

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 Kentucky's tax laws. This administrative regulation establishes the requirements for the partial exemptions 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) "Plant facilities" is defined by KRS 139.010(28).

(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.

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.

Section 7. An EDP Authorization 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 (3) percent 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 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

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.

(SU-7-3; 1 Ky.R. 706; eff. 5-14-75; Am. 4 Ky.R. 559; eff. 8-2-1978; 17 Ky.R. 1134; eff. 11-21-1990; 33 Ky.R. 2349; 3155; eff. 5-4-2007; TAM eff. 6-22-2016; 48 Ky.R. 504; eff. 2-1-2022.)

THOMAS B. MILLER, Commissioner

APPROVED BY AGENCY: July 13, 2021

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

PUBLIC HEARING AND 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.