

FINANCE AND ADMINISTRATION
Department of Revenue
(Amendment)

103 KAR 30:140. Energy and energy-producing fuels.

RELATES TO: KRS ~~139.010~~, 139.480(3), ~~160.613(3)~~

STATUTORY AUTHORITY: KRS 131.130(1)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 131.130(1) authorizes the Department of Revenue to promulgate administrative regulations for the administration and enforcement of [to administer and enforce] Kentucky's tax laws. This administrative regulation establishes the requirements for the partial exemptions~~[exemption]~~ provided for energy and energy-producing fuels.

Section 1. Definitions. (1) "Cost of production" means the total of all costs, according to accepted accounting principles, incurred in manufacturing, mining, processing, or refining of tangible personal property computed on the basis of "plant facilities" except for:

(a) The cost of the energy or energy-producing fuels used therein; and
(b) The related distribution, transmission, and transportation services for this energy that are billed to the user.

(2) "EDP Authorization" means the "Energy Direct Pay Authorization", Form 51F010 for use for the exemption from the sales and use tax or Form 51F011 for use for the exemption from the utility gross receipts license tax as approved by the department.

(3) "In the course of" means those phases of a company's operations in which the expenses incurred are properly included in the computation of the cost of production.

(4) ~~[(3)]~~ "Plant facilities" is defined by~~in~~ KRS 139.010(28). ~~[139.480(3)].~~

(5) "Toller" is defined by KRS 139.480(3).

(6) "UGRLT" means utility gross receipts license tax imposed by KRS 160.613.

Section 2. Cost of production expenses. The list in this section shall serve as examples of accounts or classifications normally reflected in the computation of the cost of production:

(1) Direct labor cost;

(2) Direct materials; and

(3) Overhead expenses:

(a) Administrative expenses allocated to cost of production;

(b) Compensation insurance;

(c) Depreciation for plant equipment;

(d) Indirect labor;

(e) Indirect materials;

(f) Insurance for plant equipment;

(g) Miscellaneous factory expenses;

(h) Office expenses allocated to cost of production;

(i) Rent or depreciation for plant building; and

(j) Taxes for plant equipment. ~~[Direct materials;~~

~~(2) Direct labor cost;~~

~~(3) Overhead expenses;~~

~~(4) Depreciation for plant equipment;~~

~~(5) Insurance for plant equipment;~~

~~(6) Taxes for plant equipment;~~

- ~~(7) Rent or depreciation for plant building;~~
- ~~(8) Compensation insurance;~~
- ~~(9) Indirect materials;~~
- ~~(10) Indirect labor;~~
- ~~(11) Miscellaneous factory expenses;~~
- ~~(12) Administrative expenses allocated to cost of production; and~~
- ~~(13) Office expenses allocated to cost of production.]~~

Section 3. (1) A taxpayer claiming an exemption for energy or energy-producing fuels under KRS 139.480(3) or KRS 160.613(3) shall compute the cost of production on a basis consistent with accepted accounting principles. Any significant deviations from procedures used in previously reported periods which are based on considerations of sales tax or UGRLT reduction shall not be permitted.

(2) A toller beginning tolling operations on or after July 1, 2018, shall fulfill the itemized requirements specified in KRS 139.480(3)(d)(1) through (5) before a determination can be made whether to exclude any portion of the cost of tangible personal property that is incorporated into or becomes a part of the product of its manufacturing or industrial processing activity when calculating the annual cost of production to determine eligibility for these exemptions.

Section 4. To qualify for the partial exemption as described in this regulation, consumers of energy and energy-producing fuel shall:

(1) Submit to the Department of Revenue an "Application for Energy Direct Pay Authorization", Form 51A109; and

(2) Upon receipt of an EDP Authorization, forward a copy of the EDP authorization to their suppliers of taxable production energy in order to claim the applicable exemption.

Section 5. Determination of sales and use tax liability. (1) When completing the "Application for an Energy Direct Pay Authorization", Form 51A109, an applicant shall:

(a) Indicate the tax type for which the application applies;

(b) Provide an itemization of the accounts included in the computation of the sales and use tax cost of production based upon applicable costs incurred in the last completed fiscal or calendar year ending prior to the date of the application;

(c) Submit documentation with the application substantiating the annual energy purchases corresponding to the accounts included in the computation of cost of production for sales and use tax purposes; and

(d) If the energy cost and any related distribution, transmission, and transportation services for this energy billed to the user exceeds three (3) percent of the cost of production:

1. Estimate the sales and use tax liability by:

a. Multiplying the cost of production calculated for sales and use tax purposes by three (3) percent; and

b. Multiplying the resulting amount by six (6) percent; and

2. Report and make monthly payments equal to one-twelfth (1/12) of the total estimated tax on the monthly sales and use tax returns.

(2) By the 20th day of the fifth month following the end of each taxpayer's fiscal year ending subsequent to the date of the authorization, the taxpayer shall:

(a) File a "Kentucky Sales and Use Tax Energy Exemption Annual Return", Form 51A129, reconciling the estimate to the final amount of tax due; and

1. Pay the additional tax due; or

2. Designate the refund amount due if no additional tax is due and an overpayment exists;

and

(b) Make an estimate for the succeeding year and adjust the payment for the months remaining so that the total tax to be paid for the year will agree with the total estimated tax. The estimate shall remain consistent with the cost of production accounts used to estimate the sales tax liability on the application for authorization.

Section 6. Determination of UGRLT Liability. (1) When completing the "Application for an Energy Direct Pay Authorization", Form 51A109, an applicant shall:

(a) Indicate the tax type for which the application applies;

(b) Provide an itemization of the accounts included in the computation of the UGRLT cost of production based upon applicable costs incurred in the last completed fiscal or calendar year ending prior to the date of the application;

(c) Submit documentation with the application substantiating the annual energy purchases corresponding to the accounts included in the computation of cost of production for UGRLT purposes; and

(d) If the energy cost and any related distribution, transmission, and transportation services for this energy billed to the user exceeds three percent (3%) of the cost of production, the taxpayer shall:

1. Estimate the tax by:

a. Multiplying the cost of production calculated for UGRLT purposes by three percent (3%);

and

b. Multiplying the resulting amount by the percentage rate imposed by the local school district, not to exceed three percent (3%); and

2. Report and make monthly payments equal to one-twelfth (1/12) of the total estimated tax on the monthly UGRLT returns.

(2) By the 20th day of the fifth month following the end of each taxpayer's fiscal year ending subsequent to the date of the authorization, the taxpayer shall:

(a) File a "Utility Gross Receipts License Tax (UGRLT) Energy Exemption Annual Return", Form 73A902, reconciling the estimate to the amount of tax due; and

1. Pay the additional tax due; or

2. If no additional tax is due, credit the overpayment on the following year's estimate or designate the refund amount due; and

(b) Make an estimate for the succeeding year and adjust the payment for the months remaining so the total tax to be paid for the year will agree with the total estimated tax. The estimate shall remain consistent with the cost of production accounts used to estimate the UGRLT liability on the application for authorization. [Consumers of energy and energy-producing fuel who qualify for an exemption under this administrative regulation shall:

(1) Submit to the Department of Revenue an Application for "Energy Direct Pay Authorization", Form 51A109, which is incorporated by reference in 103 KAR 3:020; and

(2) Upon issuance of an "Energy Direct Pay Authorization Notification", Form 51F010, which is incorporated by reference in 103 KAR 3:020, pay the taxes due under this administrative regulation.

Section 5. (1) The "Application for an Energy Direct Pay Authorization," Form 51A109, shall be filed with the Department of Revenue.

(2) The applicant shall set forth an itemization of the accounts included in the computation of cost of production based upon costs incurred in the last completed fiscal or calendar year ending prior to the date of the application.

(3) If the energy cost and any related distribution, transmission, and transportation services

~~for this energy that are billed to the user exceeds three (3) percent of the cost of production, the taxpayer shall:~~

~~(a) Estimate the tax by:~~

- ~~1. Multiplying the cost of production by three (3) percent; and~~
- ~~2. Multiplying the resulting figure by six (6) percent; and~~

~~(b) Report and make monthly payments equal to one-twelfth (1/12) of the total estimated tax.~~

~~Section 6. Four (4) months after the end of each fiscal or calendar year ending subsequent to the date of the authorization, the taxpayer shall:~~

~~(1) File a "Kentucky Sales and Use Tax Energy Exemption Annual Return", Form 51A129, which is incorporated by reference in 103 KAR 3:020, reconciling the estimate to the amount of tax due; or~~

~~(a) Pay the additional tax due; or~~

~~(b) If no additional tax is due, credit the overpayment on next year's estimate or apply for a refund; and~~

~~(2) Make an estimate for the succeeding year and adjust the payment for the months remaining so that the total tax to be paid for the year will agree with the total estimated tax. This estimate shall include the same information required by Section 5 of this administrative regulation.]~~

~~Section 7. An EDP Authorization ["Energy Direct Pay Authorization Notification", Form 51F010,] shall not be used for any purchases other than energy or energy-producing fuels used in the course of manufacturing, processing, mining, or refining and any related distribution, transmission, and transportation services for this energy that are billed to the user.~~

~~Section 8. (1) An EDP Authorization shall not be issued unless the cost of taxable energy or energy-producing fuels used in the course of manufacturing, processing, mining, or refining and any related distribution, transmission, and transportation services for this energy billed to the user during the immediately preceding year exceeds three percent (3%) of the previous year's cost of production.~~

~~(2) For UGRLT calculations, fuels not subject to tax, but used in the course of manufacturing, processing, mining, or refining, shall be included in the cost of production. Examples of fuels not subject to UGRLT include:~~

~~(a) Bottled gases;~~

~~(b) Coal;~~

~~(c) Coke;~~

~~(d) Diesel;~~

~~(e) Fuel oil;~~

~~(f) Gasoline;~~

~~(g) Kerosene;~~

~~(h) Nitrogen;~~

~~(i) Propane; and~~

~~(j) Steam.]~~

~~Section 8. An "Energy Direct Pay Authorization Notification", Form 51F010, shall not be issued unless the cost of energy or energy-producing fuels and any related distribution, transmission, and transportation services for this energy that are billed to the user during the immediately preceding year exceeds three (3) percent of the previous year's cost of production. For~~

~~new taxpayers without a previous year's cost of production history, the taxpayer may submit the estimated energy costs and cost of production for consideration by the department.]~~

Section 9. An operator of a commercial greenhouse shall be considered engaged in a processing operation and shall be eligible to purchase energy and energy-producing fuel and any related distribution, transmission, and transportation services for this energy billed to the user exempt from applicable taxes if the requirements provided in this administrative regulation are met ~~[that are billed to the user exempt from sales and use tax if the cost of the fuel exceeds three (3) percent of the cost of production as provided in Section 5 of this administrative regulation.]~~

Section 10. Forms. The forms referenced herein may be inspected, copied, or obtained, subject to applicable copyright law, at:

- (1) The Kentucky Department of Revenue, 501 High Street, Frankfort, Kentucky 40601;
- (2) A Kentucky Taxpayer Service Center, Monday through Friday, 8:00 a.m. to 4:30 p.m.; or
- (3) The Department of Revenue website at <http://revenue.ky.gov>.

Section 11. (1) This administrative regulation shall replace Revenue Policy 51P020.

(2) Revenue Policy 51P020 is hereby rescinded and shall be null, void, and unenforceable.

THOMAS B. MILLER, Commissioner

APPROVED BY AGENCY: July 13, 2021

FILED WITH LRC: July 13, 2021 at 1:16 p.m.

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on September 22, 2021, at 10:00 a.m. in Room 11A, State Office Building, 501 High Street, Frankfort, Kentucky 40601. The hearing may be conducted by video teleconference at the discretion of the agency. An individual interested in being heard at this hearing shall provide written notification to the agency of the intention to attend the hearing at least five (5) business days prior to the date scheduled for the hearing.. If no notification of intent to attend the hearing is received by that date, the hearing will be cancelled. The hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through September 30, 2021. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Gary Morris, Executive Director, Office of Tax Policy and Regulation, Department of Revenue, 501 High Street, Station 1, Frankfort, Kentucky 40601, phone (502) 564-0424, fax (502) 564-3875, email Gary.Morris@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Gary Morris

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation interprets the sales and use tax and utility gross receipts license tax law as it applies to the purchase of energy and energy producing fuels.

(b) The necessity of this administrative regulation: This administrative regulation is neces-

sary to provide up to date guidance on the purchase of energy and energy producing fuels.

(c) How this administrative regulation conforms to the content of the authorizing statutes: The proposed regulatory language conforms with the provisions of KRS 13A that require an agency to maintain the most up to date guidance and statutory references in its regulations to avoid deficiency.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation updates current regulatory language regarding the sales and use tax Energy Direct Pay Exemption to include recent statutory changes regarding tollers, and provide guidance on the utility gross receipts license tax Energy Direct Pay exemption.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: The amendment will change this existing administrative regulation by updating statutory references within the "RELATES TO" section and body of the regulation, updating the promulgation statement within the "NECESSITY, FUNCTION, AND CONFORMITY" section, adding regulatory guidance for the utility gross receipts license tax Energy Direct Pay exemption, and other clarifying language.

(b) The necessity of the amendment to this administrative regulation: See (1)(b).

(c) How the amendment conforms to the content of the authorizing statutes: See (1)(c).

(d) How the amendment will assist in the effective administration of the statutes: See (1)(d).

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: All current and future sales and use tax or utility gross receipts license tax account holders that are authorized to claim the Energy Direct Pay exemption will be affected by this administrative regulation.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No additional actions are necessary to comply with the amendments.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There are no known additional costs to comply with the amendments to the regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Anyone who accesses the regulation will benefit from the information contained therein.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: There are no expected cost to implement the proposed amendment. Current staff and budgeted funding will absorb the costs to implement this administrative regulation.

(b) On a continuing basis: There is no costs expected on a continual basis.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current departmental staff and funding will be used to implement and enforce this administrative regulation.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: No additional funding or increase in fees is needed.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: No fees are directly or indirectly established or increased by the

proposed regulation.

(9) TIERING: Is tiering applied? Tiering is not applicable as the proposed regulation will be applied equally to all entities impacted by it.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Finance and Administration Cabinet, Department of Revenue.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 131.130(1).

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? No revenues are expected to be generated by this administrative regulation.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None.

(c) How much will it cost to administer this program for the first year? No additional costs will be incurred in the first year of this regulation being in effect.

(d) How much will it cost to administer this program for subsequent years? No additional costs will be incurred in subsequent years.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation: