



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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5/2/2022 3:54 PM

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: Yes 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:

June 2, 2022

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.

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 Code §11-13EE-1, *et seq.*, originally enacted in Enrolled H.B. 3144 (2019), amended by Enrolled H. B. 4439 (2020), and amended further by Enrolled S. B. 718 (2021). W. Va. Code §11-13EE-1, *et seq.* provides a coal severance tax rebate when a taxpayer's qualified capital investment results in taxpayer's increased coal production and an increase in the taxpayer's workforce.

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

1.3. *Filing Date.* -- May 2, 2022.

1.4. *Effective Date.* -- June 2, 2022.

1.5. *Applicability.* -- The coal severance tax rebate is available to eligible taxpayers that make a qualified capital investment in a new or existing mine, which is placed in service or use in this state on or after July 1, 2019, and that results in an increase in coal production and in the taxpayer's workforce, in accordance with S.B.18 passed during the 2021 General Legislative Session. S.B.718 superseded the provisions of H.B. 3144 passed during the 2019 General Legislative Session and the provisions of H.B. 4439 passed during the 2020 General Legislative Session. The qualified investment may be in the form of new machinery or equipment, repairs or refurbishment of machinery or equipment that is capitalized for federal income tax purposes, or infrastructure improvements to real property.

§ 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. "Base period" means the five-year period directly preceding the year the qualifying capital investment in new machinery and equipment was placed into service. See W.Va. Code §11-13EE-2(b)(2).

2.2.1.a. When a business has not been in business for five years, but has been in business for at least two years, the base period is the most recent tax year prior to making the investment.

2.2.1.b. "Base period" applies to every threshold to rebate eligibility, including severance tax paid, tons mined, and employment levels.

2.2.2. "Base period annual average severance taxes" means the annual average of the state portion of severance taxes under W. Va. Code §11-13A-3 during the five-year period directly preceding the year the qualifying capital in new machinery and equipment was placed into service. The annual average of severance taxes is found by taking the cumulative total of the state portion of severance taxes paid from all mines operated within the state by the eligible taxpayer and dividing the aggregate cumulative total of the state portion of severance taxes by five. See W.Va. Code §11-13EE-2(b)(3).

2.2.3. "Coal loading facility" is defined in W. Va. Code §11-13E-2(b)(1). An investment in a new or expanded coal loading facility may be eligible for the credit allowed by W. Va. Code §11-13E-3 against the business and occupation tax. If the credit allowed by W.Va. Code §11-13E-3 is claimed by the taxpayer, then the cost of the coal loading facility is not eligible as qualified investment for purposes of the coal tax rebate.

2.2.4. "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.

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

2.2.4.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;

2.2.4.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;

2.2.4.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;

2.2.4.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;

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

2.2.4.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;

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

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

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

2.2.4.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:

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

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

2.2.4.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;

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

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

2.2.4.b.6. Measuring or determining weight, and ash content, water content;

2.2.4.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).

2.2.5. "Eligible taxpayer" means:

2.2.5.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

2.2.5.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)(15).

2.2.5.c. When the rebate applicant is part of a controlled or affiliated group, for purposes of determining the increase in the state portion of severance taxes paid, the increase in coal production tonnage, and the increase in full-time and full-time equivalent employment,

the term, "eligible taxpayer" includes all members of the rebate applicant's controlled or affiliated group. Thus, the increase in the state portion of severance taxes is determined by subtracting the base period annual average severance taxes paid by the eligible taxpayer's controlled or affiliated group for all coal mined in this state from the state portion of severance taxes paid by year for which the rebate is claimed. Likewise, the "eligible taxpayer's" total aggregate production tonnage and total employment figures referenced in W. Va. Code §11-13EE-3(c) are determined by reference to the controlled group or affiliated group's total aggregate production tonnage and total employment numbers across all mines operated by the controlled or affiliated group within the state.

2.2.6. "Full-time employee" means an employee who is compensated by an annual salary and who works, on average, at least 35 hours per week.

2.2.7. "Full-time equivalent employee" means the quotient obtained by dividing the total number of hours for which hourly employees were compensated for employment over the 12-month period in question by 1,820.

2.2.8. "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).

2.2.9. "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 every natural resource, "gross value" is reported as follows:

2.2.9.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.

2.2.9.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.

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

2.2.9.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.

2.2.9.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.

2.2.9.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).

2.2.10. "Infrastructure improvements to real property" means those improvements to the basic physical systems of a mine. Such infrastructure upgrades include, but are not limited to, materials used for construction of sewage, water, electrical, telecommunications, and ventilation systems, including ventilation fans, as well as transportation systems, including haul roads or access roads, culverts, and belt lines, and coal processing and conveying equipment, including machinery 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.

2.2.11. "Improvements to real property" means those improvements made to buildings, structures, fixtures, and other capital improvements, which are permanently affixed to the land in a manner that they are part of the realty.

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

2.2.13. "New property" or "new tangible personal property" means:

2.2.13.a. New property is limited to new machinery and equipment that meets all of the following requirements:

2.2.13.a.1. The new property is directly used in the production of coal in this state,

2.2.13.a.2. The new property is depreciable or amortizable by the coal producer for federal income tax purposes,

2.2.13.a.3. The new property has a useful life of five or more years for federal income tax purposes when placed in service or use in this state, and

2.2.13.a.4. The new property is purchased or leased by the taxpayer on or after July 1, 2019, when the original use by anyone of the property in this state is by the taxpayer, and the property results in increased coal production.

2.2.13.b. Equipment and machinery 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:

2.2.13.b.1. If purchased or leased, the remanufactured equipment or machinery must have been purchased or leased from a third party in an arm's length transaction.

2.2.13.b.2. The equipment or machinery must have been purchased or leased 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.

2.2.13.b.3. In order to qualify as new equipment for the rebate, the remanufactured equipment or machinery must have been retitled and assigned a new vehicle or equipment identification number (or manufacturer's equivalent) prior to its purchase or lease.

2.2.13.b.4. The remanufactured equipment or machinery must be treated as new equipment or machinery for federal income tax purposes.

2.2.13.b.5. Under no circumstances can the same piece of machinery or equipment be claimed in the same tax year as a capitalized repair 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).

2.2.13.b.6. Adequate records will be required to establish entitlement to this rebate on the basis of purchase of a remanufactured or remanufacture and retitle of equipment or machinery.

2.2.13.c. New property does not include any of the following:

2.2.13.c.1. Tangible personal property acquired from a person whose relationship to the person acquiring it would result in disallowance of deductions under I.R.C § 267 or 707 (b):

2.2.13.c.2. Tangible personal property acquired by one component member of a controlled group from another component member of the same controlled group;

2.2.13.c.3. Tangible personal property where 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 determined:

2.2.13.c.3.1. 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

2.2.13.c.3.2. Under I.R.C § 1014 (e). See W. Va. Code §11-13EE-2(b)(24).

2.2.13.c.4. Used equipment or machinery;

2.2.13.c.5. The repair or replacement of a component part does not constitute remanufacture of the equipment or machinery and, accordingly, does not qualify as new property. For purposes of this paragraph, "component part" 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. However, repair costs will be eligible for this rebate if capitalized. See W. Va. Code §11-13EE-2(b)(4) and (23).

2.2.13.c.6. Remanufactured equipment or machinery that was titled to the taxpayer seeking the rebate, or any affiliate, subsidiary, or parent company, prior to its

remanufacture. However, repair costs will be eligible for this rebate if capitalized. See W. Va. Code §11-13EE-2(b)(4) and (23).

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

2.2.14.a. *Included property.* -- Except as provided in subdivision 2.2.14.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:

2.2.14.a.1. New 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.

2.2.14.a.2. New 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.

2.2.14.a.3. Repair or refurbishment costs to tangible personal property directly used in the production of coal that are incurred on or after July 1, 2019, which are capitalized for federal income tax purposes.

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

2.2.14.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;

2.2.14.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;

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

2.2.14.b.4. Airplanes and helicopters;

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

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

2.2.14.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.*;

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

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

2.2.14.b.10. Improvements to real property, although tangible personal property used for infrastructure improvements to real property may qualify.

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

2.2.14.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

2.2.14.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)(23).

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

2.2.15.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);

2.2.15.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

2.2.15.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:

2.2.15.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

2.2.15.c.2. Under I.R.C. § 1014 (e). See W. Va. Code §11-13EE-2(b)(24).

2.2.16. "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)(25).

2.2.17. "Qualified investment" or "qualified investment property" for purposes of this rule means a capital investment in machinery or 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. Qualified investments are limited to the following:

2.2.17.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 for direct use in the production of coal, when the original or first use of the machinery or equipment in the state commences on or after July 1, 2019;

2.2.17.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 in this state 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;

2.2.17.c. Tangible personal property in the form of materials used for infrastructure improvements to real property on or after July 1, 2019, and placed in service for direct use in the production of coal, when the original or first use of the materials used for the infrastructure upgrades commences in this state on or after July 1, 2019; and

2.2.17.d. Repair or refurbishment costs to tangible personal property directly used in the production of coal that are incurred on or July 1, 2019, which are capitalized for federal income tax purposes.

2.2.18. "Rebate" means the amount allowable as a rebate under W. Va. Code §11-13EE-3. See W. Va. Code §11-13EE-2(b)(27).

2.2.19. "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.

2.2.20. "Severance Tax" for purposes of this rule 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.

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

2.2.22. "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)(29). "State portion of severance tax" for purposes of this rule does not include any other rate of severance tax.

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

2.2.24. "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)(30).

2.2.25. "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.

2.2.26. "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)(31).

2.2.27. "This code" means the Code of West Virginia, 1931, as amended. See W. Va. Code §11-13EE-2(b)(32).

2.2.28. "This state" means the State of West Virginia. See W. Va. Code §11-13EE-2(b)(33).

2.2.29. "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)(34).

2.2.30. "Used property" means property that has been previously owned or put to a purpose by someone other than the taxpayer. Used property is any property that is not new property as defined in this rule.

§ 110-21F-3. Rebate allowable.

3.1. *Rebate allowable.* Eligible taxpayers shall be allowed a rebate against a portion of severance taxes imposed by W. Va. Code §11-13A-3 on the privilege of engaging in the production of coal in an amount not to exceed 35 percent of the eligible taxpayer's qualified investment in tangible personal property purchased or leased for business expansion, subject to the limitations in section 3.2. of this rule.

Example. If the taxpayer makes a \$1,000,000 qualified investment, the amount of the potential rebate is \$350,000.

3.2. *Limitations on the rebate.* --

3.2.1. *Maximum rebate limited to 80 percent of increase above base period severance taxes.* The maximum amount of rebate allowable for any given tax year is limited to an amount not to exceed 80 percent of the increase in the state portion of severance taxes paid for coal mined at the specific mine where the qualified investment is made when compared to the average annual state portion of severance taxes paid for coal mined at the specific mine where the qualified investment is made during the base period.

3.2.1.a. "Base period annual average severance taxes" means the annual average of the state portion of severance taxes under W. Va. Code §11-13A-3 during the five-year period directly preceding the year the qualifying capital investment in new machinery and equipment was placed into service. The annual average of the state portion of severance taxes

is found by taking the cumulative total of the state portion of severance taxes paid from all mines operated within the state by the eligible taxpayer and dividing the aggregate cumulative total of the state portion of severance taxes by five.

Example. Taxpayer's base period amount at the investment mine is \$1,000,000, which is the annual average of the five-year base period. Taxpayer paid \$1,500,000 severance tax in the claim year from production at the investment mine. The difference is \$500,000. The taxpayer can claim the rebate against \$400,000 of severance taxes paid during the claim year, which is 80 percent of the difference.

3.2.1.b. When the eligible taxpayer has produced coal in this state for two years before making the capital investment in new machinery and equipment but was not in business during a full five-year base period, then the eligible taxpayer's base severance tax amount shall be the amount of state severance tax due under W. Va. Code §11-13A-3 on coal produced in this state during the most recent tax year prior to making the investment.

Example 1: Taxpayer company has three mines, Mine A, Mine B, and Mine C. Mine A has been in operation for five years. Mine B has been in operation for three years. Mine C goes into production during the current year. The base severance tax amount for this taxpayer is the average annual production of all mines during the past five years.

Example 2: Taxpayer company has three mines, Mine A, Mine B, Mine C. Mine A went into production two years ago, while Mine B and Mine C go into production during the current year. The taxpayer's base severance tax production is the average production for all three mines during the prior year.

Example 3: Taxpayer company has three mines, Mine A, Mine B, and Mine C. All three mines go into production in West Virginia during the current year. The taxpayer is not eligible to claim the rebate until it has been in business in the State of West Virginia for at least two years.

3.2.2. The increase in the state portion of severance taxes paid against which the rebate may be taken is further limited by a fraction, the numerator of which is the increase in coal production, measured in tons produced, at all mines operated by the taxpayer, the denominator of which is the increase in coal production, measured in tons produced, at the specific mine where investment is made;

3.2.2.a. The factor cannot exceed 1.

3.2.2.b. The increase in coal production is determined by subtracting the base period coal production, measured in tons produced, from the coal production, measured in tons produced, during the tax year for which the rebate is claimed.

Example 1: Taxpayer's base period amount at the investment mine is \$3,000,000, which is the annual average of the five-year base period. Taxpayer paid \$3,800,000 severance tax in the claim year from production at the investment mine. The difference is \$800,000. 80 percent of that difference is \$640,000 ($\$800,000 \times 0.8 = \$640,000$). The taxpayer may be able to claim the rebate against \$640,000 of severance taxes paid during the claim year, depending upon the result of the limiting factor below.

The base period coal production of all the taxpayer's mines, including the mine where the investment was made, is 400,000 tons. The claim year production of all the taxpayer's mines is 450,000. 450,000 tons minus 400,000 tons is 50,000 tons.

The base period coal production of the taxpayer's mine where the investment was made is 100,000 tons. The claim year production at the taxpayer's mine where the investment was made is 160,000 tons. 160,000 tons minus 100,000 tons is 60,000 tons.

Increase in production all mines = 50,000 tons
Increase in production at investment mine = 60,000 tons

The factor does not exceed one.

The factor is multiplied by 80 percent of the increase in the state portion of severance taxes, which results in \$533,333. $((50,000/60,000) \times (\$800,000 \times 0.8) = \$533,333)$. The rebate may only be claimed against \$533,333.

Example 2: The taxpayer's increase in severance tax is the same as above, so that the taxpayer may be able to claim the rebate against \$640,000 of severance taxes paid during the claim year, depending upon the result of the limiting factor below.

However, this time the base period coal production of all the taxpayer's mines, including the mine where the investment was made, is 400,000 tons. The claim year production of all the taxpayer's mines is 460,000. 460,000 tons minus 400,000 tons is 60,000 tons.

The base period coal production of the taxpayer's mine where the investment was made is 100,000 tons. The claim year production at the taxpayer's mine where the investment was made is 150,000 tons. 150,000 tons minus 100,000 tons is 50,000 tons.

Increase in production all mines = 60,000 tons
Increase in production at investment mine = 50,000 tons

The resulting factor is larger than one. The factor cannot exceed one, so the factor will be reduced to one.

The factor is multiplied by 80 percent of the increase in the state portion of severance taxes, which results in \$640,000. $(1 \times (\$800,000 \times 0.8) = \$640,000)$. The limiting factor did not decrease the amount of rebate that may be taken.

§ 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 qualified investment property is placed in service or use in this state. See W. Va. Code §11-13EE-2(b)(15).

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)(15)(B) and section heading 9 of this rule.

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)(15)(B).

4.2.4. The taxpayer must purchase or lease the qualified purchase property 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 as well as increase in the taxpayer's workforce. 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.

4.2.6. The qualified investment property must be directly used 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 heading 13 of these rules.

4.2.7. No credit shall be allowed unless the aggregate total coal production tonnage from all mines operated by the eligible taxpayer in this state during the year for which the rebate or rebate carryover is claimed has increased above the annual average aggregate total coal production tonnage from all mines operated by the eligible taxpayer during the base period.

4.2.8. No rebate shall be allowed unless the aggregate total number of full-time employees along with full-time equivalent employees, at all mines operated by the eligible taxpayer in this state during the rebate year has increased above the annual average aggregate total number of full-time employees, along with full-time equivalent employees at all mines operated by the eligible taxpayer in this state during the base period.

Example 1: Taxpayer company owns three mines, Mine A, Mine B, and Mine C. The base tonnage produced at Mine A and Mine B was 200,000, which is 100,000 tons each. Mine C subsequently opens during 2021. Each of the three mines produced 150,000 tons during the claim year. Therefore, production increased for the aggregate group from 200,000 tons to 450,000 tons.

Example 2: Taxpayer company owns three mines, Mine A, Mine B, and Mine C. The base number of aggregate full-time employees for both Mine A and Mine B was 200, which is 100 each. Mine C subsequently opens during 2021. Each of the three mines had 100 aggregate full-time employees during the claim year. Therefore, the employment increased from 200 to 300 aggregate full-time employees.

4.2.9. No rebate shall be allowed under W. Va. Code §11-13EE-1, *et seq.*, when credit is claimed under any other article of Chapter 11 of the W. Va. Code for capital investment in the new machinery and equipment. No credit shall be allowed under any other article of Chapter 11 of the W. Va. Code when a rebate is allowed under W. Va. Code §11-13EE-1, *et seq.*, for the capital investment in new machinery and equipment.

§ 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, the gross value of the coal produced at the mine during the taxable year for which the rebate is sought, the aggregate number of full-time employees at the mine, and such other information deemed by the Tax Commissioner to be necessary to determine the base 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, the gross value of the coal produced at each mine during the taxable year for which rebate is sought, the aggregate number of full-time employees at the mine, 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, the gross value of the coal produced at each mine during the taxable year for which rebate is sought, the aggregate total number of full-time employees, and such other information deemed by the Tax Commissioner to be necessary to determine the base production amount and the net increase in state severance tax and severance tax paid, as well as employment levels, attributable to the qualified investment property placed in service or use at the coal mining operation.

5.4. When a taxpayer claims a coal severance tax rebate under W. Va. Code §11-13EE-1, *et seq.*, the information required by this section heading 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 and increased workforce.

6.2. The capital investment must be in new machinery or new equipment, repairs or refurbishment of machinery or equipment that has been capitalized for federal income tax purposes, or infrastructure improvements to real property. 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. Refurbished or rebuilt machinery or 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; or

6.2.3. Improvements to real property 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.

6.2.4. Repair or refurbishment costs to tangible personal property directly used in the production of coal that are incurred on or after July 1, 2019, which are capitalized for federal income tax purposes.

6.3 The capital investment must be directly used in the production of coal.

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

6.3.2 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.

6.3.3 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.

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

6.4. 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.

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

6.4.2. Used property.

6.4.3. Intangible personal property.

6.4.4. 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.

6.4.5. 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.

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

6.4.7. Airplanes or helicopters.

6.4.8. Off-premise transportation equipment.

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

6.5. The qualifying investment must be directly used by the taxpayer or its successor in accordance with section heading 9 of this rule 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 heading 13 of this rule.

6.6. 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. Application for rebate required.

7.1. *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 property 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.

7.2. *Due date 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

investment property to which the rebate relates is placed in service or use and all information required by the form is provided.

7.3. 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 a new qualified investment into service or use in this state.

7.4. When amended return filed. -- When the taxpayer 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.

7.5. The Tax Commissioner will issue a form 1099 showing the amount of the Coal Severance Tax Rebate paid to a taxpayer during a taxable year.

7.6. *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.

7.6.1. 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 as well as an increase in the taxpayer's workforce.

7.6.2. There must also 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 state portion of severance taxes payable, before credit for payment of the minimum severance tax, that is attributable to the increase in coal production. This provision also applies in cases where the taxpayer is claiming rebate as well as rebate carry forward. When there are two or more base period amounts at issue, the highest will be used to determine the increase in severance tax paid.

7.6.3. 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 period determination.

7.6.4. The number of full-time equivalent employees must also increase in order to claim carry forward rebate in accordance with section heading 3.

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

7.7. *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. 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.

7.8. *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.

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

7.8.2. Due to the retroactive application of these rules due to changes made by the Legislature during the 2021 regular session, the failure to make timely application will not apply to rebate applications due on January 31, 2021. Instead, those applications are due 60 days after the effective date of this rule.

§ 110-21F- 8. Records Required for capital investment property.

8.1. *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:

8.1.1. The property's identity;

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

8.1.3. Whether the machinery or equipment are new or refurbished property as defined in subsection 2.2.23 of this rule;

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

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

8.1.6. The amount of rebate claimed; and

8.1.7. 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.

8.2. *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.*

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

8.3.1. A taxpayer is treated as having disposed of, during the taxable year, any qualified investment property 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.

8.3.2. If a taxpayer cannot establish when qualified investment property 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 property was placed in service or use at the mine or coal preparation and processing plant.

8.4. 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.*, and this rule, the property will be treated as having been taken out of service during that taxable year and the recapture tax may apply.

8.5. 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-9. Transfer of qualified investment property to successors.

9.1. *Mere change in form of business.* -- Qualified investment property 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 qualified investment property 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.

9.2. *Transfer or sale to successor.* -- Qualified investment property is 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 qualified investment property at the mine or coal preparation and processing facility in this state at which the qualified investment property was 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.

9.3. *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-10. Rebate carry back, carry forward, and transfer.

10.1. 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; unused severance tax rebate may only be carried forward.

10.2. 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 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.

10.3. 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. 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 period, as established in accordance with the provisions of W. Va. Code §11-13EE-3 and section heading 3 of this rule.

10.3.1. 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.

10.3.2. 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.

10.3.3. 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 base production amount.

10.3.4. Under no circumstances may the rebate be treated as refundable credit.

10.4. 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:

10.4.1. 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

10.4.2. 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.

10.4.3. 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. There must also be a corresponding increase in the number of full-time equivalent employees in accordance with section heading 3.

10.5. 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.

10.6. 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 this rule.

§ 110-21F-11. Suspension of payment of rebate.

11.1. 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 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:

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

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

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

11.1.4. 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.

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

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

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

11.1.8. 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.

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

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

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

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

11.1.13. Federal reclamation fee.

11.2. *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 heading 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.

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

11.2.2. 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.

11.2.3. 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.

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

11.3. 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.

11.4. 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-12. Forfeiture of coal severance tax rebate.

12.1. 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.

12.2. Exceptions to forfeiture are set forth below.

12.2.1. The qualified investment property 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 qualified investment property continues to be used at the coal mining operation at which it was 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 qualified investment property at the coal mining operation in this state at which the qualified investment property was first placed in service or use subject to the requirements in W. Va. Code §11-13EE-1, *et seq.*, and this rule regarding use and duration.

12.2.1.a. Under the scenario described above, the successor business can claim the rebate amount of credit still available with respect to the qualified investment property that was transferred.

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

12.2.2. Qualified investment property is 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 qualified investment property at the coal mining operation in this state at which the qualified investment property was first placed in service or use subject to the requirements in W. Va. Code §11-13EE-1, *et seq.*, and this rule regarding use and duration.

12.2.2.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.*

12.2.2.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.

12.3. *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.

§ 110-21F-13. Recapture of rebate; recapture tax imposed.

13.1. *When recapture tax applies.* --

13.1.1. 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.

13.1.2. This section does not apply when section heading 9 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.

13.1.3. 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.

13.1.4. 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.

13.2. *Recapture tax imposed.* --

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.

13.3. *Payment of recapture tax.*

13.3.1. 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.*

13.3.2. 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.