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MEMORANDUM

TO: Lisa C. Swiger, Office of Tax Policy and Regulation, Department of Revenue

FROM: Emily Caudill, Regulations Compiler

RE: Proposed Amendment or New Regulation – 103 KAR 026:131

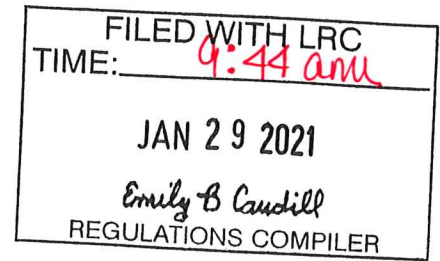
DATE: January 29, 2021

A copy of the administrative regulation listed above is enclosed for your files. This regulation is **tentatively** scheduled for review by the Administrative Regulation Review Subcommittee at its **MAY 2021** meeting. We will notify you of the date and time of this meeting once it has been scheduled.

Pursuant to KRS 13A.280, **if** comments are received during the public comment period, a Statement of Consideration or a one-month extension request for this regulation is due **by noon on May 14, 2021**. Please reference KRS 13A.270 and 13A.280 for other requirements relating to the public hearing and public comment period and Statements of Consideration.

If you have questions, please contact us at RegsCompiler@LRC.ky.gov or (502) 564-8100.

Enclosures



1 FINANCE AND ADMINISTRATION CABINET

2 Department of Revenue

3 (New Administrative Regulation)

4 103 KAR 26:131 Landscaping services.

5 RELATES TO: KRS 139.010, 139.200, 139.260, 139.270, 139.470, 139.480

6 STATUTORY AUTHORITY: KRS 131.130

7 NECESSITY, FUNCTION, AND CONFORMITY: KRS 131.130(1) authorizes the
8 Department of Revenue to promulgate administrative regulations for the administration and
9 enforcement of Kentucky tax laws. This administrative regulation interprets the sales and use tax
10 law as it applies to landscaping services.

11 Section 1. Definitions. (1) “Construction contract” is defined by 103 KAR 26:070, Sec. 1;

12 (2) “Contractor” is defined in 103 KAR 26:070 Sec. 1(2)(a).

13 (3) “Department” means the Department of Revenue.

14 (4) “De minimis threshold exemption” is defined in KRS 139.470(23).

15 (5) “Farm machinery” is defined in KRS 139.480(11).

16 (6) “Landscaping services” includes those services listed in KRS 139.200(2)(g);

17 (7) “Person” is defined in KRS 139.010(26).

18 (8) “Practice of landscape architecture” is defined in KRS 323A.010(3).

19 (9) “Professional services” is defined in KRS 323A.010(4).

20 (10) “Resale certificate” means Resale Certificate Form 51A105, Streamlined Sales and Use

21 Tax Agreement – Certificate of Exemption, Form 51A260, or Multistate Tax Commission’s

1 Uniform Sales and Use Tax Exemption/Resale Certificate – Multi-jurisdiction.

2 (11) “Retailer” is defined in KRS 139.010(35).

3 (12) “Seller” is defined in KRS 139.010(39).

4 (13) “Subcontractor” is defined in 103 KAR 26:070 Sec. 1(2)(a).

5 Section 2. Landscaping services. (1) The furnishing of landscaping services is subject to sales
6 tax pursuant to KRS 139.200(2)(g). Sales tax shall apply to the sales price received from the
7 furnishing of landscaping services.

8 (2) Persons engaged in the business of providing landscaping services are retailers of the
9 landscaping services furnished. Landscaping service providers shall register for, collect, and remit
10 sales tax.

11 (3) The list provided in this subsection shall serve as examples of the furnishing of landscaping
12 services:

13 (a) Aerating;

14 (b) Applying chemicals to lakes or ponds to control the growth of algae or plant life;

15 (c) Bush hogging;

16 (d) Dethatching;

17 (e) Diagnosing lawn conditions for the purpose of providing landscaping services;

18 (f) Fertilizing;

19 (g) Hydro seeding;

20 (h) Installation of decorative bricks, blocks, and timbers such as those installed for a flower
21 bed;

22 (i) Installation of lawn edging, decorative rock, and weed control fabric;

23 (j) Installation of free-standing planter boxes;

- 1 (k) Landscape design and installation services;
- 2 (l) Lawn care and maintenance services;
- 3 (m) Lawn fungus treatments;
- 4 (n) Leaf removal;
- 5 (o) Mowing and trimming;
- 6 (p) Mulching;
- 7 (q) Planting, pruning, bracing, removal, surgery, and trimming of plants, trees, and shrubs;
- 8 (r) Raking, including power raking;
- 9 (s) Seeding or reseeding;
- 10 (t) Services for the removal of gophers, moles, voles and other lawn pests;
- 11 (u) Snow plowing or removal services;
- 12 (v) Sod laying;
- 13 (w) Soil moving, grading, removal, or installation as part of a landscaping service (such as
- 14 removing a top layer of soil to install sod);
- 15 (x) Spraying or other applications of chemicals and fertilizer within the landscape. Examples
- 16 include:
- 17 1. Granular and liquid lawn fertilizers;
- 18 2. Lime applications;
- 19 3. Seed and fertilizer combination applications;
- 20 4. Herbicides; or
- 21 5. Insecticides, including those to eliminate grubs, ants, fleas, and ticks.
- 22 (y) Stump removal;
- 23 (z) Tilling and soil preparation;

1 (aa) Turf installation; or

2 (bb) Watering, including the installation of soak hoses.

3 Section 3. Non-landscaping Services. The list provided in this section shall serve as examples
4 of activities not considered the furnishing of landscaping services:

5 (1) Vegetative management of highway rights-of-way including mowing, line trimming, and
6 tree trimming;

7 (2) Vegetative management of utility rights-of-way including mowing, line trimming, and tree
8 trimming;

9 (3) Perpetual care of gravesites at a cemetery;

10 (4) Government-mandated land reclamation at a mining site;

11 (5) Mosquito spraying services;

12 (6) Professional services authorized as part of the licensed practice of professional landscape
13 architecture provided under separate contract from landscape design and installation services;

14 (7) Mowing, spraying, tree trimming, and fence clearing, provided to a person regularly
15 engaged in the business of farming and provided on land that is:

16 (a) Being cultivated for the production of crops as a business;

17 (b) Being directly used in the occupation of raising and feeding livestock or poultry for sale;

18 (c) Being directly used in the occupation of producing milk for sale;

19 (d) Being directly used in the occupation of egg production;

20 (e) Being directly used in the occupation of breeding or producing:

21 1. Aquatic organisms;

22 2. Buffalos;

23 3. Cervids;

1 4. Llamas or alpacas; or

2 5. Ratites; and

3 (8) Mowing, spraying, tree trimming, and fence clearing, provided to a person engaged in the
4 raising of equine as a business; provided however, that the landscaping services are performed on
5 the portion of land directly used in the raising of equine.

6 Section 4. Property purchased for resale by persons furnishing landscaping services. (1)

7 Persons furnishing landscaping services may issue a fully completed resale certificate for the
8 purchase of property to be resold to a customer when furnishing the landscaping services where
9 the property remains with the customer after the furnishing of landscaping services. The purchaser
10 of the property to be resold to a customer when furnishing the landscaping services shall collect
11 sales tax from the customer on the sales price of the property.

12 (2) The list provided in this subsection shall serve as examples of property purchased for resale
13 that demonstrate the types of property that generally are received by, or remain with, the customer
14 after landscaping services are performed:

15 (a) Bulbs;

16 (b) Bushes;

17 (c) Chemicals;

18 (d) Dirt;

19 (e) Fertilizer;

20 (f) Insecticides;

21 (g) Landscaping materials;

22 (h) Lawn care chemicals;

23 (i) Mulch;

- 1 (j) Rock;
- 2 (k) Shrubs;
- 3 (l) Sod;
- 4 (m) Trees; or
- 5 (n) Weed barriers.

6 Section 5. Property used or consumed by persons furnishing landscaping services. (1) Persons
7 furnishing landscaping services shall not issue a resale certificate for property used or consumed
8 in the performance of the landscaping services. Property sold to landscaping service providers and
9 used or consumed by the landscaping service providers when furnishing landscaping services shall
10 be subject to sales tax at the time of purchase by the landscaping service provider.

11 (2) The list provided in this subsection shall serve as examples of property consumed in the
12 performance of landscaping services:

- 13 (a) Chemical applicators;
- 14 (b) Equipment rentals;
- 15 (c) Gasoline;
- 16 (d) Gloves;
- 17 (e) Lawnmowers;
- 18 (f) Oil;
- 19 (g) String trimmers, string trimmer lines and spools;
- 20 (h) Tools; or
- 21 (i) Wheelbarrows.

22 Section 6. Resale of landscaping services. (1) A person furnishing landscaping services may
23 issue a fully completed resale certificate to another person furnishing landscaping services for the

1 purchase of the landscaping services that will be resold to the end consumer. The purchaser of the
2 landscaping services to be resold shall collect sales tax from the end consumer on the sales price
3 for the furnished landscaping services.

4 (2) Example. Landscaping services provider A may issue a fully completed resale certificate
5 to landscaping services provider B for the purchase of lawn mowing services to fulfill his
6 obligations to the end consumer. Landscaping services provider A shall collect the sales tax from
7 the end consumer on the sales price of the landscaping services.

8 (3) A contractor or subcontractor shall not issue a resale certificate for the purchase of
9 landscaping services.

10 Section 7. De Minimis threshold exemption. (1) Transactions are exempt from tax for the
11 furnishing of landscaping services or the furnishing of landscaping services combined with other
12 services listed in KRS 139.200(h) through (q) when a service provider's receipts have never
13 exceeded the de minimis threshold exemption in a calendar year. Gross receipts from the
14 furnishing of landscaping services that exceed the de minimis threshold exemption amount in a
15 calendar year shall be subject to sales tax. All subsequent receipts in the calendar year and all
16 gross receipts for each calendar year thereafter are subject to sales tax.

17 (2) The de minimis threshold exemption described in subsection 1 of this section does not
18 apply if the landscaping services provider is also engaged in the business of selling tangible
19 personal property or digital property, or furnishing other services listed under KRS 139.200(2)(a)
20 to (f). For example, if a landscaping services provider also sells grass seed, weed and feed, lawn
21 equipment, or other similar products at retail, then all of the sales (both landscaping services and
22 sales of tangible personal property) shall be subject to sales tax.

23 Section 8. Non-taxable services and exemptions for purchases applicable to landscaping

1 services providers engaged in dual businesses. (1) This section applies to persons engaged in
2 furnishing landscaping services that are also engaged in a dual business.

3 (2) Contractors and subcontractors are subject to Regulation 103 KAR 26:070.

4 (3) When a person furnishing landscaping services also operates as a contractor or
5 subcontractor, the following list shall serve as examples of services not considered to be
6 landscaping services when performed by a contractor or subcontractor to fulfill the terms on a
7 construction contract.

8 (a) Installation, repair, or removal of the following:

9 1. Berm walls;

10 2. Driveways, sidewalks, parking areas, and patios, including those constructed of asphalt,
11 brick, concrete, crushed stone, or gravel;

12 3. Decks;

13 4. Fences;

14 5. Fountains or other water works installed as plumbing fixtures;

15 6. Gazebos;

16 7. In-ground sprinkler and irrigation systems;

17 8. Masonry, stone setting, terrazzo, tile marble, or mosaic work;

18 9. Ponds, excluding decorative or ornamental ponds; or

19 10. Retaining Walls, including those constructed of block, stone, or brick;

20 (b) Land clearing, excavation, erosion control, and finish grading for the construction of a
21 permanent structure.

22 (4) Purchases of tangible personal property such as building materials, fixtures, and supplies
23 that are to be incorporated or fabricated into any structure or any improvement to real estate are

1 subject to sales and use tax at the time of the sale to the contractor or subcontractor furnishing
2 landscaping services in conjunction with his business as a contractor or subcontractor.

3 (5) When a person furnishing landscaping services is also acting as a retailer of tangible
4 personal property, and sells tangible personal property to a person who is claiming an exemption,
5 the retailer shall not be relieved of the burden of collecting the tax until the purchaser provides
6 the retailer with a fully completed certificate of exemption or a direct pay authorization.

7 Section 9. Forms. The forms incorporated by reference into this administrative regulation may
8 be inspected, copied, or obtained, subject to applicable copyright law, at:

9 (1) The Kentucky Department of Revenue, 501 High Street, Frankfort, Kentucky 40601;

10 (2) A Kentucky Taxpayer Service Center, Monday through Friday, 8:00 a.m. to 4:30 p.m.; or

11 (3) The Department or Revenue website at <http://revenue.ky.gov>.

103 KAR 26:131

APPROVED BY AGENCY:

Thomas B. Miller

THOMAS B. MILLER, COMMISSIONER
Department of Revenue
Finance and Administration Cabinet

January 13, 2021
Date

PUBLIC HEARING AND PUBLIC COMMENT PERIOD

A public hearing on this administrative regulation shall be held on April 22, 2021, at 10:00 a.m. in Room 11A, State Office Building, 501 High Street, Frankfort, KY 40601. In the event the declaration of a State of Emergency in Executive Order 2020-215 is not rescinded by this time, this hearing will be conducted by video teleconference. Individuals interested in being heard at this hearing shall notify this agency in writing by five (5) workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This 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 April 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: Lisa Swiger, Tax Policy Research Consultant II, Department of Revenue, 501 High Street, Station 1, Frankfort, Kentucky, 40601, (502) 564-9526 (telephone), (502) 564-3875(fax), Lisa.Swiger@ky.gov (email).

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation No. 103 KAR 26:131

Contact Person: Lisa Swiger
Phone Number: (502) 564-9526
Email: Lisa.Swiger@ky.gov

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation interprets the sales and use tax law as it applies to landscaping services.

(b) The necessity of this administrative regulation: This administrative regulation is necessary to provide up to date guidance regarding landscaping services due to the 2018 statutory changes in KRS 139.200 which made these services taxable.

(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: The proposed regulatory language provides guidance on the taxability of landscaping services.

(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: Not applicable. This is a new regulation.

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

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

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

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: All landscaping service providers as well as their customers.

(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. This administrative regulation does not add any requirements, it is only intended to provide clarification of the law and guidance to landscapers on what services are taxable.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is no cost to comply. This administrative regulation does not add any additional fees or costs to be incurred by landscapers.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Anyone who accesses the administrative 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: It is not anticipated that there will be any additional costs to implement this

administrative regulation. Additional costs that may have been created by the statutory changes (for example, taxpayer outreach efforts to inform the general public of the changes in KRS 139.200) have already been, and will continue to be, absorbed through current staff and budgeted funding. Current staff are already answering questions to provide guidance on landscaping services.

(b) On a continuing basis: There is no additional cost 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 proposed 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? (Explain why or why not): 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

Regulation No. 103 KAR 26:131

Contact Person: Lisa Swiger
Phone Number: (502) 564-9526
Email: Lisa.Swiger@ky.gov

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 expenditures or revenues are expected to be generated for state or local agencies by this administrative regulation. This administrative regulation only provides clarification of the current statute that has been in effect since July 1, 2018.

(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 that is known.

(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: