

1990 Va. Op. Atty. Gen. 223, 1990 Va. Rep. Atty. Gen. 223, 1990 WL 511507 (Va.A.G.)

Office of the Attorney General
Commonwealth of Virginia

*1 September 21, 1990

The Honorable Ford C. Quillen
Member
House of Delegates
Box 339
Gate City, Virginia 24251

My dear Delegate Quillen:

You state that a **coal** mine operator in Wise County severs **coal** in that county and transports it underground to the State of Kentucky, where the **coal** is processed and sold. You ask whether the **coal** mine operator's gross receipts subject to the Wise County **coal severance** tax authorized by [§ 58.1-3712 of the Code of Virginia](#) should exclude the value added to the **coal** by the processing in Kentucky.

I. Applicable Statute

[Section 58.1-3712](#) authorizes a city or county to “levy a license tax on every person engaging in the business of severing **coal** or gases from the earth.” This license tax is based on a percentage of gross receipts from the sale of **coal** or gases severed within the locality. [Section 58.1-3712](#) provides that “[s]uch gross receipts shall be the fair market value measured at the time such **coal** or gases are utilized or sold for utilization in such county or city or at the time they are placed in transit for shipment therefrom.”

II. Fair Market Value of Exported **Coal** Excludes Value Added in Another Jurisdiction

[Section 58.1-3712](#) uses the disjunctive to describe two distinct times at which the fair market value used to determine gross receipts may be measured: (1) when the **coal** is used or sold for use in the taxing locality; or (2) when the **coal** is placed in transit for shipment from the taxing locality. The use of the disjunctive indicates that two separate alternatives were intended. See 1A N. Singer, Sutherland Stat.Const. § 21.14, at 129-30 n. 2 (4th ed. 1985). [Section 58.1-3712](#) thus contemplates that **coal** will be either used or sold for use in the taxing locality or exported for sale in another jurisdiction. In the latter event, the fair market value for purposes of determining gross receipts is measured at the time the **coal** is placed in shipment.

I am of the opinion, therefore, that in the circumstances you present, [§ 58.1-3712](#) requires that the fair market value of the **coal** for purposes of determining taxable gross receipts is the value at the time the **coal** is placed in shipment from Wise County, and should not include value added by the processing of the **coal** in Kentucky. [\[FN1\]](#)

With kindest regards, I am

Sincerely,
Mary Sue Terry
Attorney General

[FN1] Kentucky recently adopted legislation authorizing the taxation of businesses that sever **coal** in another state and process it in Kentucky. See Ch. 163 § 143.025, 1990 Ky.Acts — (Baldwin 1990). The General Assembly may wish to consider similar legislation that would permit the Commonwealth to tax **coal** severed in another state and processed in Virginia. Although the constitutionality of the Kentucky legislation has not yet been tested, the Supreme Court of the United States, in upholding a Montana **coal severance** tax, held that “a state tax does not offend the Commerce Clause if it ‘is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State.’ ” [Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617 \(1981\)](#) (citation omitted).

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