



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE EXEMPT, INTERPRETIVE OR PROCEDURAL
RULE**

AGENCY: Tax TITLE-SERIES: 110-21F
RULE TYPE: Interpretive Amendment to Existing Rule: No Repeal of existing rule: No
RULE NAME: THE COAL SEVERANCE TAX REBATE
CITE STATUTORY AUTHORITY: W. Va. Code §§11-13EE-14 and 11-10-5

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

August 8, 2020

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.

110CSR21F

TITLE 110
INTERPRETIVE RULE
STATE TAX DEPARTMENT

SERIES 21F
THE COAL SEVERANCE TAX REBATE

§ 110-21F-1. General.

1.1. *Scope.* -- This interpretive rule sets forth the State Tax Commissioner's interpretation of W. Va. Code §11-13EE-1, *et seq.*, originally enacted in Enrolled H.B. 3144 (2019) and amended by Enrolled H. B. 4439 (2020), which provides a coal severance tax rebate when a taxpayer's qualified investment in new machinery or new equipment results in taxpayer's increased coal production.

1.2. *Authority.* -- W. Va. Code §§11-13EE-14 and 11-10-5.

1.3. *Filing Date.* -- July 9, 2020.

1.4. *Effective Date.* -- August 8, 2020.

1.5. *Applicability.* -- The coal severance tax rebate is available to taxpayers that make a capital investment in new machinery and equipment placed in service or use in this state on or after July 1, 2019, that results in an increase in coal production, in accordance with H.B. 4439 passed during the 2020 General Legislative Session, effective June 5, 2020, which superseded the provisions of H.B. 3144 passed during the 2019 General Legislative Session.

1.6. *Sunset provision.* -- This rule shall terminate and have no further force or effect upon July 9, 2025.

§ 110-21F-2. Definitions.

2.1. *General Rule.* -- Unless a specific definition is provided in subsection 2.2 of this section, or the context in which the term is used clearly requires a different meaning, the terms used in this rule have the definitions provided under W. Va. Code §§11-13EE-1, *et seq.*; 11-10-1, *et seq.*; 11-13A-1, *et seq.*; 11-21-1, *et seq.*; and 11-24-1, *et seq.*

2.2. *Terms defined.*

2.2.1. "Affiliated group" means one or more chains of corporations, limited liability entities, or partnerships, or any combination thereof, connected through the ownership of stock or ownership interests with a common parent that is a corporation, limited liability entity, or partnership, but only if the common parent owns, directly or indirectly, a controlling interest in each of the members of the group. See W. Va. Code §11-13EE-2(b)(1).

2.2.2. "Base production amount" means the tons of coal produced during the 2018 calendar year at the mine at which the qualified investment is made, except as otherwise provided in this rule, provided coal was produced at the mine during the entire calendar year. If coal was produced in calendar year 2018 for only part of the year, then the number of tons produced must be annualized to determine the number of tons that would have been produced had the mine produced coal each month during calendar year 2018. For purposes of this rule,

the base production amount includes all tons of coal produced, regardless of the rate of severance tax applicable to the production privilege.

2.2.2.a. When the taxpayer is a new business that has produced coal in this state for two years before making the capital investment in new machinery or new equipment, then the base production amount shall be the amount of tons of coal produced at the mine during the second year. See W. Va. Code §11-13EE-3(e).

2.2.2.b. When the taxpayer produced coal at two or more mines in this state during calendar year 2018, then, in addition to determining the tons of coal produced in calendar year 2018 at the mine where the capital investment will be made, the tons of coal produced in calendar year 2018 by all other mines operated in this state by the taxpayer must be determined.

2.2.2.c. When the producer of coal is a member of a controlled or affiliated group that produced coal in West Virginia in calendar year 2018, then, in addition to determining the tons of coal produced during calendar year 2018 at the mine where the capital investment will be made, the total number of tons of coal produced in calendar year 2018 at each mine in West Virginia operated by all members of the controlled or affiliated group must be determined.

2.2.2.d. When coal is produced at a mine for only part of a calendar year, the production at that mine must be annualized to determine the tons of coal that would have been produced at the mine during the calendar year, had the mine produced coal each month during the calendar year.

Example. During calendar year 2018, coal was produced at the mine for six months of the calendar year. In this example, the number of tons of coal produced during the six months during which coal was produced during calendar year 2018 is multiplied by two to determine the tons of coal that would have been produced during calendar year 2018 had coal been produced at that mine each month during the 2018 calendar year.

2.2.2.e. When one or more mines operated by the producer, or by the controlled or affiliated group, during calendar year 2018 produced some coal at the mine but did not produce coal for the entire 2018 calendar year, the production at the mine must be annualized to determine the tons of coal that would have been produced during calendar year 2018 had coal been produced at the mine during all of calendar year 2018.

2.2.3. "Capital investment in new machinery or new equipment" means:

2.2.3.a. Tangible personal property in the form of new machinery and new equipment that is purchased on or after July 1, 2019, and placed in service in this state for direct use in the production of coal, when the original or first use of the machinery or equipment by anyone commences in this state on or after July 1, 2019;

2.2.3.b. Tangible personal property in the form of new machinery and new equipment that is leased by the taxpayer and placed in service in this state for direct use in the production of coal by the taxpayer on or after July 1, 2019, if the original or first use of the machinery or equipment by anyone commences on or after July 1, 2019, and the new machinery or new equipment is depreciable, or amortizable, for federal income tax purposes and has a useful life of five or more years for federal income tax purposes;

2.2.4. "Capital investment property" means "capital investment in new machinery or new equipment," as defined in subsection 2.2.3 of this rule, that is a "qualified investment," as defined in subsection 2.2.30 of this rule.

2.2.5. "Clean tons" means coal that has been removed from the earth and processed so that it is no longer run-of-mine coal. "Run of mine coal" or "ROM" is coal of all sizes that comes out of the mine without any crushing or screening.

2.2.6. "Coal loading facility" is defined in W. Va. Code §11-13E-2(b)(1) and means any building or structure specifically designed and solely used to transfer coal from a coal processing or preparation facility, or from a coal storage facility, or both, or from any means of transportation, to any means of rail, truck, or barge transportation used to move coal, including such land as is directly associated with and solely used for the coal loading facility, and including any device or combination of machinery and equipment that is directly associated with and solely used for the loading of coal. This investment may be eligible for the credit allowed by W. Va. Code §11-13E-3. If the credit allowed by W. Va. Code §11-13E-3 is claimed by the taxpayer, the cost of the coal loading facility is not eligible as qualified investment for purposes of the coal tax rebate.

2.2.7. "Coal mine" or "mine" includes:

2.2.7.a. A "surface mine," or "surface mining operation," which means:

2.2.7.a.1. Activities conducted on the surface of lands for the removal of coal, or, subject to the requirements of W. Va. Code §11-13E-2(b)(4)(A), of surface operations and surface impacts incident to an underground coal mine, including the drainage and discharge from the mine. The activities include: excavation for the purpose of obtaining coal, including, but not limited to, common methods as contour, strip, auger, mountaintop removal, box cut, open pit and area mining; the uses of explosives and blasting; reclamation; *in situ* distillation or retorting, leaching or other chemical or physical processing; the cleaning, concentrating or other processing or preparation and loading of coal for commercial purposes at or near the mine site; and

2.2.7.a.2. The areas of the land upon which the above activities occur or where the activities disturb the natural land surface. The areas also include any adjacent land, the use of which is incidental to the activities; all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the activities and for haulage; and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to the above activities: *Provided*, that the activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the tonnage of minerals removed for purposes of commercial use or sale, or coal prospecting. Surface mining does not include any of the following:

2.2.7.a.2.A. Coal extraction authorized pursuant to a government-financed reclamation contract;

2.2.7.a.2.B. Coal extraction authorized as an incidental part of development of land for commercial, residential, industrial or civic use; or

2.2.7.a.2.C. The reclamation of an abandoned or forfeited mine by a no cost reclamation contract.

2.2.7.b. An "underground mine" includes the shafts, slopes, drifts or inclines connected with, or intended in the future to be connected with, excavations penetrating coal seams or strata, which excavations are ventilated by one general air current or divisions thereof, and connected by one general system of mine haulage over which coal may be delivered to one or more points outside the mine, and the surface structures or equipment connected or associated therewith which contribute directly or indirectly to the mining, preparation or handling of coal. See W. Va. Code §11-13EE-2(b)(4).

2.2.8. "Coal mining operation" includes the mine and the coal preparation and processing plant. See W. Va. Code §11-13EE-2(b)(5).

2.2.9. "Coal preparation and processing plant" means any facility (excluding underground mining operations) which prepares coal by one or more of the following processes: breaking, crushing, screening, wet or dry cleaning, and thermal drying. See W. Va. Code §11-13EE-2(b)(6).

2.2.10. "Coal processing and conveying equipment" means any machinery used in a coal preparation and processing facility to reduce the size of coal or to separate coal from refuse, and the equipment used to convey coal to or remove coal and refuse from the machinery. This includes, but is not limited to, breakers, crushers, screens, and conveyor belts. Equipment located at the mine face is not considered to be part of the coal preparation and processing plant.

2.2.11. "Coal production" means the privilege of severing, extracting, reducing to possession and producing coal for sale, profit or commercial use and includes the processing of coal at a coal preparation and processing plant. See W. Va. Code §11-13EE-2(b)(7).

2.2.12. "Controlled group" means one or more chains of corporations connected through stock ownership with a common parent corporation if stock possessing at least 50 percent of the voting power of all classes of stock of each of the corporations is owned, directly or indirectly, by one or more of the corporations; and the common parent owns directly stock possessing at least 50 percent of the voting power of all classes of stock of at least one of the other corporations. See W. Va. Code §11-13EE-2(b)(9).

2.2.13. "Controlling interest" means:

2.2.13.a. For a corporation, either more than 50 percent ownership, directly or indirectly, of the total combined voting power of all classes of stock of the corporation, or more than 50 percent ownership, directly or indirectly, of the beneficial ownership interest in the voting stock of all classes of stock of the corporation;

2.2.13.b. For a partnership, association, trust or other entity other than a limited liability company, more than 50 percent ownership, directly or indirectly, of the capital, profits, or beneficial interest in the partnership, association, trust, or other entity; and

2.2.13.c. For a limited liability company, either more than 50 percent ownership, directly or indirectly, of the total membership interest of the limited liability company, or more

than 50 percent ownership, directly or indirectly, of the beneficial ownership interest in the membership interest of the limited liability company. See W. Va. Code §11-13EE-2(b)(10).

2.2.14. "Corporation" includes associations, joint-stock companies and insurance companies. It also includes governmental entities when and to the extent such governmental entities engage in activities taxable under W. Va. Code §11-13A-1, *et seq.* See W. Va. Code §11-13EE-2(b)(11).

2.2.15. "Directly used or consumed in the production of coal" means used or consumed in those activities or operations that constitute an integral and essential part of the production of coal, as contrasted with and distinguished from those activities or operations that are simply incidental, convenient or remote to the production of coal.

2.2.15.a. Uses of tangible personal property that constitute direct use or consumption in the production of coal include only:

2.2.15.a.1. New machinery or new equipment that is depreciable, or amortizable, and has a useful life of five or more years for federal income tax purposes, and that is directly used in the production of coal in this state;

2.2.15.a.2. Transportation of coal within the coal mine from the coal face or coal deposit to the exterior of the mine or to a point where the extracted coal is transported away from the mine;

2.2.15.a.3. Directly and physically recording the flow of coal during the production of coal including those coal treatment processes specified in W. Va. Code §11-13A-4;

2.2.15.a.4. Safety equipment and apparatus directly used in the production of coal, or to secure the safety of mine personnel in direct use in the production of coal;

2.2.15.a.5. Controlling or otherwise regulating atmospheric conditions required to produce coal;

2.2.15.a.6. Transformers, pumps, rock dusting equipment or other property used to supply electricity or water, or to supply or apply rock dust directly used in the production of coal;

2.2.15.a.7. Storing, removal or transportation of economic waste, including coal gob, resulting from the production of coal;

2.2.15.a.8. Engaging in pollution control or environmental quality or protection activity directly relating to the production of coal; or

2.2.15.a.9. Otherwise using as an integral and essential part of the production of coal.

2.2.15.b. Uses of tangible personal property which do not constitute direct use or consumption in the production of coal include, but are not limited to:

2.2.15.b.1. Heating and illumination of office buildings;

2.2.15.b.2. Janitorial or general cleaning activities;

2.2.15.b.3. Personal comfort of personnel: *Provided*, that safety equipment and apparatus directly used in the production of coal or to secure the safety of mine personnel is direct use in the production of coal when the tangible personal property is depreciable, or amortizable, for federal income tax purposes and has a useful life of five or more years for federal income tax purposes when it is placed in service or use;

2.2.15.b.4. Production planning, scheduling of work or inventory control;

2.2.15.b.5. Marketing, general management, supervision, finance, training, accounting and administration;

2.2.15.b.6. Measuring or determining weight, and ash content, water content and other physical and chemical characteristics of the coal after production;

2.2.15.b.7. An activity or function incidental or convenient to the production of coal, rather than an integral and essential part of these activities. See W. Va. Code §11-13EE-2(b)(13).

2.2.16. "Eligible taxpayer" means:

2.2.16.a. Any person who pays the tax imposed by W. Va. Code §11-13A-3 on the privilege of producing coal for sale, profit or commercial use for at least two years before the capital investment in new machinery or new equipment is placed in service or use in this state; or

2.2.16.b. A taxpayer that has experienced a change in business composition through merger, acquisition, split-up, spin-off or other ownership changes or changes in the form of the business organization from limited liability company to C corporation, or partnership, or from one form of business organization to a different form of business organization, may constitute an eligible taxpayer if the entity currently operating in this state was operating in a different form of business organization in this state at least two years before the capital investment in new machinery or equipment is placed in service or use in this state. In the case of a business composition change through merger, acquisition, split-up, spin-off or other ownership changes, the current business may constitute an eligible taxpayer if at least 50 percent of the business assets of such component were actively and directly used in coal production activity in this state for such two year period. If at least 50 percent of the assets of the current entity were not actively and directly used in coal production activity in this state for such two year period, then the current entity resulting from a business composition change through merger, acquisition, split-up, spin-off or other ownership shall not constitute an eligible taxpayer. See W. Va. Code §11-13EE-2(b)(14).

2.2.17. "Gross proceeds" means the value, whether in money or other property, actually proceeding from the sale or lease of tangible personal property, or from the rendering of services, without any deduction for the cost of property sold or leased or expenses of any kind. See W. Va. Code §11-13A-2(b)(5).

2.2.18. "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 reported as follows:

2.2.18.a. For natural resources severed or processed (or both severed and processed) and sold during a reporting period, gross value is the gross proceeds received or receivable by the taxpayer.

2.2.18.b. In a transaction involving related parties, gross value shall not be less than the fair market value for natural resources of similar grade and quality.

2.2.18.c. In the absence of a sale, gross value shall be the fair market value for natural resources of similar grade and quality.

2.2.18.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 sale, the gross value is the amount received or receivable during the reporting period reduced by the fair market value of natural resources of similar grade and quality and in the same condition immediately preceding the processing of the natural resources in this state.

2.2.18.e. If severed natural resources are purchased for the purpose of processing and consumption, the gross value is the fair market value of processed natural resources of similar grade and quality reduced by the amount paid or payable to the taxpayer actually severing the natural resource. If severed 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 consumption, the gross value is the fair market value of processed natural resources of similar grade and quality reduced by the fair market value of natural resources of similar grade and quality and in the same condition immediately preceding the processing of the natural resources.

2.2.18.f. In all instances, the gross value shall be reduced by the amount of any federal energy tax imposed upon the taxpayer after June 1, 1993, but shall not be reduced by any state or federal taxes, royalties, sales commissions or any other expense. See W. Va. Code §11-13A-2(c)(6).

2.2.19. "Includes" and "including," when used in a definition contained in this article, shall not be deemed to exclude other things otherwise within the meaning of the term being defined unless otherwise specified. See W. Va. Code §11-13EE-2(b)(15).

2.2.20. "Mining" includes not merely the extraction of ores or minerals from the ground, but also those treatment processes necessary or incidental thereto.

2.2.21. "New property" means and is limited to machinery and equipment that:

2.2.21.a. Is directly used in the production of coal in this state,

2.2.21.b. Is depreciable or amortizable by the coal producer for federal income tax purposes,

2.2.21.c. Has a useful life of five or more years for federal income tax purposes when placed in service or use in this state, and

2.2.21.d. Is purchased or leased by the taxpayer on or after July 1, 2019, when the original use by anyone of the property is by the taxpayer, and the property results in increased coal production.

2.2.21.e. A longwall mining machine that has been remanufactured will be treated as new property for purposes of The Coal Severance Tax Rebate provided that each of the following requirements has been met.

2.2.21.e.1. For purposes of the coal severance tax rebate, the term “longwall miner” or “longwall mining machine” includes a shearer, continuous miner, conveyer used in conjunction with a long wall mining system, or complete longwall mining system, which has wheels or tracks affixed to it and is capable of being driven or moved without being placed onto another piece of equipment for transport. The repair or replacement of a component part does not constitute the remanufacture of the long wall miner. For purposes of this paragraph, “component part” of a long wall miner includes, but is not limited to, chassis, roof bolts, belts, shields, individual body parts, hoses, piping, control panels, wheels, tires, tracks, rollers, paint, hydraulics, mechanical parts, transmissions, steering mechanisms, fuel systems, brakes, axles, engines, or motors.

2.2.21.e.2. If purchased, the remanufactured longwall miner must have been purchased from a third party in an arm’s length transaction.

2.2.21.e.3. If the remanufactured longwall miner was titled to the taxpayer seeking the rebate, or any affiliate, subsidiary, or parent company, prior to its remanufacture, it must have been remanufactured by a third-party in an arm’s length transaction.

2.2.21.e.4. The remanufactured longwall miner must have been purchased (or in the case of paragraph 2.2.21.e.3, remanufactured and retitled) and placed into service or use on or after July 1, 2019, and meet all other requirements set forth in order to obtain this rebate.

2.2.21.e.5. In order to qualify as new equipment for the rebate, the remanufactured longwall miner must have been retitled and assigned a new vehicle or equipment identification number (or manufacturer’s equivalent) prior to its purchase by a third party, or before its subsequent use by the owner who had it remanufactured.

2.2.21.e.6. The remanufactured longwall miner must be treated as a new longwall miner for federal income tax purposes.

2.2.21.e.7. Under no circumstances can the same longwall miner be claimed in the same tax year as a capitalized repair pursuant to paragraph 2.2.26.b.2 and as a purchase of new equipment for purposes of this rebate, even if it has been retitled and assigned two different vehicle or equipment identification numbers (or manufacturer’s equivalent).

2.2.21.e.8. Adequate records will be required to establish entitlement to this rebate on the basis of purchase of a remanufactured or remanufacture and retitle of a longwall mining machine.

2.2.22. "Original use" means the first use to which the property is put by anyone anywhere. See W. Va. Code §11-13EE-2(b)(16).

2.2.23. "Partnership" includes a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any privilege taxable under W. Va. Code §11-13A-1, *et seq.* is exercised and which is not, within the meaning of this article, a trust or estate or corporation. See W. Va. Code §11-13EE-2(b)(17). "Partnership" includes a limited liability company which is treated as a partnership for federal income tax purposes. *Ibid.*

2.2.24. "Person" includes any natural person, corporation, partnership, limited liability company or other business entity. See W. Va. Code §11-13EE-2(b)(18).

2.2.25. "Production of coal" means "the privilege of severing, extracting, reducing to possession and producing coal for sale, profit or commercial use and includes the processing of coal at a coal preparation and processing plant." See W. Va. Code §11-13EE-2(b)(19).

2.2.26. "Property purchased or leased for business expansion" means:

2.2.26.a. *Included property.* -- Except as provided in subdivision 2.2.26.b of this rule, the term "property purchased or leased for business expansion" means tangible personal property, but only if the property was purchased, or leased, and placed in service for direct use by the taxpayer in the production of coal in West Virginia. This term includes only:

2.2.26.a.1. Tangible personal property placed in service or use by the taxpayer on or after July 1, 2019, with respect to which depreciation, or amortization in lieu of depreciation, is allowable in determining the personal or corporation net income tax liability of the business, or its equity owners, under W. Va. Code §§11-21-1, *et seq.* or 11-24-1, *et seq.*, and has a useful economic life at the time the property is placed in service or use in this state of five or more years.

2.2.26.a.2. Tangible personal property acquired by written lease having a primary term of five years or more, that is depreciable or amortizable by the lessor or lessee for federal income tax purposes and has a useful life of five or more years for federal income purposes when it is placed in service or use in this state, and when the lease commences and was executed by the parties thereto on or after July 1, 2019, if used as a component part of a new or expanded coal mining operation in this state shall be included within this definition.

2.2.26.b. *Excluded property.* -- The term "property purchased or leased for business expansion" shall not include:

2.2.26.b.1. Machinery or equipment owned or leased by the taxpayer for which credit was taken or is claimed under any other article in chapter 11 of the West Virginia Code;

2.2.26.b.2. Repair costs, including materials used in the repair, unless for federal income tax purposes the repair costs must be capitalized and not expensed;

2.2.26.b.3. Motor vehicles licensed by the West Virginia Division of Motor Vehicles;

2.2.26.b.4. Airplanes and helicopters;

2.2.26.b.5. Off-premise transportation equipment;

2.2.26.b.6. Machinery or equipment that is primarily used outside this state;

2.2.26.b.7. Machinery or equipment that is acquired incident to the purchase of the stock or assets of the seller except as otherwise provided in W. Va. Code §11-13EE-1, *et seq.*;

2.2.26.b.8. Coal loading facilities for which the taxpayer has claimed credit under W.Va. Code §11-13E-1, *et. seq.*;

2.2.26.b.9. Used machinery and equipment; and

2.2.26.b.10. Improvements to real property.

2.2.26.c. *Purchase date.* -- New machinery or new equipment shall be deemed to have been purchased prior to July 1, 2019, if:

2.2.26.c.1. The machinery or equipment was owned by the taxpayer prior to July 1, 2019, or was acquired by the taxpayer pursuant to a binding purchase contract that was in effect prior to July 1, 2019; or

2.2.26.c.2. In the case of leased machinery and equipment, there was a binding written lease or contract to lease identifiable machinery or equipment in effect prior to July 1, 2019. See W. Va. Code §11-13EE-2(b)(21).

2.2.27. "Purchase" means any acquisition of new machinery or new equipment directly used or consumed in the production of coal, but only if:

2.2.27.a. The tangible personal property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under I.R.C. § 267 or § 707 (b);

2.2.27.b. The tangible personal property is not acquired by one component member of a controlled group from another component member of the same controlled group; and

2.2.27.c. The basis of the tangible personal property or improvements to property for federal income tax purposes, in the hands of the person acquiring it, is not determined:

2.2.27.c.1. In whole or in part by reference to the federal adjusted basis of the property in the hands of the person from whom it was acquired; or

2.2.27.c.2. Under I.R.C. § 1014 (e). See W. Va. Code §11-13EE-2(b)(22).

2.2.28. "Purchase date" is defined in W. Va. Code §11-13EE-2(b)(21)(C).

2.2.29. "Qualified coal mining activity" means any business or other activity subject to the tax imposed by W. Va. Code §11-13A-3 on the privilege of severing, extracting, reducing to possession and producing coal for sale, profit or commercial use including the treatment process described as mining in W. Va. Code §11-13A-4(a)(1). See W. Va. Code §11-13EE-2(b)(23).

2.2.30. "Qualified investment" or "qualified investment property" for purposes of this rule means "capital investment in new machinery or new equipment directly used in the production of coal in this state that is depreciable, or amortizable, for federal income tax purposes and has a useful life for federal income tax purposes of five or more years when it is placed in service or use in this state" and the investment results in increased coal production at the mine where the qualified investment is made. See W. Va. Code §11-13EE-2(b)(24).

2.2.31. "Rebate" means the amount allowable as a rebate under W. Va. Code §11-13EE-3. See W. Va. Code §11-13EE-2(b)(25).

2.2.32. "Related person" means:

2.2.32.a. A corporation, partnership, association or trust controlled by the taxpayer;

2.2.32.b. An individual, corporation, partnership, association, or trust that is in control of the taxpayer;

2.2.32.c. A corporation, partnership, association, or trust controlled by an individual, corporation, partnership, association, or trust that is in control of the taxpayer; or

2.2.32.d. A member of the same controlled group as the taxpayer.

2.2.32.e. For purposes of this subsection, the term "control", with respect to a corporation, means ownership, directly or indirectly, of stock possessing 50 percent or more of the total combined voting power of all classes of the stock of the corporation entitled to vote. "Control," with respect to a trust, means ownership, directly or indirectly, of 50 percent or more of the beneficial interest in the principal or income of the trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association, or of a beneficial interest in a trust is determined in accordance with the rules for constructive ownership of stock provided in I.R.C. § 267(c), other than paragraph (3) of that subsection. See W. Va. Code §11-13EE-2(b)(26).

2.2.33. "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. "Sale" includes a lease of property, whether the transaction be characterized as a rental, lease, hire, bailment or license to use. "Sale" also includes rendering services for a consideration, whether direct or indirect.

2.2.34. "Severance Tax" means the tax imposed in W. Va. Code §11-13A-3(a) on the privilege of engaging or continuing within this state in the business of severing coal, extracting coal, reducing coal to possession and producing coal for sale, profit or commercial use computed at the five percent rate of tax. "Severance tax" for purposes of this rule does not include any other rate of severance tax.

2.2.35. "Severing" or "severed" means the physical removal of the natural resources from the earth or waters of this state by any means.

2.2.36. "State portion of severance taxes payable" or "state portion of severance taxes paid" or "state portion of severance taxes due" means the portion of severance taxes due under W. Va. Code §11-13A-3(a), when computed at the 4.65 percent rate of tax, before credit for the

minimum severance tax paid. See W. Va. Code §11-13EE-2(b)(27). "State portion of severance tax" for purposes of this rule does not include any other rate of severance tax.

2.2.37. "State Tax Commissioner" or "Tax Commissioner" means the Commissioner of the West Virginia State Tax Department or his or her designee.

2.2.38. "Tangible personal property" means, and is limited to, new machinery and new equipment that is depreciable, or amortizable, for federal income tax purposes and that has a useful life of five or more years for federal income tax purposes when it is placed in service or use in this state. See W. Va. Code §11-13EE-2(b)(28).

2.2.39. "Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which a tax liability is computed under W. Va. Code §11-13A-1, *et seq.* In the case of a return made under W. Va. Code §11-13A-1, *et seq.*, or regulations of the Tax Commissioner, for a fractional part of a year, the term "taxable year" means the period for which such return is made.

2.2.40. "Taxpayer" means any person exercising the privilege of severing, extracting, reducing to possession, and producing coal for sale, profit, or commercial use, which privilege is taxable under W. Va. Code §11-13A-3(a). See W. Va. Code §11-13EE-2(b)(29).

2.2.41. "Thermal dryer" means "any facility in which the moisture content of coal is reduced by either contact with a heated gas stream which is exhausted to the atmosphere or through indirect heating of the coal through contact with a heated heat transfer medium."

2.2.42. "This code" means the Code of West Virginia, 1931, as amended. See W. Va. Code §11-13EE-2(b)(30).

2.2.43. "This state" means the State of West Virginia. See W. Va. Code §11-13EE-2(b)(31).

2.2.44. "United States Internal Revenue Code" or "Internal Revenue Code," or "I.R.C." means the Internal Revenue Code as defined in W. Va. Code §11-24-3. See W. Va. Code §11-13EE-2(b)(32).

2.2.45. "Used property" is any property that is not new property as defined in this section.

§ 110-21F-3. Rebate allowable.

3.1. *Rebate allowable.* -- An eligible taxpayer is allowed a rebate for a portion of state severance taxes imposed by W. Va. Code §11-13A-3(a) on the privilege of severing, extracting, reducing to possession and producing coal for sale, profit, or commercial use that is attributable to the increase in the production of coal that results from and is the consequence of the taxpayer's capital investment in new machinery or new equipment directly used at the coal mining operation to produce coal. The amount of this rebate is determined and applied as provided in W. Va. Code §11-13EE-1, *et seq.* and this rule.

3.2. *Amount of rebate.* -- The amount of rebate potentially allowable is determined by multiplying the cost of the taxpayer's qualified investment in new machinery or new equipment, directly used in the production of coal at a coal mining operation in this state by 35 percent. The

product of this computation establishes the maximum potential amount of rebate allowable under W. Va. Code §11-13EE-1, *et seq.* for the qualified investment in new machinery or new equipment.

Example. ABC Co., an eligible taxpayer, places qualified investment property costing \$1,000,000 in service or use at a coal mining operation in this state that results in increased coal production. The maximum potential rebate allowable is \$350,000 (thirty-five percent of \$1,000,000).

3.3. *Cost of qualified investment property.* -- The cost of qualified investment property is its purchase price or the basis of the property for federal income tax purposes, whichever is less.

3.3.1. The amount of taxpayer's qualified investment cannot exceed its basis for federal income tax purposes in the new machinery or new equipment, directly used in the production of coal at the coal mining operation at which the property is placed in service or use in this state.

3.4. *Maximum rebate allowable in any year.* -- The maximum amount of rebate allowable in any year for the qualified investment cannot exceed 80 percent of the increase in the state portion of severance taxes payable that is attributable to and the consequence of the taxpayer's qualified investment directly used at the coal mining operation in this state that results in taxpayer's increased coal production.

3.5. *Determining tons of coal produced.* -- Production is measured by number of tons of coal produced at the coal mining operation at which the qualified investment property is placed into service or use. Tons produced in the year for which rebate is sought is compared with tons of coal produced in calendar year 2018 or other base-year period, whichever is applicable to the coal mining operation.

3.5.1. *Single entity owner of multiple mines.* -- When the taxpayer operates several coal mines in this state, total production from all mines in the year for which rebate is sought is compared with total production from all mines in calendar year 2018, or other base-year period, whichever period is applicable, to determine if there has been an increase in tons of coal produced of at least the increase in tons of coal produced at the coal mining operation attributable to the qualified investment placed in service or use.

3.5.1.a. When the producer of coal operates more than one mine in this state, no rebate shall be allowed unless the total coal production from all mines operated by the taxpayer in this state has increased by at least the same amount, as measured in tons, of coal produced at the coal mining operation at which the qualified investment was placed in service or use. In no case shall the severance tax attributable to any mine other than the specific mine at which capital investment in new machinery or new equipment directly used in a coal mining operation has been placed in service or use be offset by this rebate.

3.5.2. *Controlled or affiliated group.* -- When the taxpayer is a member of a controlled or affiliated group of companies that produces coal in West Virginia, then total production from all mines in West Virginia operated by the controlled or affiliated group, including the taxpayer, in the year for which rebate is sought, is compared with total production from all mines in this state operated by the controlled or affiliated group, including the taxpayer, in calendar year 2018, or other base-year period, whichever period is applicable, to determine if there has been an increase in tons of coal produced of at least the increase in tons of coal produced at the coal mining operation attributable to the qualified investment placed in service or use.

3.5.2.a. When the producer of coal is a member of a controlled group or affiliated group that operates multiple coal mines in this state, no rebate shall be allowed unless the total coal production from all mines operated in this state by all members of the affiliated group, or controlled group, including mines operated by the taxpayer, has increased by at least the increase in production at the coal mine at which the qualified investment property was placed in service or use in this state. In no case shall the severance tax attributable to any mine other than the specific mine at which capital investment in new machinery or new equipment directly used in a coal mining operation has been placed in service or use be offset by this rebate.

3.5.3. *Production when taxpayer is a new business.* -- When taxpayer is a new business that has not paid coal severance taxes in this state, taxpayer must pay coal severance taxes for two years before it becomes an eligible taxpayer. In this situation, taxpayer's production of coal during the second year of this two-year period established its base production amount. If the taxpayer is a member of an affiliated group or controlled group of companies, subsection 3.5.2 of this rule also applies.

Example. D&D Coal Company, a limited liability company, was formed in 2018 and began producing coal in West Virginia in 2019. D&D Coal Company will not be an eligible taxpayer for purposes of the coal severance tax rebate until after it has produced coal and paid the severance tax imposed by W. Va. Code §11-13A-3(a) for two calendar years. See definition of "eligible taxpayer" in subsection 2.2.16 of this rule.

3.5.4. *Production for a new mine.* -- When a coal company is an eligible taxpayer that opens a new coal mine at which qualified investment property is placed in service or use, its base for purposes of the coal severance tax rebate will be the production from its other coal mines in this state during calendar year 2018. If the taxpayer is a member of an affiliated group or controlled group of companies that produce coal in this state, subsection 3.5.2 of this rule also applies.

3.6. *Production when rebate is carried forward.* -- When taxpayer carries forward a rebate amount, then coal production in the year for which rebate carry forward is sought must be determined in accordance with the rules for determining production set forth in this rule.

3.7. *Determining increase in tons of coal produced attributable to qualified investment being placed in service.* -- The number of tons of coal produced during the base year is compared to the number of tons of coal produced during the year for which the coal severance tax rebate is being sought to determine whether there is an increase in production attributable to the qualified investment being placed in service.

To determine the increase in production that is due to the qualified investment at the coal mining operation at which the qualified investment property was placed into service or use, the tons of coal produced in the base production year must be identified using one of the following methods:

3.7.1. If the eligible taxpayer files its annual severance tax return on a calendar year basis, tons of coal produced at the mine during calendar year 2018 is the base production amount unless another rule in section 3.7 of this rule applies.

Example. ABC Co., an eligible taxpayer, operates one mine in West Virginia. It began producing coal at its Apple Mine #1 during 2015. It made a qualified investment at that

mine during 2020 that results in increased production of coal at the mine. The base production amount, for rebate purposes, is the tons of coal produced at the Apple Mine #1 during the 2018 calendar year.

3.7.2. In the event the taxpayer was not producing coal in West Virginia in 2018 but is an eligible taxpayer because they have paid the tax imposed by W. Va. Code §11-13A-3 for two consecutive years prior to placing qualified investment property in service or use at a coal mining operation in this state, the base production amount will be the production during the second year that coal is produced in this state by the taxpayer.

Example. ABC Co. is a calendar year filer that began producing coal in West Virginia at Apple Mine #1 on January 1, 2020. It made a qualified investment during 2022, at least two years later. The base production amount is the amount of coal produced at the Apple Mine #1 during calendar year 2021.

3.7.3. In order to determine whether any rebate is allowable, two calculations must be made. It must first be determined if the tons of coal produced during the rebate year at the mine where the qualified investment was made are greater than the tons of coal produced at that mine during the base year as described in subsection 3.7.1 and subsection 3.7.2 of these regulations.

If the tons of coal produced at the mine during the rebate year are greater than the tons of coal produced during the base year and the increase is attributable to the qualified investment placed in service, it must next be determined if there is also an increase in the total production of coal from all mines of the taxpayer (or from all mines of the taxpayer and taxpayer's affiliated or controlled group, if applicable) from the base year to the rebate year that equals or exceeds the increase in the number of tons of coal produced during the rebate year attributable to placing the qualified investment property in service.

This is determined by comparing the total increase in tons of coal produced from all mines of the taxpayer (or from all mines of the taxpayer and taxpayer's affiliated or controlled group, if applicable), from the base year to the rebate year to the increase in tons of coal produced from the base year to the rebate year that are attributable to placing the qualified investment property in service or use at the taxpayer's coal mining operation. If the total increase in tons of coal produced from all mines of the taxpayer (or all mines of the taxpayer and the taxpayer's affiliated or controlled group, if applicable), from the base year to the rebate year is equal to or more than the increase in tons of coal produced by the taxpayer from the base year to the rebate year that is attributable to placing the qualified investment property in service, then the rebate is allowable.

3.7.3.a. When the claim is for a rebate carried forward amount, the computation described in subsection 3.7.3 must be made for the rebate carry forward year by substituting the words "rebate year" with the words "rebate carry forward year."

3.8. *Calculation of base year tonnage when production does not occur for full year.* -- If no coal was produced from the mine at which the qualified investment property is placed in service or use during a calendar year, that year cannot qualify as a base year. If coal was produced only during a portion of a calendar year, then the average monthly production of coal that was produced during the calendar year must be multiplied by 12 to determine the tons of coal that was produced during that calendar year.

3.9. *Base year tonnage remains static.* -- Once the number of tons of coal produced during the base year is determined, the number of tons produced during the base year for that specific capital investment remains static for the period during which the rebate is allowed for that qualified investment.

3.10. *Determination of severance tax increase due to increased coal production.* -- The amount of state severance tax attributable to the increase in coal production at the coal mining operation due to the qualified investment property being placed in service or use is determined by comparing the amount determined under subsection 3.10.1 of this rule with the amount determined under subsection 3.10.2 of this rule as set forth in subsection 3.10.3 of this rule.

3.10.1. Determine the state portion of the severance tax payable under W. Va. Code §11-13A-3(a), before credits, due to coal produced from the mine at which the qualified investment property was placed in service or use during calendar year 2018 or other base year as determined under subsection 3.7.2.

3.10.2. Next, determine the state severance tax payable under W. Va. Code §11-13A-3(a), before credits, on coal produced at the mine during the calendar year for which a rebate is claimed.

3.10.3. When the amount determined in subsection 3.10.2 of this rule is greater than the amount determined in subsection 3.10.1 of this rule, the difference is the amount of state severance tax payable due to the increase in tons of coal produced from the coal mining operation at which the qualified investment property was placed in service or use, except as otherwise provided in this rule.

Example 1. ABC Co., an eligible taxpayer, operates one coal mine at which its qualified investment in the amount of \$1,000,000 was placed in service or use in 2020. There was a net increase in tons of coal produced at the mine where the qualified investment property was placed in service or use. The maximum potential amount of rebate is \$350,000 (thirty-five percent of \$1,000,000). ABC Co. paid \$2,000,000 in state portion of severance tax for the 2018 taxable year. ABC Co. paid \$3,000,000 in state portion of severance tax for the 2020 calendar year. The difference is \$1,000,000. Eighty percent of \$1,000,000 is \$800,000. Since this number is greater than \$350,000, the entire \$350,000 will be paid to ABC Co. when it timely files an application for severance tax rebate.

Example 2. ABC Co., an eligible taxpayer, operated one coal mine at which its qualified investment in the amount of \$10,000,000 was placed in service or use during 2020. There was a net increase in tons of coal produced at the mine where the qualified investment property was placed in service or use. The maximum potential rebate allowable for this \$10,000,000 qualified investment is \$3,500,000 (thirty-five percent of \$10,000,000). ABC Co. paid \$2,000,000 in state portion of severance tax for the 2018 taxable year. ABC paid \$4,000,000 in state portion of severance tax for the 2020 taxable year. The difference is \$2,000,000 (\$4,000,000 minus \$2,000,000). Eighty percent of \$2,000,000 is \$1,600,000. When ABC Co. timely files an application for rebate, the amount of rebate paid by the Tax Commissioner will be \$1,600,000. The remaining rebate amount of \$1,900,000 is carried forward and may be claimed as rebate of severance taxes paid in subsequent years subject to the limitations in W. Va. Code §11-13EE-1, *et seq.*

3.11. *Methodology to determine rebate amount.* -- The following methodology shall be used to determine the amount of rebate allowable.

3.11.1. Determine whether an increase in coal production has occurred at the mine where the capital investment was placed in service as outlined in section 3.7 of this rule. There must be an increase in coal production attributable to the qualified investment before a rebate will be allowed.

3.11.2. Determine the increase in the amount of the state portion of severance tax paid due to the increase in coal production at the mine where the qualified investment was made as set forth in section 3.10 of this rule.

3.11.3. Determine the amount of maximum rebate allowable by multiplying the cost of the qualified investment made by the taxpayer by 35 percent.

3.11.4. Only when the preceding steps determine that there is an increase in the number of tons of coal produced between the base year and the rebate year or carryover rebate year will a rebate be allowable. The maximum potential rebate amount for any taxable year may not exceed 80 percent of the state portion of the severance tax payable, before credits, that is attributable to the increase in coal production at the mine at which the qualified investment property is placed in service or use.

Example. In 2018, ABC Mining LLC produced 200,000 tons of coal at its Blue Mountain coal mine, which it sold for \$15,000,000 (200,000 x \$75). The state portion of severance taxes payable was \$697,500 (four and sixty-five hundredths percent of \$15,000,000). Then, on or after July 1, 2019, ABC placed qualified investment property that cost \$1,000,000 into service or use at the Blue Mountain coal mine. The maximum potential rebate allowable for this qualified investment is \$350,000 (thirty-five percent of \$1,000,000).

During 2019, ABC Mining LLC produced 250,000 tons of coal at its Blue Mountain coal mine, which it sold for \$18,750,000 (250,000 x \$75). The state portion of severance taxes payable on this amount was \$871,875 (four and sixty-five hundredths percent of \$18,750,000).

In 2019, the state portion of severance taxes payable, before credits, due to the production of coal from the Blue Mountain coal mine was \$871,875. In 2018, the state portion of severance taxes payable on the production from the Blue Mountain coal mine was \$697,500. The difference between severance taxes payable, before credits, in 2019 and the severance taxes payable, before credits, in 2018 is \$174,375. The maximum amount of 2019 severance taxes payable that can be rebated is \$139,500 (eighty percent of \$174,375). The rebate amount carried forward is \$210,500.

Maximum potential rebate allowable for qualified investment is \$350,000
 Eighty percent of additional state severance taxes payable for 2019 is \$139,500
 The rebate amount carried forward is \$210,500

3.12. *Limitations on rebate:* -- The rebate is limited to 35 percent of the cost of the qualified investment made by the taxpayer and 80 percent of the state portion of the severance tax paid on the increased coal production at the coal mining operation that is attributable to the qualified investment being placed in service or use by the taxpayer. The rebate is also subject to the limitations set forth in the subsections below.

3.12.1. No rebate shall be allowed under W. Va. Code §11-13EE-1, *et seq.* when the taxpayer claims credit under any other article in chapter 11 of this code for the qualified

investment in the new machinery or equipment directly used or consumed in the production of coal.

3.12.2. No credit shall be allowed under any other article of chapter 11 of this code when rebate is allowed under W. Va. Code §11-13EE-1, *et seq.* for the capital investment in new machinery or new equipment.

3.12.3. In no case shall the severance tax attributable to any mine other than the specific mine at which capital investment in new machinery or new equipment has been placed in service or use for direct use in a coal mining operation be offset by this rebate.

3.12.4. In accordance with the provisions of W.Va. Code §11-13FF-3(f), no rebate shall be issued when production at one or more of the taxpayer's mines ceases or is reduced from the base year in an amount that decreases overall production at all the taxpayer's mines to the extent that the increase in coal produced at all mines is not equal to or greater than the increase in production from the base year at the mine where the qualified investment related to the rebate was placed. See sections 3.5 and 3.7 of this rule for further guidance.

3.12.5. Other limitations may apply depending upon the particular facts.

§ 110-21F-4. Eligibility to claim the coal severance tax rebate.

4.1. The coal severance tax rebate is available to taxpayers that meet every requirement as set forth in W. Va. Code §11-13EE-1, *et seq.*, any other controlling section of the W. Va. Code and W. Va. Code of State Rules, and any other recognized legal authority including controlling decisions rendered by courts of competent jurisdiction.

4.2. In order to qualify for the coal severance tax rebate, each of the following criteria must be met. Even if every requirement has been met, the rebate may be denied, limited, suspended or forfeited for any lawful reason.

4.2.1. The taxpayer must be an eligible taxpayer, which means that the taxpayer was engaged in the business of producing coal for sale, profit or commercial use, as defined by W. Va. Code §11-13EE-2(b)(19), for at least two years in the State of West Virginia before the capital investment in new machinery or new equipment is placed in service or use in this state. See W. Va. Code §11-13EE-2(b)(14).

4.2.2. However, a mere change in the form of doing business, from one business form to another, or a mere change in ownership, does not disqualify an otherwise eligible taxpayer as long as the transferor produced coal in this state and paid the tax imposed by W. Va. Code §11-13A-3(a), for at least two years prior to placing the qualified investment in service or use. See W. Va. Code §11-13EE-2(b)(14)(B) and section 12 of this rule.

Example 1. ABC, Inc., a C corporation, has continually produced coal in this state since 2016 at its ABC mine. The corporation is acquired by XYZ partnership during 2018. The partnership continues to operate the ABC mine. In 2020, XYZ partnership places qualified investment property in service or use at the ABC mine that increases the tons of coal produced at the mine. To determine the rebate allowable, the base production is the number of tons of coal produced at the ABC mine in calendar year 2018 and the gross proceeds derived from sale of coal produced at the mine in calendar year 2018. After XYZ files its annual severance tax return for 2020, it may file a claim for rebate.

Example 2. ABC, Inc. is a corporation that elects to be treated as an S corporation for federal and state income tax purposes. The corporation began producing coal in the State of West Virginia in 2016 and has produced coal continuously at its ABC mine since then. In 2019, the corporation is reorganized as a limited liability company. In 2020 qualified investment property is placed in service or use at the ABC mine, which results in increased coal production. This qualified investment is eligible for the severance tax rebate. To determine the amount of rebate allowable, the tons of coal produced by the ABC mine in 2018 is the base number of tons of coal produced. The state portion of severance taxes paid by ABC corporation for the 2018 tax year is also used to determine the increase in state portion of the severance taxes paid by the limited liability company that are attributable to the qualified investment.

4.2.3. When changes in business composition result in a new entity, at least 50 percent of the new entity's business assets must have been actively and directly used in coal production activity in this state for a two year period, in order for the resulting taxpayer to be eligible to claim the rebate for qualified investments made during the current tax year. See W. Va. Code §11-13EE-2(b)(14)(B).

Example. ABC is a limited liability company and has been actively engaged in the production of coal in the State of West Virginia since 2011. RST is a newly created S corporation that is a partner in XYZ. ABC is purchased during 2016 by XYZ, a partnership. XYZ merges ABC LLC and RST corporation into a new entity, TCRABS, which retains 100 percent of ABC's business assets that were directly and actively used in the production of coal in West Virginia by ABC. All of ABC's assets that were in service in this state since 2011 comprise at least 50 percent of TCRABS' assets. Therefore, TCRABS is eligible to apply for the rebate based upon qualified investments placed in service or use on or after July 1, 2019.

Note. If ABC's assets had been auctioned to NewCo, then NewCo would not be an eligible taxpayer for purposes of the severance tax rebate until it produces coal in West Virginia for at least two full tax years. Additionally, the auctioned assets acquired are not qualified investment for purposes of the rebate.

4.2.4. The taxpayer must purchase the qualifying new machinery or new equipment on or after July 1, 2019 and place it into service or use at the coal mining operation in the State of West Virginia.

4.2.5. The qualified investment property must result in an increase in the number of tons of coal produced. Additionally, there must be an increase in the state portion of the severance taxes paid. The rebate paid in any year may not exceed 80 percent of the additional severance taxes payable, before credit for payment of the minimum severance tax, that is attributable to the increase in coal production. When the taxpayer operates more than one mine in West Virginia, the production from all mines is considered when determining whether there is an increase in the taxpayer's production of coal due to placing qualified investment property into service or use. Additionally, when the taxpayer is a member of a controlled or affiliated group that has other members that produce coal in West Virginia, tons of coal produced by all members of the controlled or affiliated group, including the taxpayer, are used to determine whether the qualified investment property has resulted in an increase in the number of tons of coal produced.

Example. ABC Coal Corp., an eligible taxpayer, owns three mines, Apple, Beta, and Gamma in West Virginia. In 2020, qualified investment property is placed into service or use at

the Apple Mine, which increases coal production. The qualified investment is eligible for the severance tax rebate, provided there was an increase in the total number of tons produced at the Apple Mine, and the tons of coal produced by all three mines is equal to or greater than the increase in tons produced at the Apple Mine. To determine whether there is an increase in coal production, the number of tons of coal produced at the Apple Mine in 2020 are compared with the number of tons of coal produced at the Apple Mine in the 2018 calendar year. Next, the total tons of coal produced in 2020 by the Apple, Beta and Gamma Mines is determined and this number is compared with the total number of tons of coal produced in the 2018 calendar year by the Apple, Beta and Gamma Mines. However, during calendar year 2020 no coal was produced at the Gamma Mine. Consequently, there was a significant decline in the total number of tons of coal produced by the ABC Coal Corporation mines, and a claim for rebate cannot be asserted for the qualified investment at the Apple Mine.

4.2.6. The qualified investment property must be directly used to increase the production of coal at the coal mining operation at which it is placed in service or use for at least five years after it is placed in service or use by the taxpayer. If it is not directly used for at least five years after it is placed in service or use by the taxpayer, the taxpayer is subject to recapture of the rebate granted as described in section 17 of these rules.

§ 110-21F-5. Information required to determine amount of rebate allowable.

5.1. A taxpayer claiming a rebate under W. Va. Code §11-13EE-1, *et seq.*, who operates a single coal mine in this state, shall provide a schedule with the annual severance tax return filed under W. Va. Code §11-13A-1, *et seq.*, that shows, for the mine, the number of tons of coal produced and the gross value of the coal produced at the mine during the taxable year for which the rebate is sought and such other information deemed by the Tax Commissioner to be necessary to determine the base amount of production and the net increase in state severance tax payable attributable to the qualified investment property placed in service or use at the coal mining operation.

5.2. A taxpayer claiming a rebate under W. Va. Code §11-13EE-1, *et seq.*, who operates more than one coal mine in this state, shall provide a schedule with the annual severance tax return filed under W. Va. Code §11-13A-1, *et seq.*, that shows, for each coal mine, the number of tons of coal produced and the gross value of the coal produced at each mine during the taxable year for which rebate is sought and such other information deemed by the Tax Commissioner to be necessary to determine the base amount of production and the net increase in state severance tax payable attributable to the qualified investment property placed in service or use at the coal mining operation.

5.3. When a taxpayer claiming a rebate under W. Va. Code §11-13EE-1, *et seq.*, is a member of an affiliated or controlled group, as the case may be, that operates more than one coal mine in this state, the group shall provide a schedule with its annual severance tax return filed under W. Va. Code §11-13A-1, *et seq.*, for the taxable year that shows for each coal mine operated in this state by the affiliated or controlled group, as the case may be, or any member thereof, the number of tons of coal produced at each mine and the gross value of the coal produced at each mine during the taxable year for which rebate is sought, and such other information deemed by the Tax Commissioner to be necessary to determine the base amount of production and the net increase in state severance tax payable attributable to the qualified investment property placed in service or use at the coal mining operation.

5.4. The information required by this section when a taxpayer claims a coal severance tax rebate under W. Va. Code §11-13EE-1, *et seq.*, must be updated and provided for each year the taxpayer applies for a rebate carry forward payment.

§ 110-21F-6. Determining the qualified investment.

6.1. In order to be eligible for the coal severance tax rebate, a qualified investment must be made that results in increased production of coal.

6.1.1. The capital investment must be in new machinery or new equipment that is directly used in the production of coal.

6.1.2. The qualified investment must be a capital asset within the meaning of I.R.C. §1221.

6.1.3. The property must have a useful life for federal income tax purposes of five or more years when it is placed into service in this state.

6.1.4. Depreciation, or amortization in lieu of depreciation, must be allowable for federal income tax purposes with respect to the tangible personal property for the taxable year in which the property is placed in service or use by the taxpayer.

6.1.5. The first use of the qualified investment property by anyone must be by the taxpayer when making the qualified investment that results in taxpayer's increased coal production.

6.2. A qualified investment must be in tangible personal property and can only be made in one of the following, although multiple qualified investments can be made at the same mine. This list is inclusive.

6.2.1. New machinery used directly in the production of coal that is depreciable, or amortizable, for federal income tax purposes and has a useful life for federal income tax purposes of five or more years when it is placed in service or use in this state; or

6.2.2. New equipment used directly in the production of coal that is depreciable, or amortizable, for federal income tax purposes and has a useful life for federal income tax purposes of five or more years when it is placed in service or use in this state.

6.3. The following are not qualified investments. This list is merely illustrative and does not include every investment that is not eligible for the coal severance tax rebate.

6.3.1. Real property, including land, mineral rights, a coal mine, or an expansion of the geographical boundaries of a pre-existing mine.

6.3.2. Used property as defined in subsection 2.2.45 of this rule.

6.3.3. Intangible personal property.

6.3.4. Machinery and equipment owned or leased by the taxpayer for which an economic, industrial, or other type of credit was taken or is claimed under any article of chapter 11 of the W. Va. Code.

6.3.5. Repair costs, including the cost of materials used in the repair, do not qualify as qualified investments unless for federal income tax purposes they are required to be capitalized and not expensed.

6.3.6. Motor vehicles licensed by the West Virginia Division of Motor Vehicles or any other state authority with jurisdiction to license on-road vehicles.

6.3.7. Airplanes or helicopters.

6.3.8. Off-premise transportation equipment.

6.3.9. Machinery or equipment that is acquired incidental to the purchase of the stock or assets of the seller.

6.4. The qualifying investment must be directly used by the taxpayer in the production of coal as defined in W. Va. Code §11-13EE-2(b)(13) in this state for at least five years after it is placed in service or use in this state. When the property is used for less than five years, a recapture tax may apply. See W. Va. Code §11-13EE-11 and section 17 of this rule.

6.5. For purposes of this rebate, "leased" property is treated like "purchased" property provided the primary term of the lease is for at least five years and the lessee may take depreciation, or amortization in lieu thereof, for federal income tax purposes and the first use of the leased property by anyone is the current lessee.

§ 110-21F-7. Examples.

This section provides examples illustrating application of various rules in the Coal Severance Tax Rebate Act, W. Va. Code §11-13EE-1, *et seq.*, and this rule.

7.1. **Example 1.** ABC Co., an eligible taxpayer, placed qualified investment property costing \$1,000,000 in service or use on January 5, 2020, at its only coal mine in West Virginia. The investment increases coal production at the mine. ABC Co's maximum potential rebate amount for this investment is \$350,000 (thirty-five percent of \$1,000,000).

Analysis

In calendar year 2018 (the base production year), ABC Co. produced 860,215 tons of coal, which it sold for \$50 per ton (\$43,010,750). Its severance tax liability, under W. Va. Code §11-13A-3(a), was \$2,150,538 (five percent of \$43,010,750) before credit for minimum severance tax paid. Of this amount, \$2,000,000 (four and sixty-five hundredths percent of \$43,010,750) was the state portion of the severance tax.

In calendar year 2020, ABC Co. produced 1,075,269 tons of coal, which it sold for \$50 per ton (\$53,763,438). Its severance tax liability, under W. Va. Code §11-13A-3(a), was \$2,688,172 (five percent of \$53,763,438) before credit for minimum severance tax paid. Of this amount, \$2,500,000 (four and sixty-five hundredths percent of \$53,763,438) was the state portion of the severance tax.

The difference between the state portion of the severance tax payable in 2020 and the state portion of the severance tax payable in 2018 is \$500,000 (\$2,500,000 minus \$2,000,000). The

maximum rebate amount payable in any year cannot exceed 80 percent of the additional state severance tax payable that is attributable to the qualified investment. Here 80 percent of \$500,000 is \$400,000; but, since the maximum potential rebate amount is \$350,000, the rebate to ABC Co. for 2020 will be limited to \$350,000.

7.2. **Example 2.** ABC Co., an eligible taxpayer, placed qualified investment property costing \$1,000,000 in service or use on January 5, 2020, at its ABC No. 1 coal mine in West Virginia. The company operates two other coal mines in West Virginia – ABC No. 2 and ABC No. 3. The qualified investment increases coal production at the ABC No. 1 coal mine. ABC Co's maximum potential rebate amount is \$350,000 (thirty-five percent of \$1,000,000).

Analysis

In calendar year 2018 (the base production year), ABC Co. produced 860,215 tons of coal at its ABC No. 1 mine, which it sold for \$50 per ton (\$43,010,750). Its severance tax liability for this coal production, under W. Va. Code §11-13A-3(a), was \$2,150,538 (five percent of \$43,010,750). Of this amount, \$2,000,000 (four and sixty-five hundredths percent of \$43,010,750) was the state portion of the severance tax.

In calendar year 2018 (the base production year), the ABC No. 2 mine produced 1,000,000 tons of coal and the ABC No. 3 mine produced 500,000 tons of coal, which were also sold for \$50 per ton (1,500,000 x \$50 = \$75,000,000). Its severance tax liability for the production at the ABC No. 2 and 3 mines was \$3,750,000 (five percent of \$75,000,000) before credit for payment of the minimum severance tax. Of this amount, \$3,487,500 (four and sixty-five hundredths percent of \$75,000,000) was the state portion of the severance tax.

In calendar year 2018, the total coal production by all ABC Co. mines was 2,360,215 tons, which was sold for \$50 per ton, and the state tax portion of the severance tax imposed by W. Va. Code §11-13A-3(a), before credit for payment of the minimum severance tax, was \$5,487,500.

860,215 tons -- ABC No. 1 Mine x \$50=\$43,010,750
1,500,000 tons -- ABC No. 2 and 3 Mines x \$50=\$75,000,000
2,360,215 tons -- All ABC Mines x \$50=\$118,010,750
\$2,000,000 -- ABC No. 1 Mine
\$3,487,500 -- ABC No. 2 and 3 Mines
\$5,487,500 -- Total state portion of severance tax

In calendar year 2020, ABC Co. produced 1,075,269 tons of coal at its ABC No. 1 Mine, which it sold for \$50 per ton (\$53,763,438). Its severance tax liability, under W. Va. Code §11-13A-3(a), was \$2,688,172 (five percent of \$53,763,438) before credit for minimum severance tax paid. Of this amount, \$2,500,000 (four and sixty-five hundredths of \$53,763,438) was the state portion of the severance tax.

In calendar year 2020, the ABC No. 2 mine produced 1,000,000 tons of coal and the ABC No. 3 Mine produced 500,000 tons of coal, which also sold for \$50 per ton (1,500,000 x \$50 = \$75,000,000). Its severance tax liability for the production at the ABC No. 2 and 3 Mines was \$3,750,000 (five percent of \$75,000,000) before credit for minimum severance tax paid. Of this amount, \$3,487,500 was the state portion of the severance tax (four and sixty-five hundredths of \$75,000,000).

In calendar year 2020, the total coal production by all ABC Mines was 2,575,269 tons. The state portion of the severance tax imposed by W. Va. Code §11-13A-3(a) before credit for payment of the minimum severance tax, was \$5,987,500.

1,075,269 tons – ABC No. 1 Mine x \$50=\$53,763,438
 1,500,000 tons – ABC No. 2 and 3 mines x \$50=\$75,000,000
 2,575,269 tons – All ABC Mines x \$50=\$128,763,438

\$2,500,000 state portion severance tax – ABC No. 1 Mine
 \$3,487,500 state portion severance tax – ABC No. 2 and 3 Mines
 \$5,987,500 Total state portion of severance tax – All ABC Mines

The initial question in the analysis is whether there was an increase in coal production from the base year (2018) to 2020 for both the ABC No. 1 Mine where the investment was made and also at all mines owned by ABC Co. of an amount equal to or greater than the increase at the ABC No. 1 Mine for that period. There was an increase of 215,054 tons of coal produced at the ABC No. 1 Mine from the base year of 2018 to 2020. The increase in coal production at all ABC Co. mines from 2018 to 2020 was also 215,054 tons, which is equal to the increase in production at the ABC No. 1 Mine for that time period. The difference between the state portion of the state severance tax payable on production from the ABC No. 1 mine in 2020 and the state portion of the severance tax payable on production from the ABC No. 1 Mine in 2018 is \$500,000 (\$2,500,000 minus \$2,000,000). This represents the increase in severance tax payable attributable to the qualified investment. Accordingly, the maximum rebate amount for the qualified investment is \$400,000 (eighty percent of \$500,000); but, since the maximum potential rebate amount is \$350,000, the rebate to ABC Co. for 2020 will be limited to \$350,000.

Because ABC Co. operates multiple mines, the next question is whether ABC Co.'s total increase in production of coal at all mines was at least equal to the 2020 increase in coal production at the ABC No. 1 Mine. In 2020, production at the ABC No. 1 Mine increased by 215,054 tons when compared to the 2018 production at the ABC No. 1 Mine due to the qualified investment. Because total coal production at all ABC Mines increased in 2020 by 215,054 tons (total production in 2020 minus total production in 2018), which is equal to the increase in coal production at the ABC No. 1 Mine, ABC Co. may claim a rebate in the amount of \$350,000.

Note: If the difference between the total tons of coal produced by all ABC Co. mines in 2020 and the total tons of coal produced by all ABC Co. mines in 2018 is less than the production increase at the ABC No. 1 Mine in 2020, then ABC Co.'s rebate claim will be denied for 2020. The rebate denied may be carried forward to subsequent years where the total tons of coal produced by all ABC Co. mines is equal to or greater than the production increase at the ABC No. 1 Mine for that year.

7.3. Example 3. ABC Co., an eligible taxpayer, places qualified investment costing \$1,000,000 in service or use on January 5, 2020, at its ABC No. 1 mine in West Virginia. The company is a member of an affiliated group of corporations, and other members of the affiliated group operate two additional coal mines in West Virginia – AG No. 2 and AG No. 3. The qualified investment increases coal production at the ABC No. 1 Mine. ABC Co.'s maximum potential rebate amount is \$350,000 (thirty-five percent of \$1,000,000).

Analysis

In calendar year 2018 (the base production year), ABC Co. produced 860,215 tons of coal at its ABC No. 1 mine, which it sold for \$50 per ton, amount to \$43,010,750. Its severance tax liability for this coal production, under W. Va. Code §11-13A-3(a), was \$2,150,538 (five percent of \$43,010,750), before credit for minimum severance tax paid. Of this amount, \$2,000,000 (four and sixty-five hundredths of \$43,010,750) was the state portion of the severance tax.

In calendar year 2018 (the base production year), the AG No. 2 mine produced 1,000,000 tons of coal and the AG No. 3 mine produced 500,000 tons of coal, which was also sold for \$50 per ton (1,500,000 x \$50 = \$75,000,000). The severance tax liability for the production at the AG No. 2 and AG No. 3 mines was \$3,750,000 (five percent of \$75,000,000). Of this amount, \$3,487,500 (four and sixty-five hundredths of \$75,000,000) was the state portion of the severance tax before credit for the minimum severance tax paid.

In calendar year 2018, the total tons of coal produced by all of the Affiliated Group Mines in West Virginia was 2,360,215 tons. The state portion of the severance tax imposed by W. Va. Code §11-13A-3(a), before credit for payment of the minimum severance tax, was \$5,487,500.

860,215 tons – ABC No. 1 mine x \$50=\$43,010,750
 1,500,000 tons – AG No. 2 and 3 mines x \$50=\$75,000,000
 2,360,215 tons – All Affiliated Group mines x \$50=\$118,010,750

\$2,000,000 ABC No. 1 mine
 \$3,487,500 AG No. 2 and 3 mines
 \$5,487,500 Total state portion of severance tax

In calendar year 2020, ABC Co. produced 1,075,269 tons of coal at its ABC No. 1 mine, which it sold for \$50 per ton (\$53,763,450). Its severance tax liability, under W. Va. Code §11-13A-3(a), was \$2,688,172 (five percent of \$53,763,438), before credit for minimum severance tax paid. Of this amount, \$2,500,000 (four and sixty-five hundredths of \$53,763,438) was the state portion of the severance tax.

In calendar year 2020, the AG No. 2 mine produced 1,000,000 tons of coal and the AG No. 3 mine produced 500,000 tons of coal, which also sold for \$50 per ton (1,500,000 x \$50 = \$75,000,000). The severance tax liability for the production at the AG No. 2 and 3 mines was \$3,750,000 (five percent of \$75,000,000), before credit for minimum severance tax paid. Of this amount, \$3,487,500 (four and sixty-five hundredths of \$75,000,000) was the state portion of the severance tax.

In calendar year 2020, the total coal production by all Affiliated Group mines was 2,575,269 tons. The state portion of the severance tax imposed by W. Va. Code §11-13A-3(a), before credit for payment of the minimum severance tax, was \$5,987,500.

1,075,269 tons – ABC No. 1 mine x \$50=\$53,763,437.50
 1,500,000 tons – AG No. 2 and 3 mines x \$50=\$75,000,000
 2,575,269 tons – All Affiliated Group mines x \$50=\$128,763,438

\$2,500,000 state portion severance tax – ABC No. 1 mine
 \$3,487,500 state portion severance tax – AG No. 2 and 3 mines
 \$5,987,500 Total state portion of severance tax – All Affiliated Group mines

The initial question in the analysis is whether there was an increase in the coal production from the base year (2018) to 2020 for both the ABC No. 1 mine where the investment was made and also at all mines owned by Affiliated Group of an amount equal to or greater than the increase at the ABC No. 1 mine for that period. There was an increase of 215,054 tons of coal produced at the ABC No. 1 mine from the base year of 2018 to 2020. The increase in coal production at all Affiliated Group mines from 2018 to 2020 was also 215,054 tons, which is equal to the increase in production at the ABC No. 1 mine for that time period. The difference between the state portion of the state severance tax payable on production from the ABC No. 1 mine in 2020 and the state portion of the severance tax payable on production from the ABC No. 1 mine in 2018 is \$500,000 (\$2,500,000 minus \$2,000,000). This represents the increase in severance tax payable attributable to the qualified investment. Accordingly, the maximum rebate amount for the qualified investment is \$400,000 (eighty percent of \$500,000).

Because ABC Co. is a member of an affiliated group of corporations that operates multiple mines, the next question is whether the Affiliated Group's total increased production of coal at all mines was at least equal to the 2020 increase in coal production at the ABC No. 1 mine, which was 215,054 tons. In 2020, production of coal by all Affiliated Group mines also increased by 215,054 tons. Total coal production at all Affiliated Group mines increased by 215,054 tons in 2020 (total production in 2020 minus total production in 2018). The 2020 increase in production at the ABC No. 1 mine was 215,054 tons. Because the 2020 increase in production at all Affiliated Group mines is at least equal to the 2020 increase at the ABC No. 1 mine, a rebate is allowable. Although the amount of severance tax eligible to rebate is \$400,000, the rebate is limited to the \$350,000 of available rebate.

Note: If the difference between the total tons of coal produced by all Affiliated Group mines in 2020 and the total tons of coal produced by all Affiliated Group mines in 2018 is less than the production increase at the ABC No. 1 mine in 2020, ABC Co.'s rebate claim will be denied for 2020. The rebate denied may be carried forward to subsequent years and used in years where total tons of coal produced by all Affiliated Group mines is equal to or greater than the production increase at the ABC No. 1 mine.

7.4. Example 4. NewCo is formed in 2020 for the purpose of producing coal in West Virginia. NewCo does not purchase an existing operating coal mine. In 2020, NewCo begins developing a new coal mine. The new mine will cost \$65 million and once it becomes fully operational is expected to produce 2.5 million tons of coal per year that will be sold for \$65 a ton.

Analysis

For rebate purposes, NewCo will not be eligible for a severance tax rebate for its \$65 million investment because it is not an eligible taxpayer with respect to its \$65 million investment in a new coal mine.

"Eligible taxpayer" is defined in W. Va. Code §11-13EE-2(b)(14) and means "(A) Any person who pays the tax imposed by §11-13A-3 of this code on the privilege of producing coal for sale, profit or commercial use *for at least two years* before the capital investment in new machinery or equipment is placed in service or use in this state[.]" (*Emphasis added.*)

Because NewCo did not pay severance tax on the privilege of producing coal for sale, profit, or commercial use for at least two years before the capital investment in the new mine was

placed in service or use, NewCo is not eligible for the rebate related to its capital investment in the new mine.

7.5. **Example 5.** BB Coal Company operates three coal mines in West Virginia, the BB No. 1 mine, the BB No. 2 mine, and the BB No. 3 mine. Each mine produced 900,000 tons of coal in 2018. The 2018 base production amount of coal produced by all three mines totals 2,700,000 tons. In 2021, BB Coal Company places a new mine, BB No. 4 mine, in operation at a cost of \$65 million. The new mine produced 800,000 tons of coal in 2021 and 1.5 million tons of coal in 2022. In 2022, no coal is produced at the BB No. 1 and 2 mines and those mines are closed.

Analysis

BB Coal Company sold its 2018 coal production for \$50 a ton, generating gross proceeds of \$135,000,000 (2,700,000 x \$50). The 2018 state portion of severance taxes payable by BB Coal was \$6,277,500 (four and sixty-five hundredths of \$135,000,000), or \$2,092,500 per mine.

In 2021, BB Coal Company produced 3,500,000 tons of coal at its four mines that it sold for \$65 a ton, generating gross proceeds of \$227,500,000. The 2021 state portion of severance taxes payable was \$10,578,750 (four and sixty-five hundredths of \$227,500,000). The breakout by mine is shown below.

BB mine No. 1 severance tax	\$2,720,250	(900,000 x \$65 = \$58,500,000 x 4.65%)
BB mine No. 2 severance tax	\$2,720,250	(900,000 x \$65 = \$58,500,000 x 4.65%)
BB mine No. 3 severance tax	\$2,720,250	(900,000 x \$65 = \$58,500,000 x 4.65%)
BB mine No. 4 severance tax	\$2,418,000	(800,000 x \$65 = \$52,000,000 x 4.65%)
	\$10,578,750	

BB Coal Company timely filed a claim for severance tax rebate with its severance tax return for the 2021 taxable year. The \$65 million capital investment in BB No. 4 mine generated a potential coal severance tax rebate amount equal to \$22,750,000 (thirty-five percent of \$65,000,000).

The allowable rebate of 2021 severance taxes is limited to 80 percent of the additional severance taxes payable due to the additional tons of coal produced that are attributable to the qualified investment of \$65,000,000 in BB mine No. 4. The additional severance tax payable attributable to No. 4 mine is \$2,418,000, and the amount of allowable rebate for 2021 is \$1,934,400 (eighty percent of \$2,418,000). The rebate is payable because tons of coal produced at the mine where the qualified investment property was placed in service or use and the tons of coal produced overall by BB Coal Company increased from 2018 to 2021. The rebate amount carried forward is \$20,815,600 (\$22,750,000 minus \$1,934,400).

In 2022, the new mine produced 1.5 million tons of coal that were sold for \$65 per ton generating gross receipts of \$97,500,000. The state portion of severance tax payable on this amount is \$4,533,750 (four and sixty-five hundredths of \$97,500,000). The rebate amount carried forward theoretically results in a rebate payment of \$3,627,000 (eighty percent of \$4,533,750). However, because the total tons of coal produced by BB Coal Company in 2022 was less than the tons of coal it produced in 2018, the claim for rebate carry forward is denied.

	Tons of Coal Produced	
	2018	2022
BB mine No. 1	900,000	0
BB mine No. 2	900,000	0
BB mine No. 3	900,000	900,000
BB mine No. 4	NA	1,500,000
Total tons	2,700,000	2,400,000

2,700,000 tons of coal produced in 2018 by BB Coal Company
 2,400,000 tons of coal produced in 2022 by BB Coal Company

7.6. **Example 6.** AJAX Coal Company operates one coal mine in West Virginia, the AJAX No. 1 Mine. AJAX Coal Company is a member of a Controlled Group of corporations for West Virginia corporation net income tax purposes that collectively operate a total of three coal mines in West Virginia – the AJAX No. 1 mine, the CG No. 1 mine and the CG No. 2 mine. Each mine produced 900,000 tons of coal in 2018. The 2018 base production amount of coal produced by the three mines is 2,700,000 tons. In 2021, AJAX Coal Company placed a new mine, AJAX No. 2 mine, in operation at a cost of \$65 million. The potential coal severance rebate allowable is \$22,750,000 (thirty-five percent of \$65,000,000). The new mine produced 800,000 tons of coal in 2021 and 1.5 million tons of coal in 2022. AJAX Coal Company timely files an application for rebate. In 2022, the Controlled Group shut down production at CG No. 1 mine and CG No. 2 mine.

Analysis

AJAX Coal Company sold its 2018 coal production for \$50 a ton, generating gross proceeds of \$45,000,000 (900,000 x \$50). The 2018 production at the CG No. 1 and 2 mines also sold for \$50 a ton generating \$45,000,000 for each mine. The 2018 state portion of severance taxes payable by the Controlled Group was \$6,277,500 (four and sixty-five hundredths of \$135,000,000), or \$2,092,500 per mine.

AJAX mine No. 1 severance tax	\$2,092,500	(900,000 x \$50 = \$45,000,000 x 4.65%)
CG mine No. 1 severance tax	\$2,092,500	(900,000 x \$50 = \$45,000,000 x 4.65%)
CG mine No. 2 severance tax	\$2,092,500	(900,000 x \$50 = \$45,000,000 x 4.65%)
	\$6,277,500	2,700,000 \$135,000,000

In 2021, AJAX Coal Company placed a new mine, AJAX No. 2 mine, in operation at a cost of \$65 million. The new mine produced 800,000 tons of coal in 2021 and 1.5 million tons of coal in 2022. In 2021, the AJAX No. 1 Mine, the CG No. 1 and the CG No. 2 Mine each produced 900,000 tons of coal. In 2022, the AJAX No. 1 mine produced 900,000 tons of coal but the CG No.1 and CG No.2 mines were shut down.

In 2021, AJAX No. 1 mine produced 900,000 tons of coal. The AJAX No. 2 mine produced 800,000 tons of coal. AJAX Coal Company sold the production from both mines for \$65 a ton, generating gross proceeds of \$110,500,000 (1,700,000 x \$65). The state portion of its severance tax liability was \$5,138,250 (four and sixty-five hundredths of \$110,500,000). The CG No. 1 and CG No. 2 mines each produced 900,000 tons of coal that sold for \$65 a ton, generating gross proceeds of \$58,500,000 (900,000 x \$65) for each mine. The state severance tax payable by each mine was \$2,720,250 (four and sixty-five hundredths of \$58,500,000). The 2021 state portion of severance taxes payable by the Controlled Group was \$10,578,750.

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CG No. 1 mine severance tax	\$2,720,250	(900,000 x \$65 = \$58,500,000 x 4.65%)
CG No. 2 mine severance tax	\$2,720,250	(900,000 x \$65 = \$58,500,000 x 4.65%)
AJAX No. 1 severance tax	\$2,720,250	(900,000 x \$65 = \$58,500,000 x 4.65%)
AJAX No. 2 severance tax	\$2,418,000	(800,000 x \$65 = \$52,000,000 x 4.65%)
	\$10,578,750	

AJAX Coal Company timely filed a claim for severance tax rebate with the severance tax return filed by the Controlled Group for the 2021 taxable year. The \$65 million capital investment in the AJAX No. 2 mine generated a potential coal severance tax rebate equal to \$22,750,000 (thirty-five percent of \$65,000,000). The rebate of 2021 severance taxes allowable is \$1,934,400 (eighty percent of the additional severance taxes payable of \$2,418,000 due to the additional tons of coal produced that are attributable to the qualified investment of \$65,000,000). Since the number of tons produced by AJAX Coal Company increased from the base year 2018 and the increase in production by the controlled group increased from the base year 2018 in an amount at least equal to the increased production at the AJAX No. 2 mine where the investment was made, the rebate paid is \$1,934,400. The rebate amount carried forward is \$20,815,600 (\$22,750,000 minus \$1,934,400).

In 2022, the new mine produced 1.5 million tons of coal that were sold for \$65 per ton generating \$97,500,000. The state portion of severance tax payable on this amount was \$4,533,750 (four and sixty-five hundredths of \$97,500,000). The rebate amount carried forward (\$20,815,600) theoretically results in a rebate payment of \$3,627,000 (eighty percent of \$4,533,750). However, because total tons of coal produced in 2022 by the Controlled Group is less than the total tons of coal it produced in 2018, the claim for rebate carry forward is denied.

	Tons of Coal Produced	
	2018	2022
AJAX No. 1 mine	900,000	900,000
AJAX No. 2 mine	NA	1,500,000
CG No. 1 mine	900,000	0
CG No. 2 mine	900,000	0
Total tons produced	2,700,000	2,400,000

7.7. Example 7. M & M Coal Company, an eligible taxpayer, operates one mine. This mine produces coal from seams with a seam thickness of 45 inches or more. It also produces coal from seams with a thickness of less than 45 inches, known as thin seam coal. In 2020, M & M Coal Company places into service or use qualified investment that cost \$5 million, which increases the production of coal at the mine by 300,000 tons of coal, 100,000 tons of which is thin seam coal.

The maximum potential coal severance tax rebate allowable is \$1,750,000 (thirty-five percent of \$5,000,000). In 2018, the coal produced from this mine sold for \$50 a ton. In 2020, the coal produced at this mine sells for \$60 per ton. With its annual severance tax return filed for the 2020 taxable year, the coal company files a claim for severance tax rebate of \$1,750,000.

Analysis

	\$50	State Portion
	Sales Price	Severance Tax
2018 coal production		
500,000 tons of coal, seams of 45 inches or more	$\$25,000,000 \times 4.65\% =$	$\$1,162,500$
200,000 tons of thin seam coal	$\$10,000,000 \times 1.65\% =$	$165,000$
		\$1,327,500
	\$60	State Portion
	Sales Price	Severance Tax
2020 coal production		
700,000 tons of coal, seams 45 inches or more	$\$42,000,000 \times 4.65\% =$	$\$1,953,000$
300,000 tons of thin seam coal	$\$18,000,000 \times 1.65\% =$	$297,000$
		\$2,250,000

In this example, the 2020 increase in severance taxes attributable to the increase in production taxed at the 4.65 percent rate is \$790,500. The amount of 2020 severance taxes rebated is \$790,500 (\$1,953,000 - \$1,162,500).

The amount of allowable rebate applied in any year may not exceed 80 percent of the additional severance taxes due at the 4.65 percent rate attributable to the increase in coal production. The amount of rebate carried forward is \$959,500 (\$1,750,000 - \$790,500). No rebate is available under the statute for the additional severance taxes imposed at the 1.65 percent rate that are attributable to the increase in thin seam coal production.

7.8. Example 8. ABC Coal Company is an eligible taxpayer that operates two coal mines that are located near each other. In 2020, the ABC Coal Company builds a new coal preparation and processing facility to process the coal it produces at its ABC No. 1 and ABC No. 2 mines. The new coal preparation and processing facility is completed in 2021 and costs \$6.5 million. With its severance tax return for the 2021 taxable year, the ABC Coal Company files an application for a severance tax rebate of \$2,275,000 (thirty-five percent of \$6,500,000). The claim for rebate is denied because the investment did not result in an increase in the number of tons of coal produced by ABC Coal Company.

Analysis

	Tons of coal produced	
	2018	2021
ABC No. 1 mine	700,000	700,000
ABC No. 2 mine	700,000	700,000
Total tons produced	1,400,000	1,400,000

Because ABC Coal Company did not increase the number of tons of coal it produced in 2021 from the base year 2018, the claim for rebate is denied.

7.9. Example 9. AJAX Coal Company is an eligible taxpayer that operates two coal mines in West Virginia that are located near each other. In 2018, both mines had identical production of 700,000 tons of coal, resulting in total production for AJAX of 1,400,000 tons. AJAX sold its coal in 2018 at a price of \$50 per ton, yielding gross proceeds of \$70 million. The state portion of severance tax paid for 2018 was \$3,255,000 (four and sixty-five hundredths of \$70,000,000).

In 2020, AJAX builds a new coal preparation and processing facility to process the coal it produces from both mines. The new coal preparation and processing facility is completed in 2021 at a cost of \$6.5 million. Total production for the two AJAX mines in 2021 remains at 1,400,000 tons; but the price has increased to \$60 per ton, yielding gross proceeds of \$84 million. The state portion of severance tax paid for 2021 was \$3,906,000 (four and sixty-five hundredths of \$84,000,000).

With its severance tax return for the 2021 tax year, AJAX files an application for a severance tax rebate of \$2,275,000 (thirty-five percent of \$6,500,000). The claim for rebate is denied. While the state portion of the severance tax liability for AJAX increased by \$651,000 (\$3,906,000 - \$3,255,000) from 2018 to 2021, this increase was entirely due to the increased sales price of its coal. AJAX Coal Company's production of coal did not increase from the base year 2018 to 2021. Accordingly, the claim for rebate is denied.

7.10. Example 10. D & L Coal Company, an eligible taxpayer, operates two coal mines in West Virginia that are near to each other. Coal production at D&L No. 1 mine and D&L No. 2 mine totaled 1,500,000 tons in both 2018 and 2021; but the price received for the coal increased from \$50 per ton in 2018 to \$55 per ton in 2021.

In 2020, the Coal Company builds a new coal preparation and processing facility to process the coal it produces at its D&L No. 1 and D&L No. 2 mines. The new coal preparation and processing facility is completed in 2021 and costs \$6.5 million. In 2021, the D&L Coal Company began processing coal produced by two other coal companies (CG mine No. 1 and CG mine No. 2) in its controlled group when they shut down their coal preparation plants. Coal production at CG No. 1 mine and CG No. 2 mine totaled 1,000,000 tons in both 2018 and 2021, while the price received for the coal remained at \$55 per ton in both years.

With the severance tax return for the 2021 taxable year by the controlled group, D & L Coal Company applies for a severance tax rebate of \$2,275,000 (thirty-five percent of \$6,500,000). The claim for rebate is denied.

Analysis

The capital investment in the coal preparation and processing plant did not result in an increase in the number of tons of coal produced by the controlled group of coal companies in 2021 from the base year 2018. The additional state severance taxes of \$348,750 payable for tax year 2021 were due solely to the increase in the sales price of some of its coal. Accordingly, the claim for rebate was denied.

7.11. Example 11. XYZ Coal Company, an eligible taxpayer, operates several coal mines located in this state. During calendar year 2018, XYZ Coal Company's mines collectively produced 3,500,000 tons of coal, which it sold for \$70 per ton, generating \$245,000,000 in gross proceeds. The XYZ Coal Company's 2018 state portion of their severance tax liability under W. Va. Code §11-13A-3(a), before credits, was \$11,392,500 (four and sixty-five hundredths of \$245,000,000).

In 2028, the XYZ Coal Company opened a new coal mine at a capital investment of \$70 million. In 2028, the new mine produced 800,000 tons of coal in 2028, which is sold for \$70 per ton, generating \$56,000,000 in gross proceeds. The state portion of severance tax payable under W. Va. Code §11-13A-3(a), before credits, is \$2,604,000 (four and sixty-five hundredths

of \$56,000,000). The Coal Company's other mines again produced 3,500,000 tons of coal in 2028.

In 2028, XYZ Coal Company's mines in West Virginia collectively produced 4,300,000 tons of coal that it sold for \$70 per ton generating \$301,000,000 (4,300,000 x \$70). The Coal Company's 2028 severance tax liability under W. Va. Code §11-13A-3(a), before credits, was \$13,996,500 (four and sixty-five hundredths of \$301,000,000).

2028 production from mines operating in 2018	3,500,000 tons
2028 production from the new mine	800,000 tons
	4,300,000 total tons

With its annual severance tax return for calendar year 2028, XYZ Coal Company files a claim for coal severance tax rebate of \$24,500,000 (thirty five percent of \$70,000,000).

Analysis

Because the tons of coal produced by the new mine (800,000 tons) in 2028 increased XYZ Coal Company's total coal production from all mines to 4,300,000 tons in 2028, XYZ's claim for severance tax rebate will be allowed because the increase in total tons of coal produced in 2028 by taxpayer's mines was equal to or greater than the increase in coal production directly attributable to the qualified investment property. The potential rebate allowable is \$24,500,000 (thirty-five percent of \$70 million). The portion of 2028 severance tax rebated to XYZ Coal Company is \$2,083,200 (eighty percent of \$2,604,000). The rebate amount carried forward is \$22,416,800 (\$24,500,000 minus \$2,083,200).

2028 severance taxes payable	\$13,996,500
2018 severance taxes payable	- 11,392,500
Additional severance payable	\$ 2,604,000

7.12. **Example 12.** Continuing with the previous example, XYZ Coal Company's mines collectively produced 3,500,000 tons of coal in calendar year 2029, which it sold for \$70 per ton, generating \$245,000,000. The Coal Company's 2029 state severance tax liability under W. Va. Code §11-13A-3(a), before credits, was \$11,392,500 (four and sixty-five hundredths of \$245,000,000).

With its annual coal severance tax return for the 2029 taxable year, XYZ Coal Company filed a claim for rebate carry forward of \$22,416,800. This claim for coal severance tax rebate carry forward was denied because while the coal mining operation at which the qualified investment property was placed in service or use produced 800,000 tons of coal in 2029, the tons of coal produced at the Coal Company's other mines dropped by 800,000 tons of coal.

Analysis

When a claim for a rebate carried forward amount is submitted, the computation described in subdivision 3.7.3 of this rule must be made for the rebate carry forward year. Only when total tons of coal produced by the taxpayer at all of its mines in the rebate carry forward year is equal to or greater than the total tons of coal produced by taxpayer's mines in the rebate year, is a rebate carry forward amount payable.

2018 tons of coal produced by all XYZ mines	3,500,000
2028 tons of coal produced by all XYZ mines	4,300,000
2028 Increase in production:	800,000 tons
2028 Increase in production – new mine	800,000 tons
2029 tons of coal produced by all XYZ mines	3,500,000
2029 decrease in tons of coal produced	(800,000)
2029 production at new mine	800,000 tons

7.13. **Example 13.** XYZ Coal Company, an eligible taxpayer, operates several coal mines located in this state. During calendar year 2018, XYZ Coal Company's mines collectively produced 3,500,000 tons of coal, which it sold for \$70 per ton, generating \$245,000,000. The Coal Company's 2027 state severance tax liability under W. Va. Code §11-13A-3(a), before credits, was \$11,392,500 (four and sixty-five hundredths of \$245,000,000).

2018 production from all mines	3,500,000
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In 2028, the XYZ Coal Company opened a new coal mine with a capital investment of \$70 million. The new mine produced 800,000 tons of coal in 2028, which is sold for \$70 per ton, generating \$56,000,000. Its severance tax payable under W. Va. Code §11-13A-3(a), before credits, is \$2,604,000 (four and sixty-five hundredths of \$56,000,000). However, production at other mines operated by XYZ Coal Company dropped by 400,000 tons of coal.

Therefore, in 2028, XYZ Coal Company's mines in West Virginia collectively produced 3,900,000 tons of coal that it sold for \$70 per ton generating \$273,000,000 (3,900,000 x \$70). The Coal Company's 2028 severance tax liability under W. Va. Code §11-13A-3(a), before credits, was \$12,694,500 (four and sixty-five hundredths of \$273,000,000).

2028 production from mines operating in 2018	3,100,000 tons
2028 production from the new mine	800,000 tons
	3,900,000 total tons

With its annual severance tax return for calendar year 2028, XYZ Coal Company files a claim for coal severance tax rebate of \$24,500,000 (thirty-five percent of \$70,000,000).

Analysis

Because the increased coal production from all mines in 2028 (400,000 tons) is less than the increase in production at the new mine (800,000 tons) where the qualified investment property was placed in service or use, the claim for severance tax rebate will be denied. The rebate denied may be carried forward to subsequent years and used in years where total tons of coal produced by all XYZ Coal Company's mines is equal to or greater than the production increase at the new mine where the investment was placed in service.

Note: In order to determine the amount of rebate allowable, it must be determined if the increase in the number of tons of coal produced for the rebate year that is attributable to the qualified investment property resulted in an equal or greater increase in the total production of coal from all mines of the taxpayer (or from all mines of the taxpayer and taxpayer's affiliated or controlled group, if applicable) during the rebate year. This is determined by comparing the total increase in tons of coal produced from all mines of the taxpayer (or from all mines of the taxpayer and taxpayer's affiliated or controlled group, if applicable) for the rebate year to the increase in tons of coal produced for the rebate year that are attributable to placing the qualified investment property in service or use at the taxpayer's coal mining operation for the rebate year. If the total increase in tons of coal produced from all mines of the taxpayer (or all mines of the taxpayer and taxpayer's affiliated or controlled group, if applicable), during the rebate year is equal to or more than the increase in tons of coal produced by the taxpayer attributable to placing the qualified investment property in service, then the rebate is allowable.

§ 110-21F-8. Application for rebate required.

8.1. *Application for rebate required.* -- Notwithstanding any provision of W. Va. Code §11-13EE-1, *et seq.*, to the contrary, no rebate shall be paid under W. Va. Code §11-13EE-1, *et seq.*, for any qualified investment in new machinery or new equipment placed in service or use at a mine site until the person asserting a claim for the allowance of rebate under W. Va. Code §11-13EE-1, *et seq.*, makes written application to the Tax Commissioner for allowance of rebate as provided in W. Va. Code §11-13EE-7 and this rule. The application for rebate must be filed using MYTAXES, which is available at the Tax Department's webpage.

8.2. *Form and contents of application.* -- An application for rebate shall be filed, in the form prescribed by the Tax Commissioner, no later than the last day for filing the annual severance tax return under W. Va. Code §11-13A-1, *et seq.*, determined by including any authorized extension of time for filing the return, for the taxable year in which the qualified machinery or equipment to which the rebate relates is placed in service or use and all information required by the form is provided.

8.3. *Rebate carry forward.* -- When the amount of rebate claimed exceeds 80 percent of the additional state severance tax payable, the unused portion of the rebate amount may be carried forward and rebated by the Tax Commissioner after severance taxes due in subsequent years are paid and the taxpayer files a claim for the rebate carry forward amount, or a portion thereof, and provides the information required by the Tax Commissioner. In order for a rebate carry forward to be allowed, the qualified investment property that is the basis of the rebate must result in an increase in the number of tons of coal produced in the rebate carry forward year from the base year. Additionally, there must be an increase in the state portion of the severance taxes paid. The rebate paid in any year may not exceed 80 percent of the additional severance taxes payable, before credit for payment of the minimum severance tax, that is attributable to the increase in coal production. When the taxpayer operates more than one mine in West Virginia, the production from all mines is considered when determining whether there is an increase in the taxpayer's production of coal due to placing qualified investment property into service or use from the base year. Additionally, when the taxpayer is a member of a controlled or affiliated group that has other members that produce coal in West Virginia, tons of coal produced by all members of the controlled or affiliated group, including the taxpayer, are used to determine whether the qualified investment property has resulted in an increase in the number of tons of coal produced from the base year.

8.3.1. However, the rebate amount cannot be carried forward for a period that exceeds 10 years from the date the qualified investment in new machinery or equipment is first placed in service or use in this state by the taxpayer applying for the rebate.

8.4. *Application for rebate carried forward.* -- When an eligible taxpayer carries forward unused rebate, and then seeks to claim the rebate carried forward, an application for rebate carried forward shall be filed, in the form prescribed by the Tax Commissioner, no later than the last day for filing the severance tax return under W. Va. Code §11-13A-1, *et seq.*, determined by including any authorized extension of time for filing the return for that taxable year.

8.5. *Multiple qualified investments.* -- A separate application for rebate is required for each taxable year during which the taxpayer places qualified investment in the form of new machinery or equipment in service or use in a mine or coal preparation and processing facility in this state that results in increased coal production.

8.6. *Failure to make timely application.* -- The failure to timely apply for the rebate results in the forfeiture of 25 percent of the rebate amount otherwise allowable under W. Va. Code §11-13EE-1, *et seq.*, for the taxable year. This 25 percent penalty applies each year until the application is filed.

8.6.1. The late filing of the required application does not cure the failure to timely file the application and the 25 percent penalty still applies.

8.6.2. Due to the retroactive application of these rules due to changes made by the Legislature in the 2020 regular session of the Legislature, the failure to make timely application will not apply to rebate applications due on January 31, 2020. Instead, those applications are due on August 30, 2020.

8.7. *Amended coal severance tax return filed.* -- When a taxpayer files an amended severance tax annual return for a taxable year for which an application for coal severance tax rebate was filed, the taxpayer must also file with the amended return an amended application for coal severance tax rebate.

§ 110-21F-9. Method to claim coal severance tax rebate.

9.1. The severance tax rebate may not be claimed on a severance tax return and a rebate amount carried forward may not be claimed on a severance tax return.

9.2. No rebate shall be paid for any qualified investment in new machinery or new equipment placed in service or use until the taxpayer asserting a claim for the rebate makes written application to the State Tax Commissioner as provided in W. Va. Code §11-13EE-7 and this rule.

9.2.1. The written application must be in the form prescribed by the State Tax Commissioner and must be filed electronically with the Tax Commissioner. It is contemplated that some calculations may be performed by the State Tax Department's proprietary software.

9.2.2. Information that must be provided in the application includes, but is not limited to:

9.2.2.a. Taxpayer's name,

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- 9.2.2.b. Taxpayer's physical address location,
 - 9.2.2.c. Taxpayer's mailing address, if different from its physical location,
 - 9.2.2.d. Taxpayer's federal employer identification number,
 - 9.2.2.e. Taxpayer's West Virginia severance tax account number,
 - 9.2.2.f. The taxable period for which rebate is claimed,
 - 9.2.2.g. The basis of the qualified investment property for federal income tax purposes,
 - 9.2.2.h. The Department of Environmental Protection mining permit number,
 - 9.2.2.i. A description of the qualified investment property,
 - 9.2.2.j. The purpose for which the property was been placed in service or use,
 - 9.2.2.k. The date the qualified investment property was acquired,
 - 9.2.2.l. The date the qualified investment property was placed in service or use,
 - 9.2.2.m. The useful life of the qualified investment property for federal income tax purposes,
 - 9.2.2.n. The tons of coal produced by the taxpayer at the coal mining operation in the base production year,
 - 9.2.2.o. The tons of coal produced by the taxpayer at the coal mining operation in the year for which rebate is claimed,
 - 9.2.2.p. The gross value of coal produced at the site of the coal mining operation in the base production year and the amount of W. Va. Code §11-13A-3(a) severance tax payable for that year before credit for payment of the minimum severance tax.
 - 9.2.2.q. The tons of coal produced at the site of the coal mining operation in the year for which a rebate carry forward is claimed and the amount of W. Va. Code §11-13A-3(a) severance tax payable for that year before credit for payment of the minimum severance tax.
 - 9.2.2.r. Any other information required by the Tax Commissioner.
- 9.2.3. *Taxpayer operating more than one mine.* -- If the taxpayer operates more than one mine in West Virginia, then it must provide a schedule with its annual severance tax return filed under W. Va. Code §11-13A-1, *et seq.*, that shows, for each coal mine:
- 9.2.3.a. The number of tons of coal produced during the taxable year at each mine,
 - 9.2.3.b. The gross value of the coal produced at each mine during the taxable year,
- and

9.2.3.c. The amount of severance tax imposed by W. Va. Code §11-13A-3(a) on the privilege of producing coal at each mine, computed before application of tax credits such as the credit for paying the minimum severance tax for the taxable year.

9.2.4. *Controlled or affiliated group.* -- When a taxpayer claiming rebate under W. Va. Code §11-13EE-1, *et seq.*, is a member of an affiliated or controlled group which operates more than one coal mine in this state, the group shall provide a schedule with its annual severance tax return filed under W. Va. Code §11-13A-1, *et seq.*, for the taxable year that shows for each coal mine operated in this state by a member of the affiliated or controlled group:

9.2.4.a. The number of tons of coal produced during the taxable year at each mine,

9.2.4.b. The gross value of the coal produced at each mine during the taxable year,
and

9.2.4.c. The amount of severance tax imposed by W. Va. Code §11-13A-3(a) on the privilege of producing coal at each mine, computed before application of tax credits such as the credit for paying the minimum severance tax for the taxable year.

9.3. *Due date of application.* -- An application for rebate must be filed no later than the last day for filing the severance tax return, determined by including any authorized extension of time for filing the return, for the taxable year in which the qualified investment property for which rebate is claimed is placed in service or use, and all information required by the Tax Commissioner must be provided with the application. The application must be filed electronically using the MYTAXES feature at the Tax Department's website.

9.4. *Separate application required for each taxable year in which qualified investment property is placed in service or use.* -- A separate application for rebate is required for each taxable year during which the taxpayer places new machinery or equipment into service or use in a mine or coal preparation and processing facility in this state.

9.5. *Application for rebate carried forward.* -- When a rebate amount is carried forward for use in whole or in part in a subsequent taxable year, the taxpayer must file the application for rebate carry forward required by the Tax Commissioner to claim the rebate carried forward amount. Rebate carried forward may not be claimed as a credit against severance taxes on any periodic estimate of severance tax liability or on the annual severance tax return.

9.6. *When amended return filed.* -- When the producer of the coal files an amended severance tax return for a tax year for which a rebate was allowed, or a rebate carry forward was allowed, the taxpayer must file an amended application for rebate, or an amended application for rebate carried forward, and provide the information required by the Tax Commissioner.

9.7. The State Tax Commissioner will issue a form 1099 showing the amount of coal severance tax rebate paid to a taxpayer during a taxable year.

§ 110-21F-10. Identification of capital investment property.

10.1. *Records required.* -- Every taxpayer who claims a rebate pursuant to W. Va. Code §11-13EE-1, *et seq.*, and this rule shall maintain adequate records establishing the following facts for each item of qualified investment property:

10.1.1. The property's identity;

10.1.2. The property's actual cost, or reasonably determined cost in the absence of actual cost;

10.1.3. Whether the machinery or equipment are new property as defined in subsection 2.2.21 of this rule;

10.1.4. The property's useful life for federal income tax purposes;

10.1.5. The month and taxable year in which the property was placed in service or use;

10.1.6. The amount of rebate claimed; and

10.1.7. The date the property was disposed of, or otherwise ceased to be used at the mine or coal preparation and processing plant at which it was first placed in service or use.

10.2. *Burden of proof.* -- The burden of proof is on the taxpayer to establish by clear and convincing evidence that the taxpayer is entitled to the benefits allowed by W. Va. Code §11-13EE-1, *et seq.*

10.3. *Recapture tax.* -- Failure to maintain adequate records may result in imposition of the recapture tax imposed in W. Va. Code §11-13EE-11.

§ 110-21F-11. Failure to keep records of qualified investment property.

11.1. A taxpayer who does not keep the records required by section 10 of this rule for identification of the qualified investment property is subject to the following rules:

11.1.1. A taxpayer is treated as having disposed of, during the taxable year, any machinery or equipment that the taxpayer cannot establish was still in use at the mine or coal preparation and processing plant at which it was first placed in use in this state, at the end of that taxable year.

11.1.2. If a taxpayer cannot establish when capital investment in new machinery or equipment was placed in service or use for purposes of claiming this rebate, the taxpayer is treated as having placed the property in service or use in the most recent taxable year in which similar machinery or equipment were placed in service or use at the mine or coal preparation and processing plant.

11.2. A taxpayer placing qualified investment property in service or use at a coal mining operation in this state is required to keep the property in service or use for five years after the property is placed in service or use at that coal mining operation. If in any year the taxpayer cannot establish that qualified investment property is still in service or use at the coal mining operation at which it was first placed in service or use and used to qualify for the rebate under W. Va. Code §11-13EE-1, *et seq.*, the property will be treated as having been taken out of service during that taxable year and the recapture tax may apply. See section 17 of this rule.

§ 110-21F-12. Transfer of qualified investment property to successors.

12.1. *Mere change in form of business.* -- New machinery or new equipment may not be treated as disposed of under W. Va. Code §11-13EE-9 by reason of a mere change in the form of conducting the business as long as the machinery or equipment is retained in the successor business at the coal mining operation at which it was first placed in service or use and used to qualify for the rebate under W. Va. Code §11-13EE-1, *et seq.*, and the transferor business retains a controlling interest in the successor business. In this event, the successor business is allowed to claim the remaining amount of rebate still available with respect to the qualified investment property transferred, and the transferor business may not be required to redetermine the amount of rebate allowed in earlier years.

Example. ABC is formed as a corporation and begins producing coal in the State of West Virginia in 2016. In 2019 it places qualified investment property in service or use at its mine or coal preparation and processing facility that results in increased coal production. The corporation timely files a claim for rebate when its severance tax return for the 2019 calendar year is filed and the claim is allowed by the Tax Commissioner. In 2021, the corporation becomes a limited liability company that continues to operate the mine and coal preparation and processing facility at which the qualified investment was made and placed into service or use. This transfer of the business' structure from a corporation to a limited liability company will not be treated as a premature disposition of the qualified investment property triggering application of the recapture tax.

12.2. *Transfer or sale to successor.* -- New machinery or new equipment are not treated as disposed of under W. Va. Code §11-13EE-11 by reason of any transfer or sale to a successor business provided the successor business continues to operate the new machinery or new equipment at the mine or coal preparation and processing facility in this state at which the machinery or equipment were first placed in service or use. Upon transfer or sale, the successor shall acquire the amount of rebate, if any, that remains available under W. Va. Code §11-13EE-1, *et seq.*, and the transferor business is not required to redetermine the amount of rebate allowed in earlier years.

Example. ABC, Inc., a C corporation, has continually produced coal for sale, profit or commercial use in West Virginia since 2016. In 2019, the corporation placed in service or use qualified investment property that it purchased on or after July 1, 2019, which results in increased coal production. The corporation timely files a claim for rebate when its severance tax return for the 2019 tax years is filed and the severance taxes shown to be due on the return are paid. The claim for rebate is paid. In 2021, the corporation is acquired by XYZ partnership which continues to operate the coal mine and coal preparation and processing facility that it acquired from ABC, Inc. Under these facts, the sale of ABC Inc., to XYZ partnership will not constitute a premature disposition of property triggering a recapture tax under W. Va. Code §11-13EE-11. In the event ABC Inc., has a rebate that is carried forward, the rebate carried forward amount is not forfeited and the remaining amount of the rebate carried forward may be claimed by XYZ partnership if the rebate amount carried forward could have been claimed by ABC, Inc., had it not been purchased by XYZ partnership.

12.3. *Reporting transaction.* -- When there is a change in the form of the business, or there is a transfer of the business to a successor, the business that claimed the rebate must notify the Tax Commissioner of the change in the form of the business, or the transfer of the business to a successor, within 30 calendar days after the transfer or change in form and provide the information required by the Tax Commissioner regarding the event.

§ 110-21F-13. Rebate carry back, carry forward, and transfer.

13.1. No rebate allowable under W. Va. Code §11-13EE-1, *et seq.* for qualified investment property placed in service or use may be carried back to a taxable year before the taxable year in which the qualified investment property is placed in service or use.

13.2. When the amount of rebate allowable exceeds 80 percent of the state portion of the additional severance tax payable on the increased production at the mine where the qualified investment is placed in service or use during the taxable year for which the application for rebate is submitted, then the following rules apply:

13.2.1. No provision in W. Va. Code §11-13EE-1, *et seq.* allows carry back of the coal severance tax rebate. Unused severance tax rebate may only be carried forward.

13.2.2. The unused portion of the rebate amount may be claimed as rebate in subsequent taxable years by filing a claim for unused rebate with the Tax Commissioner no later than the due date of the annual severance tax return for the carried forward taxable year, determined with regard to any authorized extension of time for filing the annual return. Under no circumstances can the unused rebate be claimed after the expiration of the tenth consecutive tax year after the qualified investment giving rise to the rebate is placed in service or use.

13.3. The amount of severance tax subject to the remainder rebate each year is determined by comparing (1) the amount of the state portion of severance tax payable for the taxable year in which rebate carry forward is sought (before credits such as the credit for payment of the minimum severance tax) on the increase in coal production at the mine where the qualified investment was placed in service or use, with (2) the amount of the state portion of severance tax imposed by W. Va. Code §11-13A-3(a) paid during for the base production year, as established in accordance with the provisions of W. Va. Code §11-13EE-3 and section 3 of this rule.

13.3.1. The rebate amount carried forward can only be applied against 80 percent of the state portion of the increased severance tax payable for the taxable year to which the rebate amount is carried forward that is attributable to the qualified investment property.

13.3.2. Any rebate remaining after the tenth consecutive year following the taxable year in which the qualified investment property is placed in service or use is forfeited.

13.3.3. The amount of rebate carried forward may be paid only when coal production at the mine in the carry forward year continues to be greater than the coal production in the base production year.

13.4. When the taxpayer operates more than one coal mine in West Virginia, and when the taxpayer is a member of a controlled or affiliated group that operates more than one coal mine in West Virginia, the increase in coal production is determined by comparing:

13.4.1. The tons of coal produced at all mines in this state operated by the taxpayer, or by all mines operated in this state by all members of the taxpayer's controlled or affiliated group, including the taxpayer, as appropriate, for the taxable year for which rebate is sought with tons of coal produced by all such mines in the base production year; and

13.4.2. Tons of coal produced at the mine at which the qualified investment property was placed in service or use during the taxable year for which rebate is sought with the tons of coal produced at that mine during the base production year.

13.4.3. There must be an increase in the total tons of coal produced at all mines operated in this state by the taxpayer, or by all mines operated in this state by all members of the taxpayer's affiliated or controlled group, including the taxpayer, equal to or greater than the increase in the tons of coal produced at the mine at which the qualified investment property was placed in service or use.

13.5. The provisions limiting the rebate set forth in this rule also apply when the taxpayer files a claim for application of an amount of rebate carried forward.

13.6. No provision in W. Va. Code §11-13EE-1, *et seq.*, allows transfer of the coal severance tax rebate, including but not limited to transfer between members of a controlled or affiliated group, in the absence of a transfer of the qualified investment property to a successor as provided in W. Va. Code §11-13EE-10 and section 12 of this rule.

§ 110-21F-14. Limitations on claiming rebate or rebate carry forward.

14.1. Each of the following requirements must be satisfied in order for the property to qualify for the coal severance tax rebate. This list is not inclusive.

14.1.1. The property must be new property; it may not be used property.

14.1.2. The qualified investment property must be directly used in the production of coal.

14.1.3. Use of the qualified investment property must result in an increase in the tons of coal produced by the coal mining operation where the property is placed in service or use.

14.1.4. The first or original use of the qualified investment property by anyone must be by the taxpayer claiming the rebate when making the qualified investment that results in taxpayer's increased coal production, except when the successor rule in section 12 of this rule applies.

14.1.5. The qualified investment property must have been purchased or leased, and placed into use or service, on or after July 1, 2019.

14.1.6. In the case of leased machinery and equipment, the primary term of the lease must be for at least five years.

14.1.7. The property must be subject to federal depreciation or amortization on the federal income tax return of the taxpayer claiming the rebate.

14.1.8. The useful life of the property for federal income tax purposes must be at least five years.

14.2. The taxpayer's purchase or lease of the qualifying machinery or equipment cannot be made from a person whose relationship to the taxpayer acquiring it would result in the disallowance of deductions under I.R.C. §§ 267 or 707(b).

14.3. The qualified investment property cannot be acquired by one component member of a controlled or affiliated group from another component member of the same controlled or affiliated group.

14.4. The basis of the qualified investment property for federal income tax purposes, in the hands of the person acquiring it, cannot be determined by either of the following methods:

14.4.1. In whole or in part by reference to the federal adjusted basis of the property in the hands of the person from whom it was acquired; or

14.4.2. Under Section 1014(e) of the United States Internal Revenue Code, as defined in W. Va. Code §§11-21-9 or 11-24-3.

14.5. The allowable rebate can only be used to recover the state portion of severance tax payable attributable to coal produced at the coal mining operation at which the qualified investment property was first placed in service or use.

§ 110-21F-15. Suspension of payment of rebate.

15.1. No rebate may be paid under W. Va. Code §11-13EE-1, *et seq.*, when the taxpayer, or any member of the taxpayer's controlled or affiliated group, as the case may be, is delinquent in the payment of severance taxes imposed pursuant to W. Va. Code §§11-12B-3 or 11-13A-3, or any local, state, or federal tax or fee, until such time as the delinquency is cured. This includes, but is not limited to:

15.1.1. West Virginia minimum severance tax on coal imposed pursuant to W. Va. Code §11-12B-1, *et seq.*

15.1.2. West Virginia severance taxes imposed pursuant to W. Va. Code §11-13A-1, *et seq.*

15.1.3. West Virginia employer withholding taxes imposed pursuant to W. Va. Code §11-21-1, *et seq.*

15.1.4. West Virginia consumers sales and service tax imposed pursuant to W. Va. Code §11-15-1, *et seq.*, use taxes imposed pursuant to W. Va. Code §11-15A-1, *et seq.*, and municipal sales and use tax administered, collected and enforced by the Tax Commissioner.

15.1.5. West Virginia income taxes imposed pursuant to W. Va. Code §11-21-1, *et seq.*, or §11-24-1, *et seq.*

15.1.6. Any other tax imposed pursuant to chapter 11 of the West Virginia Code.

15.1.7. West Virginia unemployment taxes imposed pursuant to W. Va. Code §21A-1-1, *et seq.*

15.1.8. Ad valorem property taxes levied on the real or tangible personal property of the eligible taxpayer and members of the taxpayer's affiliated or controlled group, if applicable.

15.1.9. The special reclamation tax imposed pursuant to W. Va. Code §22-3-11.

15.1.10. The special tax on coal imposed pursuant to W. Va. Code §22-3-32 and §22-3-32a.

15.1.11. Any fees imposed by the Secretary of the West Virginia Department of Environmental Protection, or any agency thereof.

15.1.12. Federal taxes including, but not limited to, federal income taxes, employer withholding taxes, social security taxes and federal excise taxes on coal.

15.1.13. Federal reclamation fee.

15.2. *Affidavit.* -- When a claim for rebate is filed, including a claim for rebate carried forward, the taxpayer must attach to the claim a sworn affidavit signed by the taxpayer attesting that neither it nor any member of its controlled or affiliated group, as defined in section 2 of this rule, is delinquent in the payment of any tax or fee to (1) the federal government, (2) the State of West Virginia or any agency thereof, or (3) any local government agency, including but not limited to, ad valorem property taxes.

15.2.1. When the taxpayer is a corporation, the affidavit must be signed by an officer of the corporation, or its chief executive officer.

15.2.2. When the taxpayer is a limited liability company that is member managed, the affidavit must be signed by the member manager of the limited liability company.

15.2.3. When the taxpayer is a limited liability company that is not member managed, or is a partnership, limited partnership, joint venture or other similar type entity, the affidavit must be signed by an equity owner of the entity.

15.2.4. When the taxpayer is a sole proprietor, the affidavit must be signed by its owner.

15.3. For purposes of W. Va. Code §11-13EE-6 and this rule, a taxpayer is not delinquent if the taxpayer is contesting liability for a tax or fee before the West Virginia Office of Tax Appeals, or in any court of competent jurisdiction in this state, or before the state or federal agency imposing the tax or fee, or in a federal or state court of competent jurisdiction, or is complying with the terms of any payment plan agreement administered by the Tax Commissioner for payment of the tax or fee. When this subsection applies, taxpayer shall include in, or with, the affidavit sufficient information for the Tax Commissioner to verify the accuracy of the affidavit.

15.4. When the taxpayer claiming a rebate under W. Va. Code §11-13EE-1, *et seq.*, is a member of a controlled group, or an affiliated group, no rebate allowable under W. Va. Code §11-13EE-1, *et seq.*, to the taxpayer may be claimed, in whole or in part, by another member of the group.

§ 110-21F-16. Forfeiture of coal severance tax rebate.

16.1. Grounds for forfeiture of the severance tax rebate include, but are not limited to:

16.1.1. The failure to timely apply for the rebate results in the forfeiture of 25 percent of the rebate amount otherwise allowable under W. Va. Code §11-13EE-1, *et seq.* This 25 percent

forfeiture penalty applies each year until the properly completed application for rebate is filed with the State Tax Commissioner.

Example 1. The coal company makes an investment that is eligible for the severance tax rebate that is placed in service or use in the 2020 taxable year. The company does not file a claim for rebate until 2022 when it files an amended severance tax return for the 2020 taxable year. Because the claim for rebate is filed late, 25 percent of the allowable rebate amount is forfeited.

Example 2. Same facts as example one except that the amended return and claim for rebate are not filed until 2023. Because the claim for rebate is filed late, 50 percent of the rebate amount is forfeited, 25 percent for each year the application for rebate is filed late.

16.2. Exceptions to forfeiture are set forth below.

16.2.1. New machinery or new equipment may not be treated as disposed of under W. Va. Code §11-13EE-9 by reason of a mere change in the form of conducting the business, as long as the machinery or equipment continue to be used at the coal mining operation at which they were originally placed in service or use by the transferor business in this state, and the transferor business retains a controlling interest in the successor business. In order to avoid forfeiture, the successor business must continue to operate the same machinery or equipment at the coal mining operation in this state at which the qualified investment property was first placed in service or use.

16.2.1.a. Under the scenario described above, the successor business can claim the rebate amount of credit still available with respect to the machinery or equipment transferred.

16.2.1.b. Under the scenario described above, the transferor business is not required to redetermine the amount of rebate allowed in earlier years.

16.2.2. New machinery or new equipment are not treated as disposed of under W. Va. Code §11-13EE-11 by reason of any transfer or sale to a successor business which continues to operate the same machinery or equipment at the coal mining operation in this state at which the qualified investment property was first placed in service or use.

16.2.2.a. Upon transfer or sale of qualified investment property and the coal mining operation, the successor shall acquire the amount of rebate, if any, that remains available under W. Va. Code §11-13EE-1, *et seq.*

16.2.2.b. Upon transfer or sale of qualified investment property and the coal mining operation, the transferor business is not required to redetermine the amount of rebate allowed in earlier years.

16.3. *Notice of transfer to Tax Commissioner.* -- Within 30 days after transfer of qualified investment property and the coal mining operation to a successor business, the transferor shall provide notice to the Tax Commissioner of the transfer and provide such information about the transfer that the Tax Commissioner may require.

16.4. *Cross references.*

16.4.1. See section 10 of this rule for identification of qualified investment property.

16.4.2. See section 11 of this rule for failure to keep records of qualified investment property.

§ 110-21F-17. Recapture of rebate; recapture tax imposed.

17.1. When recapture tax applies.

17.1.1. Any person who places qualified investment property in service or use for purposes of this rebate and who fails to use the qualified investment property or any portion thereof for at least five years in the production of coal in this state at the coal mining operation where it was placed in service or use shall pay the recapture tax imposed by W. Va. Code §11-13EE-11(b). No temporary downtime can exceed 30 consecutive days.

17.1.2. This section does not apply when section 12 of this rule, relating to transfer of qualified investment property, applies. However, the successor(s) may be subject to a recapture tax in the event they prematurely dispose of the qualified investment property or any portion thereof.

17.1.3. When the severance tax return filed by the taxpayer, or taxpayer's controlled or affiliated group, as applicable, is audited and the amount of severance tax rebate allowable is redetermined, resulting in less rebate being allowable, then if the rebate amount has already been paid by the Tax Commissioner, the recapture tax will be assessed to recover the amount of rebate that was erroneously paid.

17.1.4. When the taxpayer's books and records, or the books and records of taxpayer's controlled or affiliated group, as applicable, are audited and the amount of severance tax rebate allowable is redetermined, resulting in less rebate being allowable, then if the rebate amount has already been paid by the Tax Commissioner, the recapture tax will be assessed to recover the amount of rebate that was erroneously paid.

17.2. *Recapture tax imposed.* -- The recapture tax imposed by W. Va. Code §11-13EE-11(b) is the amount determined as follows:

17.2.1. If the taxpayer prematurely removes from service qualified investment property at the coal mining operation in this state where it was first placed in service or use prior to its fifth anniversary after being placed in service or use, the Tax Commissioner shall recapture the amount of rebate claimed under W. Va. Code §11-13EE-1, *et seq.*, for the current taxable year, and all preceding taxable years, attributable to qualified investment property that was prematurely removed from service at the coal mining operation in this state at which the qualified investment property was first placed in service or use.

Example 1. In 2020, taxpayer placed qualified investment property costing \$10 million in service or use at its Able No. 1 mine. The qualified investment property increases the tons of coal produced at the mine. A claim for rebate was timely filed for \$3.5 million. One-fourth of this amount was rebated each year, in 2021, 2022, and 2023. In 2024, the Able No. 1 mine closes. The remaining rebate carry forward amount of \$875,000 ($\$3.5 \text{ million} \div 4$) is forfeited. In addition, taxpayer owes a recapture tax. Because the qualified investment property was not used at the Able No. 1 mine for five years, the recapture tax applies. The recapture tax due is equal to \$2,625,000. ($\$3.5 \text{ million} \text{ minus } \$875,000$).

Example 2. Same facts as Example 1 except that only 50 percent of the qualified investment property is prematurely taken out of service in 2024 and the tons of coal produced from the Able No. 1 mine in 2024 drops below the tons of coal produced in its 2018 base production year. The remaining rebate carry forward amount of \$875,000 (\$3.5 million ÷ 4) is forfeited. In addition, taxpayer owes a recapture tax equal to \$1,312,500 ($\$875,000 \div 2 = \$437,500 \times 3$). This amount is equal to 50 percent of the rebate amount paid in 2021 through 2023.

17.3. *Payment of recapture tax.*

17.3.1. The recapture tax is due and payable on the day the taxpayer's annual severance tax return is due under W. Va. Code §11-13A-1, *et seq.*, including any authorized extension of time for filing the return, for the taxable year in which there was a premature removal of qualified investment property from service or use at the coal mining operation at which it was first placed in service or use and qualified for the rebate allowed by W. Va. Code §11-13EE-1, *et seq.*

17.3.2. The recapture tax shall be paid by the taxpayer subject to the recapture tax. However, if the taxpayer does not pay the recapture tax and the taxpayer is a partnership, limited liability company, an S corporation, or other flow-through entity, for federal income tax purposes, then the recapture tax shall be paid by those persons who are equity owners of the partnership, limited liability company, S corporation, or other flow-through entity, in the taxable year in which recapture tax is imposed under W. Va. Code §11-13EE-11. The equity owners are liable for their respective proportionate shares of the recapture tax, determined in accordance with how income, gain, loss, deductions and other items are distributable for the taxable year among the equity owners.