



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

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

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 10/26/2019 10:00 AM

COMMENTS MAY BE MAILED OR EMAILED TO:

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PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: Yes

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

INCORPORATED BY REFERENCE: Yes

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

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

This interpretive rule sets forth the Tax Commissioner's interpretation of W.Va. Code S11-31EE-1, et seq., providing a severance tax rebate for qualified investment resulting in increased coal production.

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

Pursuant to W. Va. Code S11-13EE-14, the Tax Commissioner has authority to promulgate such interpretive, legislative or procedural rules as deemed useful or necessary to carry out the purposes of this article and implement the intent of the Legislature.

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

This interpretive rule is designed to guide Taxpayers and others with regard to a new highly complex statutory provision that provides up to a 35% investment tax credit for qualified new capital investment in coal mining operations, but only to the benefit of coal companies who demonstrate increased production of West Virginia coal from their qualified mines. Policymakers attempted to craft statutory language that would guarantee the continuation of at least base year coal severance tax collections for future State and local budget purposes while also providing a potentially huge tax rebate via the 35% investment tax credit to qualified coal companies with expanding operations. The proposed rule highlights various examples where new investment may result in a net rebate and examples where new investment would not result in a rebate due to lack of coal production increase on the part of the taxpayer or the controlled group of members inclusive of the taxpayer.

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

One possibly unintended consequence of such a large investment tax credit program is that it could effectively become a State sponsored incentive for greater consolidation of the industry with those companies receiving benefits gaining a significant competitive advantage over other in-state mining operations not receiving such a benefit.

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2019 Increase/Decrease (use "-")	2020 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	70,000.00	40,000.00	40,000.00
Personal Services	20,000.00	40,000.00	40,000.00
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	0	50,000.00	0
2. Estimated Total Revenues	0		

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

Administrative costs associated with proper administration of the rebate program and the associated guidelines provided by this interpretive rule will not be insignificant. The fiscal note to the original bill contained estimated administrative costs of \$70,000 in the first year and \$40,000 per year, thereafter. Given the complexity of both the Law and associated interpretive rule, actual administrative costs could exceed these estimates.

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.*, enacted in Enrolled H.B. 3144 (2019), which provides a coal severance tax rebate when a taxpayer's qualified investment in new machinery, new equipment, or new improvements to real property, results in taxpayer's increased coal production.

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

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Applicability. -- The coal severance tax rebate is available to taxpayers that meet the requirements for this rebate on or after June 7, 2019.

§ 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 which 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 the rate of severance tax applicable to the production privilege.

2.2.2.a. However, when the mine produced coal during the entire 5-year period ending December 31, 2018, then the base production amount is either the average tons of coal per year produced during the 5-year period or the tons produced during calendar year 2018, whichever amount is the lower amount. If in any year during the 5-year period, coal was produced during part of the year, but not all of the year, the average monthly production when coal was produced during that year must be multiplied by 12 to determine the tons of coal produced during that year for purposes of this computation.

2.2.2.b. When the taxpayer is a new business that has produced coal in this state for 2 years before making the capital investment in new machinery, new equipment, or new improvements to real property then, the base production amount shall be the average amount of tons of coal produced at the mine during this 2-year period. See W. Va. Code § 11-13EE-3(e). Also see definition of eligible taxpayer in section 2.2.16 of this rule.

2.2.2.c. When the taxpayer produced coal at 2 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 taxpayer must be determined.

2.2.2.c.1. However, when one or more of the mines produced coal during the entire 5-year period ending December 31, 2018, then the base production amount for that mine is either the average tons of coal per year produced by the mine during the 5-year period, or the tons produced by the mine during calendar year 2018, whichever amount is the lower amount.

2.2.2.d. 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.1. However, when a mine produced coal during the entire 5-year period ending December 31, 2018, then the base production amount for that mine is either the average tons of coal per year produced at the mine during the 5-year period, or the tons produced at the mine during calendar year 2018, whichever amount is the lower amount.

2.2.2.e. 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 6 months of calendar year 2018. In this example, the number of tons of coal produced during the 6 months during which coal was produced during calendar year 2018 is multiplied by 2 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.f. 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.

2.2.2.g. When the producer operates 2 or more mines in West Virginia or members of the affiliated or controlled group including the producer operates 2 or more mines in West Virginia, but one or more of the mines did not produce coal during the 5-year period ending December 31, 2018, the 5-year average production cannot be used as the base production amount of tons produced.

2.2.3. "Capital investment in new machinery, new equipment, or new improvements to real property" means:

2.2.3.a. Tangible personal property in the form of new machinery and new equipment that is purchased on or after June 7, 2019, and placed in service 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 June 7, 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 for direct use in the production of coal by the taxpayer on or after June 7, 2019, if the original or first use of the machinery or equipment by anyone commences on or after June 7, 2019, and the new machinery or new equipment is depreciable, or amortizable, for federal income tax purposes and has a useful life of 5 or more years for federal income tax purposes;

2.2.3.c. New improvements to real property having a useful life of 5 or more years, that are depreciable or amortizable for federal income tax purposes, purchased on or after June 7, 2019, if the original or first use of such improvements commences in this state on or after June 7, 2019, and the improvements are placed in service for direct use in the production of coal. See W. Va. Code § 11-13E-2(b)(3).

2.2.4. "Capital investment property" means "capital investment in new machinery, new equipment, or new improvements to real property," as defined in 2.2.3. of this rule, that is "qualified investment," as defined in 2.2.31. 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 which 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. The cost of a coal loading facility is not eligible for the severance tax rebate allowed by HB 3144 (2019). This investment may be eligible for the credit allowed by W. Va. Code § 11-13E-3.

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 §11-13EE-14 of this code, 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 and two-thirds 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" which 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); 40 CFR 60.251(e).

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. See 40 CFR 60.251(f).

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 § 11-13EE-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 which constitute an integral and essential part of the production of coal, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the production of coal.

2.2.15.a. Uses of tangible personal property or new improvements to real property which constitute direct use or consumption in the production of coal include only:

2.2.15.a.1. New machinery, new equipment, or new improvements to real property that are depreciable, or amortizable, and have a useful life of 5 or more years for federal income tax purposes, and that are 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 §11-13A-4 of this code;

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 or improvements to real 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 5 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 2 years before the capital investment in new machinery, new equipment, or new improvements to real property, 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 2 years before the capital investment in new machinery, equipment, or improvements to real property 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 2 year period. If less than 50 percent of the assets of the current entity were not actively and directly used in coal production activity in this state for such 2 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). Also see section 12 of this rule.

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. "Improvements to real property." See definition of "capital investment in new machinery, equipment or improvements to real property" in subsection 2.2.3. of this rule.

2.2.20. "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).

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

2.2.22. "New property" means and is limited to machinery, equipment, and improvements to real property, that:

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

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

2.2.22.c. Has a useful life of 5 or more years for federal income tax purposes when placed in service or use in this state, and

2.2.22.d. Is purchased or leased by the taxpayer on or after June 7, 2019, when the original use by anyone of the property is by the taxpayer, and the property results in increased coal production.

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

2.2.24. "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.

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

2.2.26. "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).

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

2.2.27.a. Included property. -- Except as provided in subdivision 2.2.28.b of this rule, the term "property purchased or leased for business expansion" means tangible personal property, or improvements to real property but only if the property was purchased, or leased, and placed in service or use by the taxpayer in West Virginia. This term includes only:

2.2.27.a.1. Tangible personal property placed in service or use by the taxpayer on or after June 7, 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 §11-21-1, et seq. or §11-24-1, et seq. of this Code, and which has a useful economic life at the time the property is placed in service or use in this state, of 5 or more years.

2.2.27.a.2. Tangible personal property acquired by written lease having a primary term of 5 years or more, that is depreciable or amortizable by the lessor, or lessee, for federal income tax purposes and that has a useful life of 5 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 June 7, 2019, if used as a component part of a new or expanded coal mining operation in this state shall be included within this definition.

2.2.27.a.3. Improvements to real property having a useful life of 5 or more years, that are depreciable or amortizable for federal income tax purposes, purchased on or after June 7, 2019, if the original or first use of such improvements commences in this state on or after June 7, 2019 and the improvements are placed in service as a component part of a new or expanded coal mining operation in this state.

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

2.2.27.b.1. Machinery and equipment owned or leased by the taxpayer and improvements to real property owned by a taxpayer for which credit was taken or is claimed under any other article in chapter 11 of the West Virginia Code;

2.2.27.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;

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

2.2.27.b.4. Airplanes and helicopters;

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

2.2.27.b.6. Machinery, equipment, or improvements to real property that are primarily used outside this state;

2.2.27.b.7. Machinery, equipment, or improvements to real property that are 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.;

2.2.27.b.8. Coal loading facilities; and

2.2.27.b.9. Used machinery and equipment.

2.2.27.c. Purchase date. -- New machinery, new equipment, or new improvements to real property shall be deemed to have been purchased prior to June 7, 2019 if:

2.2.27.c.1. The machinery, equipment, or improvements to real property were owned by the taxpayer prior to June 7, 2019, or were acquired by the taxpayer pursuant to a binding purchase contract which was in effect prior to June 7, 2019; or

2.2.27.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 June 7, 2019. See W. Va. Code § 11-13EE-2(b)(21).

2.2.28. "Purchase" means any acquisition of new machinery, new equipment, or new improvements to real property directly used or consumed in the production of coal, but only if:

2.2.28.a. The tangible personal property or the improvement to the 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);

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

2.2.28.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:

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

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

2.2.29. "Purchase date" is defined in W. Va. Code § 11-13EE-2(b)(21)(C) and subdivision 2.2.27.c. of this rule.

2.2.30. "Qualified coal mining activity" means any business or other activity subject to the tax imposed by §11-13A-3 of this code 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 §11-13A-4(a)(1) of this code. See W. Va. Code § 11-13EE-2(b)(23).

2.2.31. "Qualified investment" or "qualified investment property" for purposes of this rule means "capital investment in new machinery, new equipment, or new improvements to real property 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 5 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).

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

2.2.33. "Related person" means:

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

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

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

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

For purposes of this subdivision 2.2.33., 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).

2.2.34. "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.

2.2.35. "Severance Tax" means the tax imposed in W. Va. Code §11-13A-3(a) on the privilege of engaging or continuing within this state the business of severing coal, extracting coal, reducing coal to

possession and producing coal for sale, profit or commercial use computed at the 5% rate of tax. "Severance tax" for purposes of this rule does not include any other rate of tax.

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

2.2.37. "State portion of severance taxes payable" 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 tax.

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

2.2.39. "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 5 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).

2.2.40. "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.

2.2.41. "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).

2.2.42. "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." See 40 CFR 60.251(r)(2).

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

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

2.2.45. "United States Internal Revenue Code" or "Internal Revenue Code," or "I.R.C." means the Internal Revenue Code as defined in §11-24-3 of this code. See W. Va. Code § 11-13EE-2(b)(36).

2.2.46. "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, new equipment, or new improvements to real property 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.

3.1.1. "Eligible taxpayer" is defined in subsection 2.2.16 of 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, new equipment, or new improvements to real property, 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, new equipment, or new improvements to real property.

EXAMPLE. ABC Co., an eligible taxpayer, places qualified investment property costing \$1 million 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 (\$1,000,000 x 35%).

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, new equipment, or new improvements to real property, 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 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.

3.4.1. Production of coal is determined under section 3.5 of this rule. The Increase in severance taxes is determined under section 3.6 of this rule.

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 the 5-year period ending December 31, 2018, or other base-year period, whichever is applicable to the coal mining operation.

3.5.1. 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 from all mines during the 5-year period ending December 31, 2018, or other base-year period, whichever period is applicable.

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 increase 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, new equipment, or new improvements to real property is directly used in a coal mining operation has been placed in service or use be offset by this rebate.

EXAMPLE. See the example in section 7.2 of this rule.

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 from all mines operated during the 5-year period ending December 31, 2018, or other base-year period, whichever period is applicable.

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, new equipment, or new improvements to real property is directly used in a coal mining operation has been placed in service or use be offset by this rebate.

EXAMPLE. See the example in section 7.3 of this rule

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 2 years before it becomes an eligible taxpayer. In this situation, taxpayer's annualized production of coal during this 2 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 2 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, unless those mines produced coal during the 5-year period ending December 31, 2018 and the average production during that 5-year period is lower than the production of these mines in 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 carryforward is sought must be determined in accordance with the rules for determining production set forth in this rule.

3.7. Determining increase in production. -- 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. If the eligible taxpayer files its annual severance tax return on a calendar year basis and the mine at which the qualified investment is made produced coal each year during the 5-year period ending December 31, 2018, then the average tons of coal produced at the mine during the 5 year period ending on December 31, 2018, is the base period tons of coal produced if this number is less than the tons of coal produced at the mine during the 2018 calendar year.

EXAMPLE. ABC Co., an eligible taxpayer, began producing coal at its Apple Mine #1 during 2010 and made a qualified investment at that mine that was placed in service or use during 2020 that results in increased coal production. The base production amount is either (1) the tons of coal produced at the Apple Mine #1 during calendar year 2018 or (2) the average production of coal at the Apple Mine # 1 during the 5-year period ending on December 31, 2018, whichever amount is less.

3.7.3. In the event the taxpayer has not operated or produced coal in West Virginia and paid the tax imposed by W. Va. Code § 11-13A-3 for 2 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 average of the production during the first 2 consecutive years coal is produced in this state by the taxpayer.

EXAMPLE. ABC Co. is a calendar year filer that began producing coal at Apple Mine #1 on January 1, 2020. It made a qualified investment during 2022, at least 2 years later. The base production amount is the average amount of coal produced at the Apple #1 mine during calendar years 2020 and 2021.

3.7.4. In order to determine the amount of rebate allowable, it must first be determined if the increase in the number of tons of coal produced that are attributable to the qualified investment property for the taxable year resulted in 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) for the taxable year. This is determined by dividing the total increase in tons of coal produced (taxpayer and taxpayer's affiliated or controlled group, if applicable) for the taxable year by the increase in tons of coal

produced for the taxable year that are attributable to placing the qualified investment property in service or use at taxpayer's coal mining operation. The result is the percentage of the rebate allowed. The rebate allowed cannot be greater than 100 percent of the rebate claimed. The mathematical calculation is:

Total increase in tons of coal produced (taxpayer and taxpayer's affiliated or controlled group, if applicable) for the rebate year ÷ by
Tons of coal produced by taxpayer attributable to qualified investment property for the rebate year

3.7.4.a. When the claim is for a rebate carried forward amount, the computation described in subdivision 3.7.4 must be made for the rebate carryforward year by substituting for the words "rebate year" the words "rebate carryforward year". The mathematical calculation is:

Total increase in tons of coal produced (taxpayer and taxpayer's affiliated or controlled group, if applicable) for the rebate carryforward year ÷ by
Tons of coal produced by taxpayer attributable to qualified investment property for the rebate carryforward year

3.8. No single year during which no coal was produced from the mine at which the qualified investment property is placed in service or use can ever be used to calculate coal production in base production year coal production. If coal was produced only during a portion of a calendar year, the following rules apply:

3.8.1. If coal was produced for only some of the months in calendar year 2018, then the average production of coal per month during the period of production must be multiplied by 12 to determine the tons of coal produced during the 2018 calendar year.

3.8.2. The 5-year base period cannot be used unless coal was produced at the mine during each year in the 5-year period ending December 31, 2018. If coal was produced for only a portion of a year during this 5-year period, then the average production of coal per month during the period of production must be multiplied by 12 to determine the tons of coal produced during that calendar year.

3.8.3. When coal is produced for only a portion of a calendar year, then the average production of coal per month during the period of production must be multiplied by 12 to determine the tons of coal produced during that calendar year.

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

3.10. The base number of tons of coal produced 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.

EXAMPLE. ABC Co., an eligible taxpayer, operates one coal mine at which its qualified investment in the amount of \$1 million 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 (\$1,000,000 x 35%). 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 (80%) 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 files timely an application for severance tax rebate.

EXAMPLE. ABC Co., an eligible taxpayer, operated one coal mine at which its qualified investment in the amount of \$10 million 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 million qualified investment is \$3,500,000 (\$10,000,000 x 35%). 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 (80%) of \$2,000,000 is \$1,600,000. When ABC Co., files timely an application for rebate, the amount of rebate paid by the Tax Commissioner will be \$1,600,000. The additional 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. 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 3.11.1 of this rule with the amount determined under subsection 3.11.2 of this rule.

3.11.1. 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. However, if the taxpayer has produced coal for 5 years at the mine at which its qualified investment property is placed in service or use, then the state portion of the severance taxes payable under W. Va. Code § 11-13A-3(a), before credits, is the average of the state portion of the severance taxes payable on coal produced from the mine during the 5-year period ending on December 31, 2018, when that amount is less than the state portion of severance tax payable under W. Va. Code § 11-13A-3(a) on coal produced from the mine in calendar year 2018.

3.11.1.a. The application for the severance tax rebate must state whether the mine at which the qualified investment property is placed in service or use produced coal throughout the period beginning January 1, 2014 and ending December 31, 2018.

3.11.1.b. When coal was produced at a mine, during the 5-year period beginning January 1, 2014 and ending December 31, 2018, then the applicant must provide with the application for rebate, the tons of coal produced each year and the sales price of the tons used as the measure to compute severance tax liability under W. Va. Code § 11-13A-3(a) in each of those years.

3.11.2. 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.

3.12. Determining amount of Increase in severance taxes. -- When the amount determined in subsection 3.11.2. of this rule is greater than the amount determined in subsection 3.11.1. 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.

3.13. *Limitations on rebate:*

3.13.1. No rebate shall be allowed under W. Va. Code § 11-13EE-1, *et seq.* when taxpayer claims credit under any other article in chapter 11 of this code for the qualified investment in the new machinery, equipment, or improvements to real property directly used or consumed in the production of coal.

3.13.2. 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, new equipment, or new improvements to real property.

3.13.3. In no case shall the severance tax attributable to any mine other than the specific mine at which capital investment in new machinery, new equipment, or new improvements to real property is directly used in a coal mining operation has been placed in service or use be offset by this rebate.

3.13.4. In no case shall the severance tax attributable to any mine other than the specific mine at which capital investment in new machinery, new equipment, or new improvements to real property is directly used in a coal mining operation has been placed in service or use be offset by this rebate.

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

3.14. The “state portion of severance taxes paid” is defined in subsection 2.2.38 of this rule.

3.15. *Methodology to determine rebate amount.* -- The following methodology shall be used to determine the state portion of the severance tax payable under W.Va. Code §11-13A-3(a), before credits, that is subject to being rebated.

3.15.1. First, the number of tons of coal produced during the base production year at the mine where the capital investment was made must be determined as well as the gross proceeds derived from sale of the coal produced from that mine.

EXAMPLE: ABC Mining LLC produced 200,000 tons of coal during 2018 at its Blue Mountain coal mine during 2018, which it sold for \$15,000,000 (200,000 x \$75). The state portion of severance taxes payable was \$697,500 (\$15,000,000 x 4.65%). Then, during 2019, after June 6, 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 (\$1,000,000 x 35%).

3.15.2. Second, the number of tons of coal produced at the mine during the year in which the qualified investment was placed in service or use must be determined. (This determination must be made each year thereafter for which rebate carryover is claimed.) The sales price of the coal produced must also be determined.

EXAMPLE: 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 (\$18,750,000 x 4.65%).

3.15.3. Only when there is an increase in the number of tons of coal produced does subsection 3.15.4 of this rule apply.

3.15.4. Third, 80 percent of the additional amount 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 establishes the maximum potential amount that can be rebated for any taxable year.

EXAMPLE: In 2020, 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 2020 and the severance taxes payable, before credits, in 2018 is \$174,375. The maximum amount of 2020 severance taxes payable that can be rebated is \$139,500 (\$174,375 x 80%). The rebate amount carried forward is \$210,500.

Maximum potential rebate allowable for qualified investment is	\$350,000
80% of additional state severance taxes payable for 2020 is	\$139,500
The rebate amount carried forward is	\$210,500

§ 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 2 years in the State of West Virginia before the capital investment in new machinery, new equipment and new improvements to real property are 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, for example, a proprietorship becomes a corporation or limited liability company, 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 2 years prior to placing the qualified investment in service or use. W. Va. Code §11-13EE-2(b)(14)(B) and section 13 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 that increases the tons of coal produced at the mine where the qualified investment property is placed in

service or use. 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 fifty percent (50%) of the new entity's business assets must have been actively and directly used in coal production activity in this state for a 2 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% 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% of TCRABS' assets. Therefore, TCRABS is eligible to apply for the rebate based upon qualified investments placed in service or use on or after June 7, 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 2 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, new equipment or new improvements to real property on or after June 7, 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 determine 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 3 mines, Apple, Beta, and Gamma in West Virginia. In 2020, qualified investment property is placed into service or use at the Apple, which increases coal production at the Apple Mine. The qualified investment is eligible for the severance tax provided there was an increase in the total number of tons produced at the Apple Mine, and the tons of coal produced by all 3 mines combined increases by at least 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 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 5 years after it is placed in service or use by the taxpayer.

§ 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 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 or in certain new improvements to real property that are 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 5 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 or improvement to real 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 making the qualified investment that results in taxpayer's increased coal production.

6.2. A qualified investment must be in tangible personal property, or certain improvements to real 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,

6.2.2. New equipment, and

6.2.3. New improvements to real property as defined in subdivision 2.2.3.c. of this rule.

6.3. Investment cannot be qualified investment if it is made in any of the following. This list is merely demonstrative 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 2.2.46 of this rule.

6.3.3. Intangible personal property.

6.3.4. Machinery and equipment owned or leased by the taxpayer and improvements to real property owned by a 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 materials used in the repair, do not qualify as qualified investments unless for federal income tax purposes they must be capitalized and may not be 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, equipment, or improvements to real property that are acquired incidental to the purchase of the stock or assets of the seller.

6.4. The qualifying investment must be directly used by taxpayer in the production of coal as defined in W. Va. Code §11-13EE-2(b)(13) in this state for at least 5 years after it is placed in service or use in this state. When the property is used for less than 5 years, a recapture tax may apply. See W. Va. Code § 11-13EE-11 and Section 17.1 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 5 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.

7.1. **Example 1.** ABC Co., an eligible taxpayer, placed qualified investment property in service or use, on January 5, 2020, at its only coal mine in West Virginia, that cost \$1,000,000. The investment increases coal production at the mine. ABC Co's maximum potential rebate amount for this investment is \$350,000 (\$1 million x 0.35%).

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 \$2,150,537.50 (\$430,010,750 x 5%) before credit for minimum severance tax paid. Of this amount, \$1,999,999.88 (\$430,010,750 x 4.65%) was the state portion of the severance tax, and \$1,537.63 (\$430,010,750 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In calendar year 2020, ABC Co. produced 1,075,268.75 tons of coal, which it sold for \$50 per ton (\$53,763,437.50). Its severance tax liability, under W. Va. Code § 11-13A-3(a), was \$2,688,171.88

(\$53,763,437.50 x 5%) before credit for minimum severance tax paid. Of this amount, \$2,499,999.84 (\$53,763,437.50 x 4.65%) was the state portion of the severance tax, and \$188,172.03 (\$53,763,437.50 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

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 \$499,999.96 (\$2,499,999.84 minus \$1,999,999.86). The maximum rebate amount payable in any year cannot exceed 80 percent of the additional state severance tax payable that are attributable to the qualified investment. Here 80 percent of \$499,999.96 is \$399,999.97.

After the 2020 coal severance taxes are paid, ABC Co. files a claim for rebate of \$350,000, which is paid by the Tax Commissioner.

7.2. Example 2. ABC Co., an eligible taxpayer, placed qualified investment property in service or use on January 5, 2020, at its ABC No. 1 coal mine in West Virginia, that cost \$1,000,000. The company operates 2 other coal mines in West Virginia – ABC No. 2 and ABC No. 3. The qualified investment increases coal production at the ABC No. 1 mine. ABC Co’s maximum potential rebate amount is \$350,000 (\$1 million x 0.35%).

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 \$2,150,537.50 (\$43,010,750 x 5%), before credit for minimum severance tax paid. Of this amount, \$1,999,999.88 (\$43,010,750 x 4.65%) was the state portion of the severance tax, and \$150,537.62 (\$43,010,750 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In calendar year 2018 (the base production year), the ABC No. 2 mine produced 1 million tons of coal and the ABC No. 3 mine produced 500,000 tons of coal, which were also sold for \$50.00 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 (\$75,000,000 x 5%) before credit for payment of the minimum severance tax. Of this amount, \$3,487,500 (\$75,000,000 x 4.65%) was the state portion of the severance tax and \$262,500 (\$75,000,000 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In calendar year 2018, the total coal production by all ABC Co. mines was 2,360,215 tons 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 \$5,487,499.88.

860,215 tons -- ABC No. 1 Mine
1,500,000 tons -- ABC No. 2 and 3 Mines
2,360,215 tons -- All ABC Mines

\$1,999,999.88 -- ABC No. 1 Mine
\$3,487,500.00 -- ABC No. 2 and 3 Mines
\$5,487,499.88 -- Total state portion of severance tax

In calendar year 2020, ABC Co. produced 1,075,268.75 tons of coal at its Able No. 1 Mine, which it sold for \$50 per ton (\$53,763,437.50). Its severance tax liability, under W. Va. Code § 11-13A-3(a), was \$2,688,171.88 (\$53,763,437.50 x 5%) before credit for minimum severance tax paid. Of this amount, \$2,499,999.84 (\$53,763,437.50 x 4.65%) was the state portion of the severance tax, and \$188,172.03 (\$53,763,437.50 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In calendar year 2020, the ABC No. 2 mine produced 1 million 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 (\$75,000,000 x 5%) before credit for minimum severance tax paid. Of this amount, \$3,487,500 was the state portion of the severance tax (\$75,000,000 x 4.65%) and \$262,5000 (\$75,000,000 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In calendar year 2020, the total coal production by all ABC Mines was 2,575,268.75 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 \$5,987,499.84.

<u>1,075,268.75 tons – ABC No. 1 Mine</u>
<u>1,500,000.00 tons – ABC No. 2 and 3 Mines</u>
<u>2,575,268.75 tons – All ABC Mines</u>

<u>\$2,499,999.84 state portion severance tax – ABC No. 1 Mine</u>
<u>\$3,487,500.00 state portion severance tax – ABC No. 2 and 3 Mines</u>
<u>\$5,987,499.84 Total state portion of severance tax – All ABC Mines</u>

After the 2020 coal severance taxes are paid, ABC Co. files a claim for rebate of \$350,000, which is paid by the Tax Commissioner.

The initial question in the analysis is whether there was an increase in the state portion of severance taxes payable due to the qualified investment at the ABC No. 1 Mine. 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 Able No. 1 Mine in 2018 is \$499,999.96 (\$2,499,999.84 minus \$1,999,999.88). This represents the increase in severance tax payable attributable to the qualified investment. Accordingly, the maximum rebate amount for the qualified investment is \$399,999.97 (80% of \$499,999.96).

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 215,043.75 tons when compared to the 2018 production at the Able No. 1 Mine due to the qualified investment. Because total coal production at all ABC Mines increased by 215,053.75 tons in 2020 (total production in 2020 minus total production in 2018), ABC Co's rebate claim for \$350,000 is paid by the Tax Commissioner.

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, a portion of ABC Co.'s rebate claim will be denied. The portion denied may

be carried forward to subsequent years. However, if total production in 2020 is less than total production in 2018, the claim for rebate will be denied in its entirety.

7.3. Example 3. ABC Co., an eligible taxpayer, places qualified investment in service or use on January 5, 2020, at its ABC No. 1 Mine in West Virginia, that cost \$1,000,000. The company is a member of an affiliated group of corporations and other members of the affiliated group operates 2 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 (\$1 million x 0.35%).

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 \$2,150,537.50 (\$430,010,750 x 5%), before credit for minimum severance tax paid. Of this amount, \$1,999,999.88 (\$430,010,750 x 4.65%) was the state portion of the severance tax, and \$150,537.62 (\$430,010,750 x .035%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In calendar year 2018 (the base production year), the AG No. 2 Mine produced 1 million tons of coal and the AG No. 3 Mine produced 500,000 tons of coal, which was also sold for \$50.00 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 (\$75,000,000 x 5%). Of this amount, \$3,487,500 (\$75,000,000 x 4.65%) was the state portion of the severance tax and \$262,5000 (\$75,000,000 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6, 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 \$5,487,499.88.

<u>860,215 tons – ABC No. 1 Mine</u>
<u>1,500,000 tons – AG No. 2 and 3 Mines</u>
<u>2,360,215 tons – All Affiliated Group mines</u>

<u>\$1,999,999.88 ABC No. 1 Mine</u>
<u>\$3,487,500.00 AG No. 2 and 3 Mines</u>
<u>\$5,487,499.88 Total state portion of severance tax</u>

In calendar year 2020, ABC Co. produced 1,075,268.75 tons of coal at its Able No. 1 mine, which it sold for \$50 per ton (\$53,763,437.50). Its severance tax liability, under W. Va. Code § 11-13A-3(a), was \$2,688,171.88 (\$53,763,437.50 x 5%) before credit for minimum severance tax paid. (\$53,763,437.50 x 5%). Of this amount, \$2,499,999.84 (\$53,763,437.50 x 4.65%) was the state portion of the severance tax, and \$188,172.03 (\$53,763,437.50 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In calendar year 2020, the AG No. 2 Mine produced 1 million tons of coal and the AG No. 3 Mine produced 500,000 tons of coal, which also sold for \$50.00 per ton (1,500,000 x \$50 = \$75,000,000). The severance tax liability for the production at the ABC No. 2 and 3 Mines was \$3,750,000 (\$75,000,000

x 5%) before credit for minimum severance tax paid. Of this amount, \$3,487,500 (\$75,000,000 x 4.65%) was the state portion of the severance tax and \$262,5000 (\$75,000,000 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In calendar year 2020, the total coal production by all Affiliated Group mines was 2,575,268.75 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 \$5,987,499.84.

1,075,268.75 tons – ABC No. 1 Mine

1,500,000.00 tons – AG No. 2 and 3 Mines

2,575,268.75 tons – All Affiliated Group mines

\$2,499,999.84 state portion severance tax – ABC No. 1 Mine

\$3,487,500.00 state portion severance tax – AG No. 2 and 3 Mines

\$5,987,499.84 Total state portion of severance tax – All Affiliated Group mines

After the 2020 coal severance taxes are paid, ABC Co. files a claim for rebate of \$350,000, which is paid by the Tax Commissioner.

The initial question in the analysis is whether there was an increase in the state portion of severance taxes payable due to the qualified investment at the ABC No. 1 mine. 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 Able No. 1 mine in 2018 is \$499,999.96 (\$2,499,999.84 minus \$1,999,999.88). This represents the increase in severance tax payable attributable to the qualified investment. Accordingly, the maximum rebate amount for the qualified investment is \$399,999.97 (80% of \$499,999.96).

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? In 2020, production of coal by all Affiliated Group mines increased by 215,053.75 tons. Because total coal production at all Affiliated Group mines increased by 215,053.75 tons in 2020 (total production in 2020 minus total production in 2018), and because the 2020 increase in production at the ABC No. 1 mine was 215,0503.75 tons, which amount is not less than the 2020 increase in production at all Affiliated Group mines, a rebate is allowable. The amount of rebate allowable for 2020 may not exceed 80% of the state portion of the additional state severance taxes payable on the increase in production at the ABC No. 1 mine. (\$499,999.96 x 80% = \$399,999.97) Since the claimed rebate of \$350,000 is less than 80 percent of the increase in severance taxes (\$399,999.97), taxpayer's entire claim for rebate will be paid by the Tax Commissioner.

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, a portion of ABC Co.'s rebate claim will be denied. The portion denied may be carried forward to subsequent years. However, if total production in 2020 is less than production in 2018, the claim for rebate will be denied in its entirety.

7.4. Example 4. ZZ Coal Company places qualified investment in service in 2020, at its Alpha Mine in West Virginia that produced coal during the 5-year period ending December 31, 2018. The base production for purposes of the severance tax rebate will be either (1) tons of coal produced at the mine in calendar year 2018, or (2) the average of tons produced each year during the 5-year period ending December 31, 2018, whichever number is the lower number.

Analysis

ZZ Coal Company produced coal at its Alpha Mine during the 5-year period ending December 31, 2018. The average number of tons produced during the 5-year period is 860,000. The tons of coal produced during calendar year 2018 are 1,000,000. Since the 5-year average of tons of coal produced is less than the tons of coal produced in 2018, the base production will be the 5-year average.

<u>Calendar Year</u>	<u>Tons Produced</u>
<u>2018</u>	<u>1,000,000</u>
<u>2017</u>	<u>900,000</u>
<u>2016</u>	<u>850,000</u>
<u>2015</u>	<u>800,000</u>
<u>2014</u>	<u>750,000</u>
	<u>4,300,000 ÷ 5 = 860,000 tons</u>

To simplify this example, we assume that the selling price of all coal sold by ZZ Coal Company during the 5-year period was \$50 per ton. The selling price of 860,000 tons was \$43,000,000. The severance tax payable under W. Va. Code § 11-13A-3(a), before credit for payment of the minimum severance tax, would have been \$2,150,000 (\$43,000,000 x 5%). The state portion of the severance tax would have been \$1,999,500 (\$43,000,000 x 4.65%).

In 2020, ZZ Coal Company, placed into service or use at the Alpha Mine qualified investment property having a cost of \$1,000,000. The maximum potential rebate allowable for this investment is \$350,000 (\$1,000,000 x 35%)

This qualified investment resulted in the 2020 coal production at the Alpha Mine to increase by 20 percent to 1,032,000 tons that were sold, at \$50 per ton, for \$51,600,000. The severance tax imposed by W. Va. Code § 11-13A-3(a) was \$2,580,000 (\$51,600,000 x 5%), before credit for payment of the minimum severance tax. The state portion of this tax was \$2,399,400 (\$51,600,000 x 4.65%). The additional tax imposed by W. Va. Code § 11-13A-6 was \$180,000 (\$51,600,000 x 0.35%). After the 2020 severance taxes were paid, ZZ Coal Company filed a claim for rebate in the amount \$350,000.

The taxpayer increased coal production at the Alpha mine in 2020 by 172,000 tons when compare to the coal production at the Alpha Mine during the 5-year base period.

<u>1,032,000 tons produced in 2020</u>
<u>- 860,000 tons produced in 5-year period ending December 31, 2018</u>
<u>172,000 ton increase</u>

The state portion of the additional severance taxes payable attributable to this increase coal production was \$399,900 (\$2,399,400 minus \$1,999,500). The rebate of 2020 coal severance taxes is limited to \$319,920 (\$399,900 x 80%).

Summary

\$8,600,000 x 4.65% = \$399,900 additional state severance taxes payable

\$399,900 x 80% = \$319,920 – the maximum rebate payable in 2020 taxes

The rebated amount claimed by ZZ Coal Company was \$350,000.

The 2020 rebate amount paid by the Tax Commissioner is \$319,920

The rebate amount carried forward is \$30,080.

7.5. Example 5. Same basic facts as Example 4, except that ZZ Coal Company operates 2 mines in West Virginia in addition to the Alpha Mine. The additional mines are the Alpha No. 2 Mine and the Alpha No. 3 Mine. These additional mines began producing coal respectively in 2016 and 2017. ZZ Coal Company, an eligible taxpayer, places qualified investment in service or use on January 5, 2020 that cost \$1,000,000 at its Alpha No. 1 Mine in West Virginia. The investment increases coal production at the ABC No. 1 Mine. ZZ Coal Company’s maximum potential rebate amount is \$350,000 (\$1 million x 0.35%).

Analysis

Base year coal production computation:

ZZZ Coal Company produced coal at its Alpha Mine during the 5-year period ending December 31, 2018. The tons of coal produced during calendar year 2018 are 1,000,000. The average number of tons produced during the 5-year period is 860,000. Because the average production during the 5-year period is less than the production in 2018, the base period number will be 860,000 tons of coal.

<u>Calendar Year</u>	<u>Tons Produced</u>
<u>2018</u>	<u>1,000,000</u>
<u>2017</u>	<u>900,000</u>
<u>2016</u>	<u>850,000</u>
<u>2015</u>	<u>800,000</u>
<u>2014</u>	<u>750,000</u>
	<u>4,300,000 ÷ 5 = 860,000 tons</u>

The Alpha No. 2 Mine began coal production in 2016. It produced 1,000,000 tons of coal in calendar year 2018. The Alpha No. 3 Mine began producing coal in 2017. It produced 800,000 tons of coal in 2018.

Base year coal production of ZZ Coal Company:

<u>Name of Coal Mine</u>	<u>Tons Produced</u>
<u>Alpha No. 1 Mine</u>	<u>860,000 (5-year average)</u>
<u>Alpha No. 2 Mine</u>	<u>1,000,000</u>
<u>Alpha No. 3 Mine</u>	<u>800,000</u>
<u>Total base year production</u>	<u>2,660,000</u>

Computation of severance taxes payable:

In the 5-year period ending December 31, 2018, (the base production year period), Alpha No. 1 Mine produced an average of 860,000 tons of coal, which it sold for \$50 per ton (\$43,000,000). Its severance tax liability for this coal production, under W. Va. Code § 11-13A-3(a), was \$2,150,000 (\$43,000,000 x 5%), before credit for minimum severance tax paid of this amount, \$1,999,500 (\$43,000,000 x 4.65%) was the state portion of the severance tax, and \$150,500 (\$43,000,000 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In calendar year 2018 (the base production year), the Alpha No. 2 Mine produced 1 million tons of coal and the Alpha No. 3 Mine produced 800,000 tons of coal which was also sold for \$50.00 per ton (1,800,000 x \$50 = \$90,000,000). Its severance tax liability for the production at the Alpha No. 2 and 3 Mines was \$4,500,000 (\$90,000,000 x 5%). Of this amount, \$4,185,000 (\$90,000,000 x 4.65%) was the state portion of the severance tax and \$315,000 (\$90,000,000 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In the 2018 base production year, the total coal production by all ZZ Coal Company mines was 2,660,000 tons 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 \$6,184,999.88.

<u>860,000 tons – Alpha No. 1 Mine</u>
<u>1,800,000 tons – Alpha No. 2 and 3 Mines</u>
<u>2,660,000 tons – All ZZ Coal Company mines</u>
<u>\$1,999,500 Alpha No. 1 Mine</u>
<u>\$4,185,000 Alpha No. 2 and 3 Mines</u>
<u>\$6,184,500 Total state portion of severance tax payable</u>

In calendar year 2020, ZZ Coal Company produced 1,075,268.75 tons of coal at its Alpha No. 1 Mine, which it sold for \$50 per ton (\$53,763,437.50). Its severance tax liability, under W. Va. Code § 11-13A-3(a), was \$2,688,171.88 (\$53,763,437.50 x 5%) before credit for minimum severance tax paid. Of this amount, \$2,499,999.84 (\$53,763,437.50 x 4.65%) was the state portion of the severance tax, and \$188,172.03 (\$53,763,437.50 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In calendar year 2020, the Alpha No. 2 Mine produced 1 million tons of coal and the Alpha No. 3 Mine produced 800,000 tons of coal, which also sold for \$50.00 per ton (1,800,000 x \$50 = \$90,000,000). Its severance tax liability for the production at the ABC No. 2 and 3 Mines was \$4,500,000 (\$90,000,000 x 5%) before credit for minimum severance tax paid. Of this amount, \$4,185,000 (\$90,000,000 x 4.65%) was the state portion of the severance tax and \$315,000 (\$90,000,000 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In calendar year 2020, the total coal production by all ZZ Coal Company mines was 2,875,268.75 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 \$6,684,999.84.

<u>1,075,268.75 tons – Alpha No. 1 Mine</u>
<u>1,800,000.00 tons – Alpha No. 2 and 3 Mines</u>
<u>2,875,268.75 tons – ZZ Coal Company mines</u>

<u>\$2,499,999.84 state portion severance tax – Alpha No. 1 Mine</u>
<u>\$4,185,000.00 state portion severance tax – Alpha No. 2 and 3 Mines</u>
<u>\$6,684,999.84 Total state portion of severance tax – All ZZ Coal Company mines</u>

After the 2020 coal severance taxes are paid, ZZ Coal Company files a claim for rebate of \$350,000, which is paid by the Tax Commissioner.

The initial question in the analysis is whether there was an increase in the state portion of severance taxes payable due to the qualified investment at the Alpha No. 1 Mine. The difference between the state portion of the severance tax payable on production from the Alpha No. 1 Mine in 2020 and the state portion of the severance tax payable on production from the Alpha No. 1 Mine in the 2018 base period is \$499,999.96 (\$2,499,999.84 minus \$1,999,999.88). This represents the increase in state severance tax payable attributable to the qualified investment. Accordingly, the maximum rebate amount for the qualified investment is \$399,999.97 (80% of \$499,999.96).

Because ZZ Coal Company operates multiple mines, the next question is whether ZZ Coal Company's total production of coal at all mines was at least equal to the 2020 increase in coal production at the Alpha No. 1 Mine. In 2020, production at the Alpha No. 1 Mine increased by 215,043.75 tons when compared to the 2018 production period at the Alpha No. 1 Mine. The increase is due to the qualified investment. Because total coal production at all ZZ Coal Company mines increased by 215,053.75 tons in 2020 (total production in 2020 minus total production in 2018), ZZ Coal Company's rebate claim for \$350,000 is paid by the Tax Commissioner.

Note: If the increase in total tons of coal produced by all ZZ Coal Company mines in 2020 and the tons of coal produced by ZZ Coal Company mines in 2018 is less than the production increase at the Alpha No. 1 Mine in 2020, a portion of ZZ Coal Company's rebate claim will be denied. The portion denied may be carried forward to subsequent years. However, if total production in 2020 is less than total production in 2018, the claim for rebate will be denied in its entirety.

7.6. Example 6. ZZ Coal Company, an eligible taxpayer, places qualified investment in service or use on January 5, 2020, at its Alpha No. 1 coal mine in West Virginia, that cost \$1,000,000. The company is a member of an affiliated group of corporations and other members of the affiliated group operate 2

additional coal mines in West Virginia – AG No. 2 and AG No. 3. The qualified investment increases coal production at the Alpha No. 1 Mine. ZZ Coal Company’s maximum rebate amount for the qualified investment is \$350,000 (\$1 million x 0.35%).

Analysis

In calendar year 2018 (the base production year), ZZ Coal Company produced 860,215 tons of coal at its Alpha 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 \$2,150,537.50 (\$430,010,750 x 5%), before credit for minimum severance tax paid. Of this amount, \$1,999,999.88 (\$430,010,750 x 4.65%) was the state portion of the severance tax, and \$150,537.62 was the additional tax imposed by W. Va. Code § 11-13A-6 (0.35%).

In calendar year 2018 (the base production year), the AG No. 2 Mine produced 1 million tons of coal and the AG No. 3 Mine produced 500,000 tons of coal, which was also sold for \$50.00 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 (\$75,000,000 x 5%). Of this amount, \$3,487,500 was the state portion of the severance tax (\$75,000,000 x 4.65%) and \$262,500 (\$75,000,000 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6, before credit for the minimum severance tax paid.

In calendar year 2018, the total coal production by all of the Affiliated Group mines was 2,360,215 tons 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 \$5,487,499.88.

<u>860,215 tons – Alpha No. 1 Mine</u>
<u>1,500,000 tons – AG No. 2 and 3 Mines</u>
<u>2,360,215 tons – All Affiliated Group mines</u>

<u>\$1,999,999.88 Alpha No. 1 Mine</u>
<u>\$3,487,500.00 AG No. 2 and 3 Mines</u>
<u>\$5,487,499.88 Total state portion of severance tax</u>

In calendar year 2020, ZZ Coal Company produced 1,075,268.75 tons of coal at its Alpha No. 1 Mine, which it sold for \$50 per ton (\$53,763,437.50). Its severance tax liability, under W. Va. Code § 11-13A-3(a), was \$2,688,171.88 (\$53,763,437.50 x 5%) before credit for minimum severance tax paid. Of this amount, \$2,499,999.84 (\$53,763,437.50 x 4.65%) was the state portion of the severance tax, and \$188,172.03 was the additional tax imposed by W. Va. Code § 11-13A-6 (0.35%).

In calendar year 2020, the AG No. 2 Mine produced 1 million tons of coal and the AG No. 3 Mine produced 500,000 tons of coal, which also sold for \$50.00 per ton (1,500,000 x \$50 = \$75,000,000). The severance tax liability for the production at the ABC No. 2 and 3 Mines was \$3,750,000 (\$75,000,000 x 5%) before credit for minimum severance tax paid. Of this amount, \$3,487,500 (\$75,000,000 x 4.65%) was the state portion of the severance tax and \$262,500 (\$75,000,000 x 0.35%) was the additional tax imposed by W. Va. Code § 11-13A-6.

In calendar year 2020, the total coal production by all Affiliated Group mines was 2,575,268.75 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 \$5,987,499.84.

<u>1,075,268.75 tons – Alpha No. 1 Mine</u>
<u>1,500,000.00 tons – AG No. 2 and 3 Mines</u>
<u>2,575,268.75 tons – All Affiliated Group mines</u>
<u>\$2,499,999.84 state portion severance tax – Alpha No. 1 Mine</u>
<u>\$3,487,500.00 state portion severance tax – AG No. 2 and 3 Mines</u>
<u>\$5,987,499.84 Total state portion of severance tax – All Affiliated Group mines</u>

After the 2020 coal severance taxes are paid, ZZ Coal Company, files a claim for rebate of \$350,000.

The initial question in the analysis is whether there was an increase in the state portion of severance taxes payable due to the qualified investment at the Alpha No. 1 Mine. The difference between the state portion of the severance tax payable on production from the Alpha No. 1 Mine in 2020 and the state portion of the severance tax payable on production from the Alpha No. 1 Mine in 2018 is \$499,999.96 (\$2,499,999.84 minus \$1,999,999.88). This represents the increase in severance tax payable attributable to the qualified investment. Accordingly, the maximum potential rebate amount for the qualified investment is \$399,999.97 (80% of \$499,999.96).

Because ZZ Coal Company is a member of an affiliated group of corporations that operate multiple mines, the next question is whether the Affiliated Group's increased total production of coal at all mines was at least equal to the 2020 increase in coal production at the Alpha No. 1 Mine? In 2020, production of coal by all Affiliated Group mines increased by 215,053 tons. Because total coal production at all Affiliated Group mines increased by 215,053 tons in 2020 (total production in 2020 minus total production in 2018), and because the 2020 increase in production at the Alpha No. 1 Mine was 215,043.75 tons, which amount is less than the 2020 increase in production at all Affiliated Group mines, a rebate is allowable. The amount of rebate allowable for 2020 may not exceed 80% of the state portion of the additional taxes payable on the increase in production at the Alpha No. 1 Mine. ($\$499,999.96 \times 80\% = \$399,999.97$) Since the claimed rebate of \$350,000 is less than 80% of the increase in severance taxes (\$399,999.97), taxpayer's entire claim for rebate will be paid by the Tax Commissioner.

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 Alpha No. 1 Mine in 2020, a portion of ZZ Coal Company's rebate claim will be denied. The portion denied may be carried forward to subsequent years. However, if total production in 2020 is less than total production in 2018, the claim for rebate will be denied in its entirety.

7.7. Example 7. M & M Coal Company owns 3 mines in West Virginia at which it has produced coal for the last 10 years. It is a calendar year taxpayer. In 2020, it opens a new coal mine. After filing its severance tax return and paying severance taxes for the 2020 taxable year M & M files a claim for severance tax rebate based upon its capital investment in the new coal mine.

Analysis

Because M & M produced coal at each of its mines during the period beginning January 1, 2014 and ending December 31, 2018, the first step is to determine whether the base production period for measuring increased coal production is average coal production during the 5-year period, or production during calendar year 2018.

Calendar Year Coal Production (tons)							
Mine	2014	2015	2016	2017	2018	Totals	Average
M & M No. 1	750,000	800,000	750,000	700,000	900,000	3,270,000	654,000
M & M No. 2	650,000	700,000	650,000	625,000	800,000	3,425,000	685,000
M & M No. 3	600,000	650,000	600,000	625,000	700,000	3,175,000	635,000
Total	2,000,000	2,150,000	2,000,000	1,950,000	2,400,000	10,500,000	2,100,000

Because M & M's average coal production during the 5-year period ending December 31, 2018 (2,100,000) is less than M & M's coal production during calendar year 2018 (2,400,000), M & M's base production for measuring increased coal production will be 2,100,000 tons of coal.

The base period tons of coal sold for \$50 per ton generating gross proceeds of \$105,000,000 (2,100,000 x \$50). The state portion of severance taxes payable was \$4,882,500.

In 2020, M & M begins developing a new coal mine that is placed in operation in 2020. Qualified investment at the new mine is \$65 million. The potential rebate allowable for this qualified investment is \$22,750,000 (\$65 million x 35%).

In 2020, coal production at the new mine is 1,000,000 tons. Production increases to 2,000,000 tons in 2021 and to 2,500,000 tons in 2022. Beginning in 2022, production sold for \$65 per ton.

During the base period, M & M sold the coal it produced for \$50 per ton. During the 5-year baseline period it sold 10.5 million tons of coal at \$50 per ton, resulting in gross proceeds of sale of \$525,000,000. For the 5-year period ending December 31, 2018, M & M paid coal severance taxes as follows:

Calendar Year	Tons Produced	Sales Price	Severance Taxes	
			5% rate	4.65% rate
2014	2,000,000	\$100,000,000	\$5,000,000	\$4,650,000
2015	2,150,000	\$107,500,000	\$5,375,000	\$4,998,750
2016	2,000,000	\$100,000,000	\$5,000,000	\$4,650,000
2017	1,950,000	\$ 97,500,000	\$4,875,000	\$4,533,750
2018	2,400,000	\$120,000,000	\$6,000,000	\$5,580,000
	2,100,000 (5-year average)			\$4,882,500 (5-year average)
2019	2,425,000	\$121,250,000	\$6,062,500	\$ 5,638,125
2020	3,425,000	\$171,250,000	\$8,562,500	\$ 7,963,125
2021	4,425,000	\$221,250,000	\$11,062,500	\$10,288.125
2022	4,925,000	\$320,125,000	\$16,006,250	\$14,885,812.50
2023	4,925,000	\$320,125,000	\$16,006,250	\$14,885,812.50
2024	4,925,000	\$320,125,000	\$16,006,250	\$14,885,812.50

To simplify this chart, we assumed all coal sold for \$50 per ton until 2022. Beginning in 2022, we assumed all coal sold for \$65 per ton.

The chart above illustrates that in 2020, M & M Coal Company produced more coal than it produced on average in the 5-year period ending December 31, 2018. Consequently, rebate is allowable.

The coal produced in 2020 at the new mine resulted in the state portion of severance taxes payable in 2020 increasing by \$3,080,625, compared to the state portion of severance taxes payable on the average production of coal at M & M Coal Company mined during the 5-year base period, which was \$4,882,500.

\$ 7,963,125	state severance tax payable in 2020
- 4,882,500	average state severance payable during 5-year base period
\$ 3,080,625	

The maximum rebate payable for 2020 taxes is 80% of the additional state severance taxes attributable to the qualified investment in the new mine. For 2020 this amount is \$2,464,500 (\$3,080,625 x 80% = \$2,464,500).

Summary

The rebate claimed was	\$22,750,000
The rebate of 2020 taxes is limited to	2,464,500
The rebate carryforward amount is	\$20,285,500

The maximum rebate payable for 2021 taxes is limited to \$4,324,500 (\$5,405,625 x 80%).	
\$10,288,125	state severance tax payable in 2021
- 4,882,500	average state severance tax payable during 5- year base period
\$ 5,405,625	

The maximum rebate payable for 2022 taxes is limited to \$8,002,650 (\$10,003,312.50 x 80%).	
\$14,885,812.50	state severance tax payable in 2022
- 4,882,500.00	average state severance tax payable during 5-year base period
\$10,003,312.50	

The maximum rebate payable for 2023 taxes is limited to \$7,958,350, the balance of the rebate carryforward amount.

The rebate claimed was	\$22,750,000
2020 rebate payable	\$2,464,500
2021 rebate payable	\$4,324,500
2022 rebate payable	\$8,002,650
2023 rebate payable	\$7,958,350
Total rebate paid	\$22,750,000

7.8. Example 8. 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 be 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 2 years before the capital investment in new machinery, equipment, or improvements to real property 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 2 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.

7.9. Example 9. BB Coal Company operates 3 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 3 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. BB Coal Company filed timely an application for a severance tax rebate.

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 (\$135,000,000 x 4.65%), or \$2,092,500 per mine.

In 2021, BB Coal Company produced 3,500,000 tons of coal at its 4 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 (\$227,500,000 x 4.65%). The breakout by mine is shown below.

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

BB Coal Company filed timely 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 (\$65,000,000 x 35%).

The rebate of 2021 severance taxes allowable is limited to 80 percent of the additional severance taxes payable due to this 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 is \$2,418,000 and the amount of rebate paid is \$1,934,400 (\$2,418,000 x 80%). 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 ton generating gross receipts of \$97,500,000. The state portion of severance tax payable on this amount is \$4,533,750 (\$97,500,000 x 4.65%). The rebate amount carried forward theoretically results in a rebate payment of \$3,627,000 (\$4,533,750 x 80%). However, because 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

900,000 ton produced by BB No. 3 Mine

1,500,000 tons of coal produced by BB No. 4 Mine

7.10. Example 10. 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 3 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 3 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 (\$65,000,000 x 35%). The new mine produced 800,000 tons of coal in 2021 and 1.5 million tons of coal in 2022. AJAX Coal Company files timely and application for rebate.

Analysis

AJAX Coal Company sold its 2018 coal production for \$50 a ton, generating gross proceeds of \$58,500,000 (900,000 x \$50). The 2018 production at the CG No. 1 and 2 Mines also sold for \$50 a ton generating \$58,500,000 for each mine. The 2018 state portion of severance taxes payable by the Controlled Group was \$8,160,750 (\$175,500,000 x 4.65%), or \$2,720,250 per mine.

AJAX Mine No. 1 severance tax	\$2,720,250	(900,000 x \$65 = \$58,500,000 x 4.65%)
CG Mine No. 1 severance tax	\$2,720,250	(900,000 x \$65 = \$58,500,000 x 4.65%)
CG Mine No. 2 severance tax	\$2,720,250	(900,000 x \$65 = \$58,500,000 x 4.65%)
	\$8,160,750	2,700,000
		\$175,500,000

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 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. The state portion of its severance tax liability was \$5,138,250 (\$110,500,000 x 4.65%). 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 for each mine. The state severance tax payable by each mine was \$2,700,250. The 2021 state portion of severance taxes payable by the Controlled Group was \$10,578,750.

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%)
	<u>\$10,578,750</u>

AJAX Coal Company filed timely 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 (\$65,000,000 x 35%). The rebate of 2021 severance taxes allowable is \$1,934,400 (80% 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 and by the controlled group increased from 2018, 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. The rebate amount carried forward (\$20,815,600) theoretically results in a rebate payment of \$3,627,000 (\$4,533,750 x 80%). However, because total tons of coal produced in 2022 by 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

7.11. Example 11. 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 (\$5,000,000 x 35%). 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

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

The amount of allowable rebate applied in any year may not exceed 80% of the additional severance taxes due at the 4.65% attributable to the increase in coal production. The amount of rebate carried forward is \$960,000 (\$1,750,000 - \$790,000). No rebate is available under the statute for the additional severance taxes imposed at the 1.65% rate that are attributable to the increase in thin seam coal production.

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

7.12. Example 12. ABC Coal Company is an eligible taxpayer that operates 2 coal mines that are located near each other. In 2020, the 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 Coal Company files an application for a severance tax rebate of \$2,275,000 (\$6,500,000 x 35%). 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, the claim for rebated is denied.

7.13. Example 13. AJAX Coal Company is an eligible taxpayer that operates 2 coal mines in West Virginia that are located near each other. In 2020, the Coal Company builds a new coal preparation and processing facility to process the coal it produces at its AJAX No. 1 and AJAX 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 Coal Company files an application for a severance tax rebate of \$2,275,000 (\$6,500,000 x .35%). The claim for rebate is denied.

Analysis

In calendar years 2018 and 2021, The AJAX Coal Company produced 1,400,000 tons of coal per year.

	Tons of coal produced	
	2018	2021
AJAX No. 1 Mine	700,000	700,050
AJAX No. 2 Mine	700,000	700,050
Total tons produced	1,400,000	1,400,100

While the state portion of the severance tax liability of AJAX Coal Company increased by \$7,161,279 in 2021, this increase was totally due to the increased sales price of its coal. AJAX Coal Company's production of coal did not increase in 2021. Accordingly, the claim for rebate is denied.

AJAX State Severance Tax

	Gross Proceeds	Tax
2021	\$84,006,000 (1,400,100 tons x \$60)	$\times 0.465 = \$3,906,279$
2018	\$70,000,000 (1,400,000 tons x \$50)	$\times 0.465 = \$3,255,000$
		\$7,161,279

7.14. Example 14. D & L Coal Company, an eligible taxpayer, operates 2 coal mines in West Virginia that are near to each other. 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 Coal Company began processing coal produced by 2 other coal companies in its controlled group and they shut down their coal preparation plants. 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 (\$6,500,000 x 35%). 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. The additional state severance taxes of \$348,750 payable for tax year 2021 were due solely to the increase in the sales price of its coal. Accordingly, the claim for rebate was denied.

<u>Mine</u>	<u>2018 Production</u>	<u>State Severance Tax</u>	
D&L No. 1	700,000 tons x \$50 = \$35,000,000	x 4.65%	= \$1,627,500
D&L No. 2	800,000 tons x \$50 = \$40,000,000	x 4.65%	= \$1,860,000
			<u>\$3,487,500</u>
CG No. 1	500,000 tons x \$55 = \$27,500,000	x 4.65%	= \$1,278,750
CG No. 2	500,000 tons x \$55 = \$27,500,000	x 4.65%	= \$1,278,750
Total tons	2,500,000		<u>\$2,557,500</u>
		Total tax	<u>\$6,045,000</u>

<u>Mine</u>	<u>2021 Production Processed by New Prep plant</u>		
D&L No. 1	700,000 tons x \$55 = \$38,500,000	x 4.65%	\$1,790,250
D&L No. 2	800,000 tons x \$55 = \$44,000,000	x 4.65%	\$2,046,000
CG No. 1	500,000 tons x \$55 = \$27,500,000	x 4.65%	\$1,278,750
CG No. 2	500,000 tons x \$55 = \$27,500,000	x 4.65%	\$1,278,750
Total tons	2,500,000	Total tax	<u>\$6,393,750</u>

7.15. Example 15. XYZ Coal Company, an eligible taxpayer, operates several coal mines located in this state. During calendar year 2018, the Coal Company produced 2,500,000 tons of coal that it sold for \$137,500,000 (2,500,000 x \$55). The Coal Company's state severance tax liability under W. Va. Code § 11-13A-3(a) before credits was \$6,393,750 (\$137,500,000 x 4.65%).

XYZ Coal Company's mines collectively produced 3,500,000 tons of coal in calendar year 2027, 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 (\$245,000,000 x 4.65%).

In 2028, the 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. Its severance tax payable under W. Va. Code § 11-13A-3(a), before credits, is \$2,576,000 (\$56,000,000 x 4.65%). 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 (\$301,000,000 x 4.65%).

<u>2028 production from mines operating in 2027</u>	<u>3,500,000 tons</u>
<u>2028 production from the new mine</u>	<u>800,000 tons</u>
	<u>4,300,000 total tons</u>

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 (\$70 million x 35%).

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 of 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 (\$70 million x 35%). The portion of 2028 severance tax rebated to XYZ Coal Company is \$2,083,200 (\$2,604,000 x 80%). The rebate amount carried forward is \$22,416,800 (\$24,500,000 minus \$2,604,000).

<u>2028 severance taxes payable</u>	<u>\$13,996,500</u>
<u>2027 severance taxes payable</u>	<u>- 11,392,500</u>
<u>Additional severance payable</u>	<u>\$ 2,604,000</u>

Note: In order to determine the amount of rebate allowable, it must first be determined if the increase in the number of tons of coal produced for the rebate year that are attributable to the qualified investment property resulted in 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) for the rebate year. This is determined by dividing the total increase in tons of coal produced (taxpayer and taxpayer's affiliated or controlled group, if applicable) for the rebate year by 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 taxpayer's coal mining operation. The result is the percentage of the rebate allowed. The rebate allowed cannot be greater than 100% of the rebate claimed. The mathematical calculation is:

Total increase in tons of coal produced (taxpayer and taxpayer's affiliated or controlled group, if applicable) for the rebate year ÷ by
Tons of coal produced by taxpayer attributable to qualified investment property for the rebate year

7.16. Example 16. 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 (\$245,000,000 x 4.65%).

With its annual coal severance tax return for the 2029 taxable year, XYZ Coal Company filed a claim for rebate carryforward of \$22,416,800. This claim for coal severance tax rebate carryforward 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 paragraph 3.7.4.a. of this rule must be made for the rebate carryforward year. Only when total tons of coal produced by the taxpayer at all of its mines in the rebate carryforward 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.

2027 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

Note: Had the total tons of coal produced by all XYZ mines in 2029 been 3,900,000 tons rather than 3,500,000 tons a portion of the rebate carry forward amount would have been paid because this is still a net increase in production at the XYZ mines, when compared to the production in 2027. The amount of rebate carryforward amount payable is limited to 80% if the increase in severance tax payable attributable to the increase in coal production, when coal production in 2029 is compared with coal production in 2027.

2029 tons of coal produced by all XYZ mines	3,900,000
2027 tons of coal produced by all XYZ mines	- 3,500,000
2029 increase in tons of coal produced	400,000

7.17. Example 17. XYZ Coal Company, an eligible taxpayer, operates several coal mines located in this state. During calendar year 2018, the Coal Company produced 2,500,000 tons of coal that it sold for \$137,500,000 (2,500,000 x \$55). The Coal Company’s state severance tax liability under W. Va. Code § 11-13A-3(a) before credits was \$6,393,750 (\$137,500,000 x 4.65%).

XYZ Coal Company’s mines collectively produced 3,500,000 tons of coal in calendar year 2027, 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 (\$245,000,000 x 4.65%).

2027 production from all mines	3,500,000
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In 2028, the 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. Its severance tax payable under W. Va. Code § 11-13A-3(a), before credits, is \$2,576,000 (\$56,000,000 x 4.65%). 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 (\$273,000,000 x 4.65%).

2028 production from mines operating in 2027	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 (\$70 million x 35%).

Analysis

Because the tons of coal produced by the new mine (800,000 tons) in 2028 increased XYZ Coal Company's total coal production (3,900,000), some portion of XYZ's claim for severance tax rebate will be allowed. However, 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 reduced by 50 percent. The mathematical formula for this computation is:

Total increase in tons of coal produced (taxpayer and taxpayer's affiliated or controlled group, if applicable) for the rebate year ÷ by
Tons of coal produced by taxpayer attributable to qualified investment property for the rebate year

In this example instance:

Increase production by all mines in 2028: 400,000

Increase production by new mine in 2028: 800,000

This results in a reduction factor of 50 percent.

The potential rebate allowable is \$24,500,000 (\$70 million x 35%). Since the mine is a new mine, and the taxpayer is an eligible taxpayer that did business in WV in 2018, the net increase in severance tax payable is the entire portion of tax paid on the new mine, limited to 80 percent: 800,000 tons X \$70 per ton X 4.65% X 80% = \$2,083,200. This portion is further limited by the 50 percent factor mentioned above. Thus, the portion of 2028 severance tax rebated to XYZ Coal Company is \$1,041,600 (\$2,083,200 x 1/2). The rebate amount carried forward is \$23,458,400 (\$24,500,000 minus \$1,041,600).

Note: In order to determine the amount of rebate allowable, it must first be determined if the increase in the number of tons of coal produced for the rebate year that are attributable to the qualified investment property resulted in 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) for the rebate year. This is determined by dividing the total increase in tons of coal produced (taxpayer and taxpayer's affiliated or controlled group, if applicable) for the rebate year by 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 taxpayer's coal mining operation. The result is the percentage of the rebate allowed. The rebate allowed cannot be greater than 100% of the rebate claimed.

§ 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, new equipment, or new improvements to real 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.

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

8.3. Rebate carryforward. -- 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 carryforward amount, or a portion thereof, and provides the information required by the Tax Commissioner.

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, equipment, or improvements to real property, 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, equipment, or improvements to real property, 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.

8.7. 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, taxpayer must 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, new equipment, or new improvements to real property, 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,

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 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 taxpayer at the coal mining operation in the base production year,

9.2.2.o. The tons of coal produced by 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 carryforward 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, equipment, or improvements to real property 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, 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. Its identity;

10.1.2. Its actual or reasonably determined cost in the absence of actual cost;

10.1.3. Whether the machinery, equipment or improvements to real property are new property as defined in subdivision 2.2.22 of this rule;

10.1.4. Its useful life for federal income tax purposes;

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

10.1.6. The amount of rebate claimed; and

10.1.7. The date it 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 §110-21F-11 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, equipment or improvements to real 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.

11.1.2. If a taxpayer cannot establish when capital investment in new machinery, equipment, or improvements to real 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 machinery, equipment, or improvements to real property 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 5 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, new equipment, or new improvements to real 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 machinery, equipment, or improvements to real 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 is transferred, and the transferor business may not be required to redetermine the amount of rebate allowed in earlier years.

EXAMPLE: ABC is formed as 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 files timely a claim for rebate after 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 corporation to a limited liability 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, new equipment, or new improvements to real property 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, new equipment, or new improvements to real property at the mine or coal preparation and processing facility in this state at which the machinery, equipment, or improvements to real property 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 after June 7, 2019, which results in increased coal production. The corporation files timely a claim for rebate after 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% 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 not 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 7 of this rule.

13.3.1. The rebate amount carried forward, can only be applied against 80% 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 remaining rebate 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 carryforward 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 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 taxpayer's affiliated or controlled group, including the taxpayer, and an 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 of this rule also apply when 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 W. Va. Code §11-13EE-10 and section 13 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 coal.

14.1.3. Use of the qualified investment property must result in the 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, except when the successor rule in section 13 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 June 7, 2019.

14.1.6. In the case of leased machinery and equipment, the primary term of the lease must be for at least 5 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 5 years.

14.2. The taxpayer's purchase or lease of the qualifying machinery, equipment or improvement to real property 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 tangible personal property or the improvements to real 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 tangible personal property, or improvements to real 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, or the improvements to 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 by W. Va. Code §§11-21-9 or 11-24-3.

14.5. The rebate allowable 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 taxpayer 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 the claim for rebate is filed, including a claim for rebate carried forward, 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 federal or state court of competent jurisdiction, or is complying with the terms of any payment plan agreement 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 (25%) 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 late filed, 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, new equipment, or new improvements to real 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 machinery, equipment, or improvements to real property 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, equipment, or improvements to real property 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 and 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, new equipment, or new improvements to real property 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, equipment, or improvements to real property 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 5 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 §110-21F-13 of this rule, relating to transfer of qualified investment property. However, the successor, or the successors, 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 after audit of the severance tax return filed by the taxpayer, or taxpayer's controlled or affiliated group, as applicable, 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 after audit of the taxpayer's books and records, or audit of the books and records of taxpayer's controlled or affiliated group, as applicable, 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 of 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 filed timely 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 carryforward 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 5 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 carryforward amount of \$875,000 ($\$3.5 \text{ million} \div 4$) 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.

26 U.S. Code § 267.

Losses, expenses, and interest with respect to transactions between related taxpayers

(a) In general

(1) Deduction for losses disallowed

No deduction shall be allowed in respect of any loss from the sale or exchange of property, directly or indirectly, between persons specified in any of the paragraphs of subsection (b). The preceding sentence shall not apply to any loss of the distributing corporation (or the distributee) in the case of a distribution in complete liquidation.

(2) Matching of deduction and payee income item in the case of expenses and interest
If—

(A)

by reason of the method of accounting of the person to whom the payment is to be made, the amount thereof is not (unless paid) includible in the gross income of such person, and

(B)

at the close of the taxable year of the taxpayer for which (but for this paragraph) the amount would be deductible under this chapter, both the taxpayer and the person to whom the payment is to be made are persons specified in any of the paragraphs of subsection (b),

then any deduction allowable under this chapter in respect of such amount shall be allowable as of the day as of which such amount is includible in the gross income of the person to whom the payment is made (or, if later, as of the day on which it would be so allowable but for this paragraph). For purposes of this paragraph, in the case of a personal service corporation (within the meaning of section 441(i)(2)), such corporation and any employee-owner (within the meaning of section 269A(b)(2), as modified by section 441(i)(2)) shall be treated as persons specified in subsection (b).

(3) Payments to foreign persons

(A) In general

The Secretary shall by regulations apply the matching principle of paragraph (2) in cases in which the person to whom the payment is to be made is not a United States person.

(B) Special rule for certain foreign entities

(i) In general

Notwithstanding subparagraph (A), in the case of any item payable to a controlled foreign corporation (as defined in section 957) or a passive foreign investment company (as defined in section 1297), a deduction shall be allowable to the payor with respect to such amount for any taxable year before the taxable year in which paid only to the extent that an amount attributable to such item is includible (determined without regard to properly allocable deductions and qualified deficits under section 952(c)(1)(B)) during such prior taxable year in the gross income of a United States person who owns (within the meaning of section 958(a)) stock in such corporation.

(ii) Secretarial authority

The Secretary may by regulation exempt transactions from the application of clause (i), including any transaction which is entered into by a payor in the ordinary course of a trade or business in which the payor is predominantly engaged and in which the payment of the accrued amounts occurs within 8½ months after accrual or within such other period as the Secretary may prescribe.

(b) Relationships The persons referred to in subsection (a) are:

(1)

Members of a family, as defined in subsection (c)(4);

(2)

An individual and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual;

(3)

Two corporations which are members of the same controlled group (as defined in subsection (f));

(4)

A grantor and a fiduciary of any trust;

(5)

A fiduciary of a trust and a fiduciary of another trust, if the same person is a grantor of both trusts;

(6)

A fiduciary of a trust and a beneficiary of such trust;

(7)

A fiduciary of a trust and a beneficiary of another trust, if the same person is a grantor of both trusts;

(8)

A fiduciary of a trust and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for the trust or by or for a person who is a grantor of the trust;

(9)

A person and an organization to which section 501 (relating to certain educational and charitable organizations which are exempt from tax) applies and which is controlled

directly or indirectly by such person or (if such person is an individual) by members of the family of such individual;

(10) A corporation and a partnership if the same persons own—

(A)

more than 50 percent in value of the outstanding stock of the corporation, and

(B)

more than 50 percent of the capital interest, or the profits interest, in the partnership;

(11)

An S corporation and another S corporation if the same persons own more than 50 percent in value of the outstanding stock of each corporation;

(12)

An S corporation and a C corporation, if the same persons own more than 50 percent in value of the outstanding stock of each corporation; or

(13)

Except in the case of a sale or exchange in satisfaction of a pecuniary bequest, an executor of an estate and a beneficiary of such estate.

(c) Constructive ownership of stock For purposes of determining, in applying subsection

(b), the ownership of stock—

(1)

Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by or for its shareholders, partners, or beneficiaries;

(2)

An individual shall be considered as owning the stock owned, directly or indirectly, by or for his family;

(3)

An individual owning (otherwise than by the application of paragraph (2)) any stock in a corporation shall be considered as owning the stock owned, directly or indirectly, by or for his partner;

(4)

The family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants; and

(5)

Stock constructively owned by a person by reason of the application of paragraph (1) shall, for the purpose of applying paragraph (1), (2), or (3), be treated as actually owned by such person, but stock constructively owned by an individual by reason of the application of paragraph (2) or (3) shall not be treated as owned by him for the purpose of again applying either of such paragraphs in order to make another the constructive owner of such stock.

(d) Amount of gain where loss previously disallowed

(1) In general If—

(A)

in the case of a sale or exchange of property to the taxpayer a loss sustained by the transferor is not allowable to the transferor as a deduction by reason of subsection

(a)(1), and

(B)

the taxpayer sells or otherwise disposes of such property (or of other property the basis of which in the taxpayer's hands is determined directly or indirectly by reference to such property) at a gain, then such gain shall be recognized only to the extent that it exceeds so much of such loss as is properly allocable to the property sold or otherwise disposed of by the taxpayer.

(2) Exception for wash sales

Paragraph (1) shall not apply if the loss sustained by the transferor is not allowable to the transferor as a deduction by reason of section 1091 (relating to wash sales).

(3) Exception for transfers from tax indifferent parties

Paragraph (1) shall not apply to the extent any loss sustained by the transferor (if allowed) would not be taken into account in determining a tax imposed under section 1 or 11 or a tax computed as provided by either of such sections.

(e) Special rules for pass-thru entities

(1) In general In the case of any amount paid or incurred by, to, or on behalf of, a pass-thru entity, for purposes of applying subsection (a)(2)—

(A)

such entity,

(B) in the case of—

(i)

a partnership, any person who owns (directly or indirectly) any capital interest or profits interest of such partnership, or

(ii)

an S corporation, any person who owns (directly or indirectly) any of the stock of such corporation,

(C)

any person who owns (directly or indirectly) any capital interest or profits interest of a partnership in which such entity owns (directly or indirectly) any capital interest or profits interest, and

(D)

any person related (within the meaning of subsection (b) of this section or section 707(b)(1)) to a person described in subparagraph (B) or (C),

shall be treated as persons specified in a paragraph of subsection (b). Subparagraph (C) shall apply to a transaction only if such transaction is related either to the operations of the partnership described in such subparagraph or to an interest in such partnership.

(2) Pass-thru entity For purposes of this section, the term "pass-thru entity" means—

(A)

a partnership, and

(B)

an S corporation.

(3) Constructive ownership in the case of partnerships For purposes of determining ownership of a capital interest or profits interest of a partnership, the principles of subsection (c) shall apply, except that—

(A)

paragraph (3) of subsection (c) shall not apply, and

(B)

interests owned (directly or indirectly) by or for a C corporation shall be considered as owned by or for any shareholder only if such shareholder owns (directly or indirectly) 5 percent or more in value of the stock of such corporation.

(4) Subsection (a)(2) not to apply to certain guaranteed payments of partnerships

In the case of any amount paid or incurred by a partnership, subsection (a)(2) shall not apply to the extent that section 707(c) applies to such amount.

(5) Exception for certain expenses and interest of partnerships owning low-income housing

(A) In general This subsection shall not apply with respect to qualified expenses and interest paid or incurred by a partnership owning low-income housing to—

(i)

any qualified 5-percent or less partner of such partnership, or

(ii)

any person related (within the meaning of subsection (b) of this section or section 707(b)(1)) to any qualified 5-percent or less partner of such partnership.

(B) Qualified 5-percent or less partner For purposes of this paragraph, the term “qualified 5-percent or less partner” means any partner who has (directly or indirectly) an interest of 5 percent or less in the aggregate capital and profits interests of the partnership but only if—

(i)

such partner owned the low-income housing at all times during the 2-year period ending on the date such housing was transferred to the partnership, or

(ii)

such partnership acquired the low-income housing pursuant to a purchase, assignment, or other transfer from the Department of Housing and Urban Development or any State or local housing authority.

For purposes of the preceding sentence, a partner shall be treated as holding any interest in the partnership which is held (directly or indirectly) by any person related (within the meaning of subsection (b) of this section or section 707(b)(1)) to such partner.

(C) Qualified expenses and interest For purpose of this paragraph, the term “qualified expenses and interest” means any expense or interest incurred by the partnership with respect to low-income housing held by the partnership but—

(i)

only if the amount of such expense or interest (as the case may be) is unconditionally required to be paid by the partnership not later than 10 years after the date such amount was incurred, and

(ii)

in the case of such interest, only if such interest is incurred at an annual rate not in excess of 12 percent.

(D) Low-income housing For purposes of this paragraph, the term “low-income housing” means—

(i)

any interest in property described in clause (i), (ii), (iii), or (iv) of section 1250(a)(1)(B), and

(ii)

any interest in a partnership owning such property.

(6) Cross reference

For additional rules relating to partnerships, see section 707(b).

(f) Controlled group defined; special rules applicable to controlled groups

(1) Controlled group defined For purposes of this section, the term “controlled group” has the meaning given to such term by section 1563(a), except that—

(A)

“more than 50 percent” shall be substituted for “at least 80 percent” each place it appears in section 1563(a), and

(B)

the determination shall be made without regard to subsections (a)(4) and (e)(3)(C) of section 1563.

(2) Deferral (rather than denial) of loss from sale or exchange between members In the case of any loss from the sale or exchange of property which is between members of the same controlled group and to which subsection (a)(1) applies (determined without regard to this paragraph but with regard to paragraph (3))—

(A)

subsections (a)(1) and (d) shall not apply to such loss, but

(B)

such loss shall be deferred until the property is transferred outside such controlled group and there would be recognition of loss under consolidated return principles or until such other time as may be prescribed in regulations.

(3) Loss deferral rules not to apply in certain cases

(A) Transfer to DISC

For purposes of applying subsection (a)(1), the term “controlled group” shall not include a DISC.

(B) Certain sales of inventory Except to the extent provided in regulations prescribed by the Secretary, subsection (a)(1) shall not apply to the sale or exchange of property between members of the same controlled group (or persons described in subsection (b)(10)) if—

(i)

such property in the hands of the transferor is property described in section 1221(a)(1),

(ii)

such sale or exchange is in the ordinary course of the transferor’s trade or business,

(iii)

such property in the hands of the transferee is property described in section 1221(a)(1), and

(iv)

the transferee or the transferor is a foreign corporation.

(C) Certain foreign currency losses

To the extent provided in regulations, subsection (a)(1) shall not apply to any loss sustained by a member of a controlled group on the repayment of a loan made to another member of such group if such loan is payable in a foreign currency or is denominated in such a currency and such loss is attributable to a reduction in value of such foreign currency.

(D) Redemptions by fund-of-funds regulated investment companies Except to the extent provided in regulations prescribed by the Secretary, subsection (a)(1) shall not apply to any distribution in redemption of stock of a regulated investment company if—

(i)

such company issues only stock which is redeemable upon the demand of the stockholder, and

(ii)

such redemption is upon the demand of another regulated investment company.

(4) Determination of relationship resulting in disallowance of loss, for purposes of other provisions

For purposes of any other section of this title which refers to a relationship which would result in a disallowance of losses under this section, deferral under paragraph (2) shall be treated as disallowance.

(g) Coordination with section 1041

Subsection (a)(1) shall not apply to any transfer described in section 1041(a) (relating to transfers of property between spouses or incident to divorce).

26 U.S. Code § 707.

Transactions between partner and partnership

(a) Partner not acting in capacity as partner

(1) In general

If a partner engages in a transaction with a partnership other than in his capacity as a member of such partnership, the transaction shall, except as otherwise provided in this section, be considered as occurring between the partnership and one who is not a partner.

(2) Treatment of payments to partners for property or services Under regulations prescribed by the Secretary—

(A) Treatment of certain services and transfers of property If—

(i)

a partner performs services for a partnership or transfers property to a partnership,

(ii)

there is a related direct or indirect allocation and distribution to such partner, and

(iii)

the performance of such services (or such transfer) and the allocation and distribution, when viewed together, are properly characterized as a transaction occurring between the partnership and a partner acting other than in his capacity as a member of the partnership,

such allocation and distribution shall be treated as a transaction described in paragraph

(1).

(B) Treatment of certain property transfers If—

(i)

there is a direct or indirect transfer of money or other property by a partner to a partnership,

(ii)

there is a related direct or indirect transfer of money or other property by the partnership to such partner (or another partner), and

(iii)

the transfers described in clauses (i) and (ii), when viewed together, are properly characterized as a sale or exchange of property,

such transfers shall be treated either as a transaction described in paragraph (1) or as a transaction between 2 or more partners acting other than in their capacity as members of the partnership.

(b) Certain sales or exchanges of property with respect to controlled partnerships

(1) Losses disallowed No deduction shall be allowed in respect of losses from sales or exchanges of property (other than an interest in the partnership), directly or indirectly, between—

(A)

a partnership and a person owning, directly or indirectly, more than 50 percent of the capital interest, or the profits interest, in such partnership, or

(B)

two partnerships in which the same persons own, directly or indirectly, more than 50 percent of the capital interests or profits interests.

In the case of a subsequent sale or exchange by a transferee described in this paragraph, section 267(d) shall be applicable as if the loss were disallowed under section 267(a)(1). For purposes of section 267(a)(2), partnerships described in subparagraph (B) of this paragraph shall be treated as persons specified in section 267(b).

(2) Gains treated as ordinary income In the case of a sale or exchange, directly or indirectly, of property, which in the hands of the transferee, is property other than a capital asset as defined in section 1221—

(A)

between a partnership and a person owning, directly or indirectly, more than 50 percent of the capital interest, or profits interest, in such partnership, or

(B)

between two partnerships in which the same persons own, directly or indirectly, more than 50 percent of the capital interests or profits interests, any gain recognized shall be considered as ordinary income.

(3) Ownership of a capital or profits interest

For purposes of paragraphs (1) and (2) of this subsection, the ownership of a capital or profits interest in a partnership shall be determined in accordance with the rules for constructive ownership of stock provided in section 267(c) other than paragraph (3) of such section.

(c) Guaranteed payments

To the extent determined without regard to the income of the partnership, payments to a partner for services or the use of capital shall be considered as made to one who is not a member of the partnership, but only for the purposes of section 61(a) (relating to gross income) and, subject to section 263, for purposes of section 162(a) (relating to trade or business expenses).

26 U.S. Code § 1014.

Basis of property acquired from a decedent

(a) In general Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be—

(1)

the fair market value of the property at the date of the decedent's death,

(2)

in the case of an election under section 2032, its value at the applicable valuation date prescribed by such section,

(3)

in the case of an election under section 2032A, its value determined under such section, or

(4)

to the extent of the applicability of the exclusion described in section 2031(c), the basis in the hands of the decedent.

(b) Property acquired from the decedent For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

(1)

Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;

(2)

Property transferred by the decedent during his lifetime in trust to pay the income for life to or on the order or direction of the decedent, with the right reserved to the decedent at all times before his death to revoke the trust;

(3)

In the case of decedents dying after December 31, 1951, property transferred by the decedent during his lifetime in trust to pay the income for life to or on the order or direction of the decedent with the right reserved to the decedent at all times before his death to make any change in the enjoyment thereof through the exercise of a power to alter, amend, or terminate the trust;

(4)

Property passing without full and adequate consideration under a general power of appointment exercised by the decedent by will;

(5)

In the case of decedents dying after August 26, 1937, and before January 1, 2005, property acquired by bequest, devise, or inheritance or by the decedent's estate from the decedent, if the property consists of stock or securities of a foreign corporation, which with respect to its taxable year next preceding the date of the decedent's death was, under the law applicable to such year, a foreign personal holding company. In such case, the basis shall be the fair market value of such property at the date of the decedent's death or the basis in the hands of the decedent, whichever is lower;

(6)

In the case of decedents dying after December 31, 1947, property which represents the surviving spouse's one-half share of community property held by the decedent and the surviving spouse under the community property laws of any State, or possession of the United States or any foreign country, if at least one-half of the whole of the community interest in such property was includible in determining the value of the decedent's gross estate under chapter 11 of subtitle B (section 2001 and following, relating to estate tax) or section 811 of the Internal Revenue Code of 1939;

[(7)

, (8) Repealed. Pub. L. 113–295, div. A, title II, § 221(a)(74)(B), Dec. 19, 2014, 128 Stat. 4049]

(9) In the case of decedents dying after December 31, 1953, property acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property is required to be included in determining the value of the decedent's gross estate under chapter 11 of subtitle B or under the Internal Revenue Code of 1939. In such case, if the property is acquired before the death of the decedent, the basis shall be the amount determined under subsection (a) reduced by the amount allowed to the taxpayer as deductions in computing taxable income under this subtitle or prior income tax laws for exhaustion, wear and tear, obsolescence, amortization, and depletion on such property before the death of the decedent. Such basis shall be applicable to the property commencing on the death of the decedent. This paragraph shall not apply to—

(A)

annuities described in section 72;

(B)

property to which paragraph (5) would apply if the property had been acquired by bequest; and

(C)

property described in any other paragraph of this subsection.

(10)

Property includible in the gross estate of the decedent under section 2044 (relating to certain property for which marital deduction was previously allowed). In any such case, the last 3 sentences of paragraph (9) shall apply as if such property were described in the first sentence of paragraph (9).

(c) Property representing income in respect of a decedent

This section shall not apply to property which constitutes a right to receive an item of income in respect of a decedent under section 691.

(d) Special rule with respect to DISC stock

If stock owned by a decedent in a DISC or former DISC (as defined in section 992(a)) acquires a new basis under subsection (a), such basis (determined before the application of this subsection) shall be reduced by the amount (if any) which would have been included in gross income under section 995(c) as a dividend if the decedent had lived and sold the stock at its fair market value on the estate tax valuation date. In computing the gain the decedent would have had if he had lived and sold the stock, his basis shall be determined without regard to the last sentence of section 996(e)(2) (relating to reductions of basis of DISC stock). For purposes of this subsection, the estate tax valuation date is the date of the decedent's death or, in the case of an election under section 2032, the applicable valuation date prescribed by that section.

(e) Appreciated property acquired by decedent by gift within 1 year of death

(1) In general In the case of a decedent dying after December 31, 1981, if—

(A)

appreciated property was acquired by the decedent by gift during the 1-year period ending on the date of the decedent's death, and

(B)

such property is acquired from the decedent by (or passes from the decedent to) the donor of such property (or the spouse of such donor), the basis of such property in the hands of such donor (or spouse) shall be the adjusted basis of such property in the hands of the decedent immediately before the death of the decedent.

(2) Definitions For purposes of paragraph (1)—

(A) Appreciated property

The term "appreciated property" means any property if the fair market value of such property on the day it was transferred to the decedent by gift exceeds its adjusted basis.

(B) Treatment of certain property sold by estate

In the case of any appreciated property described in subparagraph (A) of paragraph (1) sold by the estate of the decedent or by a trust of which the decedent was the grantor, rules similar to the rules of paragraph (1) shall apply to the extent the donor of such property (or the spouse of such donor) is entitled to the proceeds from such sale.

(f) Basis must be consistent with estate tax return For purposes of this section—

(1) In general The basis of any property to which subsection (a) applies shall not exceed—

(A)

in the case of property the final value of which has been determined for purposes of the tax imposed by chapter 11 on the estate of such decedent, such value, and

(B)

in the case of property not described in subparagraph (A) and with respect to which a statement has been furnished under section 6035(a) identifying the value of such property, such value.

(2) Exception

Paragraph (1) shall only apply to any property whose inclusion in the decedent's estate increased the liability for the tax imposed by chapter 11 (reduced by credits allowable against such tax) on such estate.

(3) Determination For purposes of paragraph (1), the basis of property has been determined for purposes of the tax imposed by chapter 11 if—

(A)

the value of such property is shown on a return under section 6018 and such value is not contested by the Secretary before the expiration of the time for assessing a tax under chapter 11,

(B)

in a case not described in subparagraph (A), the value is specified by the Secretary and such value is not timely contested by the executor of the estate, or

(C)

the value is determined by a court or pursuant to a settlement agreement with the Secretary.

(4) Regulations

The Secretary may by regulations provide exceptions to the application of this subsection.

26 U.S. Code § 1221.

Capital asset defined

(a) In general For purposes of this subtitle, the term “capital asset” means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(1)

stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(2)

property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business;

(3) a patent, invention, model or design (whether or not patented), a secret formula or process, a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property, held by—

(A)

a taxpayer whose personal efforts created such property,

(B)

in the case of a letter, memorandum, or similar property, a taxpayer for whom such property was prepared or produced, or

(C)

a taxpayer in whose hands the basis of such property is determined, for purposes of determining gain from a sale or exchange, in whole or part by reference to the basis of such property in the hands of a taxpayer described in subparagraph (A) or (B);

(4)

accounts or notes receivable acquired in the ordinary course of trade or business for services rendered or from the sale of property described in paragraph (1);

(5) a publication of the United States Government (including the Congressional Record) which is received from the United States Government or any agency thereof, other than by purchase at the price at which it is offered for sale to the public, and which is held by—

(A)

a taxpayer who so received such publication, or

(B)

a taxpayer in whose hands the basis of such publication is determined, for purposes of determining gain from a sale or exchange, in whole or in part by reference to the basis of such publication in the hands of a taxpayer described in subparagraph (A);

(6) any commodities derivative financial instrument held by a commodities derivatives dealer, unless—

(A)

it is established to the satisfaction of the Secretary that such instrument has no connection to the activities of such dealer as a dealer, and

(B)

such instrument is clearly identified in such dealer's records as being described in subparagraph (A) before the close of the day on which it was acquired, originated, or entered into (or such other time as the Secretary may by regulations prescribe);

(7)

any hedging transaction which is clearly identified as such before the close of the day on which it was acquired, originated, or entered into (or such other time as the Secretary may by regulations prescribe); or

(8)

supplies of a type regularly used or consumed by the taxpayer in the ordinary course of a trade or business of the taxpayer.

(b) Definitions and special rules

(1) Commodities derivative financial instruments For purposes of subsection (a)(6)—

(A) Commodities derivatives dealer

The term “commodities derivatives dealer” means a person which [1] regularly offers to enter into, assume, offset, assign, or terminate positions in commodities derivative financial instruments with customers in the ordinary course of a trade or business.

(B) Commodities derivative financial instrument

(i) In general

The term “commodities derivative financial instrument” means any contract or financial instrument with respect to commodities (other than a share of stock in a corporation, a beneficial interest in a partnership or trust, a note, bond, debenture, or other evidence of indebtedness, or a section 1256 contract (as defined in section 1256(b))), the value or settlement price of which is calculated by or determined by reference to a specified index.

(ii) Specified index The term “specified index” means any one or more or any combination of—

(I)

a fixed rate, price, or amount, or

(II)

a variable rate, price, or amount,

which is based on any current, objectively determinable financial or economic information with respect to commodities which is not within the control of any of the parties to the contract or instrument and is not unique to any of the parties' circumstances.

(2) Hedging transaction

(A) In general For purposes of this section, the term “hedging transaction” means any transaction entered into by the taxpayer in the normal course of the taxpayer's trade or business primarily—

(i)

to manage risk of price changes or currency fluctuations with respect to ordinary property which is held or to be held by the taxpayer,

(ii)

to manage risk of interest rate or price changes or currency fluctuations with respect to borrowings made or to be made, or ordinary obligations incurred or to be incurred, by the taxpayer, or

(iii)

to manage such other risks as the Secretary may prescribe in regulations.

(B) Treatment of nonidentification or improper identification of hedging transactions

Notwithstanding subsection (a)(7), the Secretary shall prescribe regulations to properly characterize any income, gain, expense, or loss arising from a transaction—

(i)

which is a hedging transaction but which was not identified as such in accordance with subsection (a)(7), or

(ii)

which was so identified but is not a hedging transaction.

(3) Sale or exchange of self-created musical works

At the election of the taxpayer, paragraphs (1) and (3) of subsection (a) shall not apply to musical compositions or copyrights in musical works sold or exchanged by a taxpayer described in subsection (a)(3).

(4) Regulations

The Secretary shall prescribe such regulations as are appropriate to carry out the purposes of paragraph (6) and (7) of subsection (a) in the case of transactions involving related parties.

40 CFR § 60.251 - Definitions.

§ 60.251 Definitions.

As used in this subpart, all terms not defined herein have the meaning given them in the Clean Air Act (Act) and in subpart A of this part.

(a) Anthracite means coal that is classified as anthracite according to the American Society of Testing and Materials in ASTM D388 (incorporated by reference, see § 60.17).

(b) Bag leak detection system means a system that is capable of continuously monitoring relative particulate matter (dust loadings) in the exhaust of a fabric filter to detect bag leaks and other upset conditions. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, light scattering, light transmittance, or other effect to continuously monitor relative particulate matter loadings.

(c) Bituminous coal means solid fossil fuel classified as bituminous coal by ASTM D388 (incorporated by reference - see § 60.17).

(d) Coal means:

(1) For units constructed, reconstructed, or modified on or before May 27, 2009, all solid fossil fuels classified as anthracite, bituminous, subbituminous, or lignite by ASTM D388 (incorporated by reference - see § 60.17).

(2) For units constructed, reconstructed, or modified after May 27, 2009, all solid fossil fuels classified as anthracite, bituminous, subbituminous, or lignite by ASTM D388 (incorporated by reference - see § 60.17), and coal refuse.

(e) 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.

(f) Coal processing and conveying equipment means any machinery used 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.

(g) Coal refuse means waste products of coal mining, physical coal cleaning, and coal preparation operations (e.g., culm, gob, etc.) containing coal, matrix material, clay, and other organic and inorganic material.

(h)Coal storage system means any facility used to store coal except for open storage piles.

(i)Design controlled potential PM emissions rate means the theoretical particulate matter (PM) emissions (Mg) that would result from the operation of a control device at its design emissions rate (grams per dry standard cubic meter (g/dscm)), multiplied by the maximum design flow rate (dry standard cubic meter per minute (dscm/min)), multiplied by 60 (minutes per hour (min/hr)), multiplied by 8,760 (hours per year (hr/yr)), divided by 1,000,000 (megagrams per gram (Mg/g)).

(j)Indirect thermal dryer means a thermal dryer that reduces the moisture content of coal through indirect heating of the coal through contact with a heat transfer medium. If the source of heat (the source of combustion or furnace) is subject to another subpart of this part, then the furnace and the associated emissions are not part of the affected facility. However, if the source of heat is not subject to another subpart of this part, then the furnace and the associated emissions are part of the affected facility.

(k)Lignite means coal that is classified as lignite A or B according to the American Society of Testing and Materials in ASTM D388 (incorporated by reference, see§ 60.17).

(l)Mechanical vent means any vent that uses a powered mechanical drive (machine) to induce air flow.

(m)Open storage pile means any facility, including storage area, that is not enclosed that is used to store coal, including the equipment used in the loading, unloading, and conveying operations of the facility.

(n)Operating day means a 24-hour period between 12 midnight and the following midnight during which coal is prepared or processed at any time by the affected facility. It is not necessary that coal be prepared or processed the entire 24-hour period.

(o)Pneumatic coal-cleaning equipment means:

(1) For units constructed, reconstructed, or modified on or before May 27, 2009, any facility which classifies bituminous coal by size or separates bituminous coal from refuse by application of air stream(s).

(2) For units constructed, reconstructed, or modified after May 27, 2009, any facility which classifies coal by size or separates coal from refuse by application of air stream(s).

(p)Potential combustion concentration means the theoretical emissions (nanograms per joule (ng/J) or pounds per million British thermal units (lb/MMBtu) heat input) that would result from combustion of a fuel in an uncleaned state without emission control systems, as determined using Method 19 of appendix A-7 of this part.

(q)Subbituminous coal means coal that is classified as subbituminous A, B, or C according to the American Society of Testing and Materials in ASTM D388 (incorporated by reference, see§ 60.17).

(r)Thermal dryer means:

(1) For units constructed, reconstructed, or modified on or before May 27, 2009, any facility in which the moisture content of bituminous coal is reduced by contact with a heated gas stream which is exhausted to the atmosphere.

(2) For units constructed, reconstructed, or modified after May 27, 2009, 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.

(s)Transfer and loading system means any facility used to transfer and load coal for shipment.