or thermal coal upon audit, a taxpayer claiming a reduced rate must retain the appropriate books and records supporting its claim for at least three (3) years, or for so long as the taxable period remains open for assessment or refund, whichever is greater.

6.3. Taxpayer's failure, upon request of the Tax Department, to produce records showing that coal upon which the reduced severance tax rate imposed by § 11-13A-3 was used to generate or produce electricity, may result in the coal being taxed at the 5% rate.

§110-13AC-7. Minimum amount available for dedication under W. Va. Code §11-13A-6a.

7.1. Pursuant to W. Va. Code §11-13A-6a, 5% of the tax attributable to the severance tax on coal, including thermal and steam coal, is dedicated and distributed for the use and benefit of the coal producing counties, as set forth in that Code section. Effective July 1, 2019, and thereafter, W. Va. Code §11-13A-6a requires that the portion of the severance tax on coal imposed by §11-13A-3 that is dedicated and distributed for the use and benefit of the coal producing counties under §11-13A-6a shall be not less than the amount distributed for the fiscal year beginning July 1, 2018.

7.2. This provision sets forth a minimum pooled dedication amount, which is to be distributed to eligible coal-producing counties based upon the formula set forth under W. Va. Code §11-13A-6a. While the pooled amount to be dedicated and available for distribution in any year will not fall below a minimum amount, the amount any one county may receive will still be determined based upon the formula under W. Va. Code §11-13A-6a.

7.3. After July 1, 2019, the minimum amount available for distribution will be \$11,975,088.09. This amount is based upon the amounts actually distributed on July 24, 2018, which was \$3,214,709.89, on October 19, 2018, which was \$2,908,186.50, on January 17, 2019, which was \$3,461,091.33, and on April 22, 2019, which was \$2,391,100.37.

7.4. During the fourth and final quarterly distribution made in each fiscal year, the Tax Department will determine whether the minimum amount for distribution and dedication, as set forth in subsection 7.3, should be used or whether 5% of the tax attributable to the severance tax on coal, including thermal and steam coal, dedicated under W. Va. Code §11-13A-6a to the coal producing counties, has exceeded the minimum dedication and distribution amount:

7.4.1. For each of the first three quarterly distributions made in each fiscal year, the amount allocated to each coal producing county will be determined by dividing the total amount of money in the

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Coal County Reallocated Severance Tax Fund available for distribution in the quarterly period preceding the distribution by the total number of tons of coal mined in this state during the preceding quarter; and then multiplying that quotient by the number of tons of coal produced and reported for that particular county in the preceding quarter.

7.4.2. For the final quarterly distribution made in each fiscal year, the amount available for distribution to the coal producing counties shall be the greater of:

7.4.2.a. The total amount of tax remitted and placed in the Coal County Reallocated Severance Tax Fund in the preceding quarter divided by the total number of tons of coal mined in this state during the preceding quarter; and then multiplied by the number of tons of coal produced and reported for that particular county in the preceding quarter; or

7.4.2.b. The minimum total amount of distribution, which is \$11,975,088.09, less the total amount of each of the three distributions for the three previous quarters, divided by the total number of tons of coal mined in this state during the preceding quarter; and then multiplied by the number of tons of coal produced and reported for that particular county in the preceding quarter.

7.4.3. However, in no fiscal year may the proceeds dedicated to the coal producing counties exceed the sum of \$20 million pursuant to W. Va. Code §11-13A-6a.

7.5. This section and the minimum amount of dedication to the coal producing counties set forth under W. Va. Code §11-13A-6a do not apply to the dedication or distribution of the additional tax on coal for the benefit of counties and municipalities under W. Va. Code §11-13A-6.