

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I, amendment of ARM 42.25.501, 42.25.502, 42.25.511, 42.25.512, 42.25.514, 42.25.1701, 42.25.1707, and 42.25.1708, and repeal of ARM 42.25.515 and 42.25.1706 pertaining to coal valuation for coal gross proceeds and coal severance tax on coal production)	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION, AMENDMENT, AND REPEAL
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TO: All Concerned Persons

1. On October 12, 2017, at 10:30 a.m., the Department of Revenue will hold a public hearing in the Third Floor Reception Conference Room of the Sam W. Mitchell Building, located at 125 North Roberts, Helena, Montana, to consider the proposed adoption, amendment, and repeal of the above-stated rules. The hearing room is most readily accessed by entering through the east doors of the building facing Sanders Street.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5 p.m. on October 2, 2017, to advise us of the nature of the accommodation you need. Please contact Laurie Logan, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail lalogan@mt.gov.

3. The rule as proposed to be adopted provides as follows:

NEW RULE I RIGHT TO REVIEW RECORDS (1) The department may examine records of coal companies and their related parties, including contracts for the sale of coal, to determine the price of coal. Records obtained shall be considered confidential.

AUTH: 15-35-122, MCA
IMP: 15-35-103, 15-38-109, MCA

REASON: The department proposes adopting New Rule I, to be placed in ARM Title 42, chapter 25, subchapter 17, pertaining to coal severance tax, as a matter of transparency to set forth by rule the department's authority to examine all necessary records when determining the price of coal for the purposes of administering the coal severance tax. As proposed to be adopted, this rule will harmonize with a similar provision provided for in ARM 42.25.514, pertaining to the department's administration of gross proceeds taxes on coal production.

4. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

42.25.501 DEFINITIONS The following definitions apply to this subchapter:

(1) ~~"Agreement not at arm's length transaction"~~ means an a contract, negotiation, or agreement between two or among parties when there are business relationships other than the agreement between the buyer and seller which in the opinion of the department have influenced the sales price where the parties have independent interests and are not related.

(2) remains the same.

(3) ~~"Final destination" means the location where the coal is utilized by the purchaser in any industrial, commercial, or energy conversion process.~~

(4)(3) "FOB mine price" means contract revenue exclusive of all shipping expenses or any other expense incurred by the producer less reasonable and actual costs incurred to transport the taxable coal from the mine to a sales point remote from the mine after the coal has been is prepared for shipment.

(4) "Impute" means to assign a market value to coal by inference under circumstances set forth in 15-35-107, MCA.

(5) ~~"Market value" means an amount determined by multiplying "FOB mine price" of a similar ton of coal, as fixed on the market place, by the number of tons of coal sold the value at which coal would change hands between a willing buyer and a willing seller under market and economic conditions at the time of sale, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. Agreements that are not arm's-length transactions do not reflect the market value of coal.~~

(6) ~~"Third party intermediary" means any individual, corporation, partnership, subsidiary, or other entity which purchases coal on behalf of, or for the benefit of, another party. Any coal purchased by a third party intermediary is considered to be a purchase by a broker and not a purchaser and is not considered the contract sales price for tax purposes.~~

(6) "Related parties" means any relationship that has the ability to influence whether each party has independent interests and could influence a party's independence in negotiating a transaction; or

(a) when any of the following circumstances exist:

(i) Affiliation. The parties are members, affiliates, subsidiaries, or any other affiliations under the same ownership of a parent entity.

(ii) Common control. The parties are, directly or indirectly, under common or joint control.

(iii) Family member. A party is a close family member of a person who is part of key management personnel or who controls another party to a transaction. A close family member is an individual's domestic partner and children, children of the domestic partner, and dependents of the individual or the individual's domestic partner.

(iv) Individual control. A party is controlled or significantly influenced by a member of key management personnel or by a person who controls another party to the transaction.

(v) Joint venture. The parties are members of a joint venture.

(vi) Key management. The parties share key management personnel.

(7) "Related-party transaction" is a contract, negotiation, or agreement between or among related parties, as defined in (6).

(a) Related-party transactions are not considered an arm's-length transaction as that term is defined in (1).

(b) If at any time the parties to an arm's-length transaction become related parties, that agreement shall be considered to be a related-party transaction from that point forward.

AUTH: 15-23-108, MCA

IMP: 15-23-701, 15-23-702, 15-23-703, MCA

REASON: The department proposes amending ARM 42.25.501 to clearly define terms used in this subchapter pertaining to the determination of the market value of the coal.

The definitions of "final destination" and "third party intermediary" are proposed to be removed from the rule because these terms are not used in determining taxable value and therefore do not require defining.

The term "agreement not at arm's-length" is proposed to be changed to "arm's-length transaction" and the definition revised to make it clearer and eliminate unnecessary verbiage.

The definition of the term "FOB mine price" is proposed to be amended to enhance the language by providing the point at which reasonable transportation costs can be reduced from the purchase price of the coal.

The definition of the term "market value" is also proposed to be amended to more clearly provide when a purchase price between a buyer and seller may establish market value of the coal.

The department also proposes adding the term "impute" to the rule to provide the location where the term is defined in statute, for ease of locating.

The department further proposes defining the term "related-parties" to include different circumstances to identify transactions that are not arm's-length and therefore do not establish the market value of coal, and also proposes defining "related-party transaction" to identify what constitutes a transaction among related parties. The department proposes defining these terms to provide guidance in determining how the market value of coal is calculated, for the purposes of applying the rules in this subchapter.

42.25.502 FILING REQUIREMENTS (1) Each year on or before March 31, all persons engaged in mining coal in this state are required to compute and file the current Department of Revenue form "~~gross proceeds #1~~" reflecting the preceding calendar year production. All information requested on this form must be furnished and the form must be signed by an officer of the firm mining the coal.

(2) A person who sells coal under a contract which is not an arm's-length agreement transaction must comply with (1) and must upon request of the department furnish a copy of ~~his~~ their federal income tax return and copies of ~~his~~ their current sales contracts.

(3) A person who is producing coal and who uses the production in ~~his~~ their own manufacturing and/or energy conversion process must comply with (1) and (2).

AUTH: 15-23-108, MCA

IMP: 15-23-701, MCA

REASON: The department proposes amending ARM 42.25.502 to remove an outdated reference to an old gross proceeds tax form and simply direct the taxpayer to use the most current form available instead. The department also proposes adding the words "contract" and "negotiation" in (2), to better depict the arrangements in which coal is exchanged in non-arm's-length transactions to provide the department with sufficient information to properly administer the tax, and updating the terminology in (2) and (3) by replacing the word "his" with "their."

42.25.511 DETERMINATION OF CONTRACT SALES PRICE (1) ~~The department shall determine the contract sales price of the coal is calculated immediately after the point the coal is prepared for shipment to the first arm's-length purchaser, as of the coal. "Prepared for shipment" and "purchaser" are defined in 15-35-102, MCA. To arrive at Contract sales price will be the calculated FOB mine price any shipping or any other expenses incurred after the coal is prepared for shipment may be excluded from the contract revenue. Transportation costs that reduce the contract sales price of the coal shall not reduce the contract sales price below zero. The contract sales price will be determined further adjusted by deducting from either the FOB mine price or a value imputed by the department:~~

(a) and (b) remain the same.

~~(2) In computing production taxes the operator may include that amount which he expects to pay or the amount charged to the purchaser. If the taxes actually paid on the production are more or less than the production taxes deducted and affect the contract sales price, the difference shall be an adjustment in production taxes deducted for the following year.~~

~~(3)(2) Contract sales price should be computed for The formula in (1) should be applied to each contract individually with the exception of those contracts for which the department imputes value. The resource indemnity trust tax and the gross proceeds tax deductions shall be the actual amount charged to the purchaser.~~

AUTH: 15-23-108, MCA

IMP: 15-23-701, 15-23-702, MCA

REASON: The department proposes amending ARM 42.25.511 to provide taxpayers with further guidance regarding how to calculate the contract sales price, as defined in 15-35-102, MCA. As proposed to be amended, this rule will harmonize with ARM 42.25.1707, an identical rule pertaining to coal severance tax that the department is also proposing to amend in this same rulemaking notice.

The department proposes amending (1) to make the language clearer and easier to understand, and proposes eliminating the language in (2) as the cyclical deduction of production taxes is calculated and determined in the current year of the tax filing, eliminating the need to carry forward excess taxes paid in the following

year.

The department further proposes amending newly numbered (2) to make it clear what the section refers to and to remove unnecessary verbiage.

42.25.512 IMPUTED VALUATION ~~(1) The department may impute the value when the coal is sold or used under the following circumstances:~~

~~(a) the operator of a coal mine is using the produced coal in an energy conversion or other manufacturing process; or~~

~~(b) a person sells coal under a contract which is not an arm's length agreement and the transaction price is less than market value.~~

(1) When imputing value pursuant to 15-35-107, MCA, the department may use valuation methods which approximate the value of the coal at its intended market use, including but not limited to comparable sales, comparable sales adjusted to FOB mine price, or published coal sales indexes. Contract term, tonnage, quality, Btu rating, and any other appropriate comparability criteria will be considered.

(2) If using comparable sales in computing value, the department will maintain the confidentiality of all comparable contract data and will use contract data provided by the producer in question whenever possible.

AUTH: 15-23-108, MCA

IMP: 15-23-701, 15-23-702, 15-35-107, 15-38-109, MCA

REASON: The department proposes amending ARM 42.25.512 to further clarify that a variety of valuation methods may be used by the department to impute coal value and to provide those methods in the rule for transparency.

The department proposes striking the existing language in (1) because current statute suffices for describing instances when imputation may be performed. The department proposes new language for (1) to describe methods of imputing value. The department further proposes adding language to the beginning of (2) to better identify what the department is holding confidential and adding 15-38-109, MCA, as an implementing citation for the rule.

As proposed to be amended, this rule will identically harmonize with ARM 42.25.1708, a coal severance tax rule the department is also proposing to amend in this same rulemaking notice.

42.25.514 RIGHT TO AUDIT (1) and (2) remain the same.

AUTH: 15-23-108, MCA

IMP: 15-23-701, 15-23-702, 15-23-703, 15-38-109, MCA

REASON: The department proposes amending ARM 42.25.514 to add 15-38-109, MCA, as an implementing citation in support of the rule. No language changes are being proposed for the rule.

42.25.1701 DEFINITIONS The following definitions apply to this subchapter:

(1) "~~Agreement not at arm's~~ Arm's-length transaction" means ~~an~~ a contract,

negotiation, or agreement between two or among parties when there are business relationships other than the agreement between the buyer and seller which in the opinion of the department have influenced the sales price where the parties have independent interests and are not related.

(2) remains the same.

(3) "Final destination" means the location where the coal is utilized by the purchaser in any industrial, commercial, or energy conversion process.

(4)(3) "FOB mine price" means contract revenue exclusive of all shipping expenses or any other expense incurred by the producer less reasonable actual costs incurred to transport the taxable coal from the mine to a sales point remote from the mine after the coal has been is prepared for shipment.

(4) "Impute" means to assign a market value to coal by inference under circumstances set forth in 15-35-107, MCA.

(5) "Market value" is defined as an amount determined by multiplying "FOB mine price" of a similar ton of coal, as fixed on the market place, by the number of tons of coal sold means the value at which coal would change hands between a willing buyer and a willing seller under market and economic conditions at the time of sale, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. Agreements that are not arm's-length transactions do not reflect the market value of coal.

(6) "Third party intermediary" means any individual, corporation, partnership, subsidiary, or other entity which purchases coal on behalf of, or for the benefit of, another party. Any coal purchased by a third party intermediary is considered to be a purchase by a broker and not a purchaser and is not considered the contract sales price for tax purposes.

(6) "Related parties" means any relationship that has the ability to influence whether each party has independent interests and could influence a party's independence in negotiating a transaction; or

(a) when any of the following circumstances exist:

(i) Affiliation. The parties are members, affiliates, subsidiaries, or any other affiliations under the same ownership of a parent entity.

(ii) Common control. The parties are, directly or indirectly, under common or joint control.

(iii) Family member. A party is a close family member of a person who is part of key management personnel or who controls another party to a transaction. A close family member is an individual's domestic partner and children, children of the domestic partner, and dependents of the individual or the individual's domestic partner.

(iv) Individual control. A party is controlled or significantly influenced by a member of key management personnel or by a person who controls another party to the transaction.

(v) Joint venture. The parties are members of a joint venture.

(vi) Key management. The parties share key management personnel.

(7) "Related-party transaction" is a contract, negotiation, or agreement between or among related parties, as defined in (6).

(a) Related-party transactions are not considered an arm's-length transaction as that term is defined in (1).

(b) If at any time the parties to an arm's-length transaction become related parties, that agreement shall be considered to be a related-party transaction from that point forward.

AUTH: 15-35-122, MCA
IMP: 15-35-103, MCA

REASON: The department proposes amending ARM 42.25.1701 to clearly define terms used in this subchapter pertaining to the determination of the market value of the coal.

The definitions of "final destination" and "third party intermediary" are proposed to be removed from the rule because these terms are not used in determining taxable value and therefore do not require defining.

The term "agreement not at arm's-length" is proposed to be changed to "arm's-length transaction" and the definition revised to make it clearer and eliminate unnecessary verbiage.

The definition of the term "FOB mine price" is proposed to be amended to enhance the language by providing the point at which reasonable transportation costs can be reduced from the purchase price of the coal.

The definition of the term "market value" is also proposed to be amended to more clearly provide when a purchase price between a buyer and seller may establish market value of the coal.

The department also proposes adding the term "impute" to the rule to provide the location where the term is defined in statute, for ease of locating.

The department further proposes defining the term "related-parties" to include different circumstances to identify transactions that are not arm's-length and therefore do not establish the market value of coal, and also proposes defining "related-party transaction" to identify what constitutes a transaction among related parties. The department proposes defining these terms to provide guidance in determining how the market value of coal is calculated, for the purposes of applying the rules in this subchapter.

42.25.1707 DETERMINATION OF CONTRACT SALE PRICE (1) The department shall determine the contract sales price of the coal is calculated immediately after the point the coal is prepared for shipment to the first arm's-length purchaser, as of the coal. "Prepared for shipment" and "purchaser" are defined in 15-35-102, MCA. ~~To arrive at Contract sales price will be the calculated FOB mine price any shipping or any other expenses incurred after the coal is prepared for shipment may be excluded from the contract revenue. Transportations costs that reduce the contract sales price of the coal shall not reduce the contract sales price below zero.~~ The contract sales price will be determined further adjusted by deducting from either the FOB mine price or a value imputed by the department:

(a) and (b) remain the same.

~~(2) In computing production taxes the operator may include the amount that the operator expects to pay or the amount charged to the purchaser. If the taxes actually paid on the production are more or less than the production taxes deducted~~

~~and affect the contract sales price, the difference shall be an adjustment in production taxes deducted for the following year.~~

~~(3)(2) The above formula in (1) should be applied to each contract individually with the exception of those contracts for which the department must impute value. The resource indemnity trust tax and the gross proceeds tax deductions shall be the actual amount charged to the purchaser.~~

AUTH: 15-35-122, MCA

IMP: 15-35-103, MCA

REASON: The department proposes amending ARM 42.25.1707 to provide taxpayers with further guidance regarding how to calculate the contract sales price, as defined in 15-35-102, MCA. As proposed to be amended, this rule will harmonize with ARM 42.25.511, an identical rule pertaining to coal gross proceeds tax that the department is also proposing to amend in this same rulemaking notice.

The department proposes amending (1) to make the language clearer and easier to understand, and proposes eliminating the language in (2) as the cyclical deduction of production taxes is calculated and determined in the current year of the tax filing, eliminating the need to carry forward excess taxes paid in the following year.

The department further proposes amending newly numbered (2) to make it clear what the section refers to and to remove unnecessary verbiage.

42.25.1708 IMPUTED VALUATION ~~(1) The department may impute the value when coal is sold or used under the following circumstances:~~

~~(a) the operator of a coal mine is using the produced coal in an energy conversion or other manufacturing process; or~~

~~(b) a person sells coal under a contract that is not an arm's length agreement, and the transaction price is less than market value.~~

(1) When imputing value pursuant to 15-35-107, MCA, the department may use valuation methods which approximate the value of coal at its intended market use, including but not limited to comparable sales, comparable sales adjusted for FOB mine price, or published coal sales indexes. Contract term, tonnage, quality, Btu rating, and any of the appropriate comparability criteria will be considered.

~~(2) The department will consider market value to mean the FOB mine price of a similar ton of coal, as established by the marketplace. In determining said FOB mine prices, the department will consider the contract term, tonnage, quality, Btu rating, and any other appropriate comparability criteria.~~

(3)(2) The If using comparable sales in computing value, the department will maintain the confidentiality of all comparable contract data and will use contract data provided by the producer in question whenever possible.

AUTH: 15-35-122, MCA

IMP: 15-35-107, 15-38-109, MCA

REASON: The department proposes amending ARM 42.25.1708 to further clarify that a variety of valuation methods may be used by the department to impute

coal value and to provide those methods in the rule for transparency.

The department proposes striking the existing language in (1) because the current statute suffices for describing instances when imputation may be performed. The department proposes new language for (1) to describe methods of imputing value. The department further proposes adding language to the beginning of (2) to better identify what the department is holding confidential and adding 15-38-109, MCA, as an implementing citation for the rule.

As proposed to be amended, this rule will harmonize with ARM 42.25.512, a coal gross proceeds tax rule the department is also proposing to amend in this same rulemaking notice.

5. The department proposes to repeal the following rules:

42.25.515 IMPUTED VALUATION FOR COAL

AUTH: 15-35-122, MCA

IMP: 15-35-107, MCA

REASON: The department proposes repealing ARM 42.25.515 because the content is sufficiently covered in 15-35-107, MCA, and ARM 42.25.512, as proposed to be amended in this same rulemaking notice, rendering this rule no longer necessary.

42.25.1706 IMPUTED VALUATION FOR COAL

AUTH: 15-35-122, MCA

IMP: 15-35-107, MCA

REASON: The department proposes repealing ARM 42.25.1706 because the content is sufficiently covered in 15-35-107, MCA, and ARM 42.25.1708, as proposed to be amended in this same rulemaking notice, rendering this rule no longer necessary.

6. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Laurie Logan, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail lalogan@mt.gov and must be received no later than October 24, 2017.

7. Dan Whyte, Department of Revenue, Director's Office, has been designated to preside over and conduct this hearing.

8. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding a particular subject

matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. A written request may be mailed or delivered to the person in 6 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

9. An electronic copy of this notice is available on the department's web site at revenue.mt.gov/rules, or through the Secretary of State's web site at sos.mt.gov/ARM/register.

10. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

11. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption, amendment, and repeal of the above-referenced rules will not significantly and directly impact small businesses. Documentation of the department's determination is available at revenue.mt.gov/rules or upon request from the person in 6.

/s/ Laurie Logan
Laurie Logan
Rule Reviewer

/s/ Mike Kadas
Mike Kadas
Director of Revenue

Certified to the Secretary of State September 11, 2017.