

1 FINANCE AND ADMINISTRATION CABINET

2 Department of Revenue

3 (Amendment)

4 103 KAR 30:190. Interstate and foreign commerce

5 RELATES TO: KRS 139.010, 139.105, 139.260, 139.340, 139.470, 139.486

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 [~~To interpret the~~] sales
10 and use tax law as it applies to sales in interstate and foreign commerce. The purpose of this
11 administrative regulation is to state, generally, the application of the Commerce Clause of the
12 Constitution of the United States of America to the sales and use tax law.

13 Section 1. Definitions. (1) "Consummated" means the point at which a sales transaction is
14 completed and accepted to the extent that both the seller and the purchaser are legally committed
15 to fulfill the transaction.

16 (2) "Industrial machinery" is defined by KRS 139.486(1).

17 (3) "Receive" means:

18 (a) Taking possession of tangible personal property;

19 (b) Making first use of services; or

20 (c) Taking possession or making first use of digital products, whichever comes first; and

21 (d) "Receive" does not include possession by a shipping company on behalf of the purchaser.

1 (3) "Seller" is defined by KRS 139.010(39).

2 (4) "Use" is defined by KRS 139.010(44).

3 ~~[The purpose of this administrative regulation is to state generally the application of the~~
4 ~~Commerce Clause of the Constitution of the United States to the Sales and Use Tax Law.]~~

5 Section 2. Sales Tax: Transactions Consummated in Kentucky. (1) Where tangible personal
6 property is located in this state at the time of its sale [~~(f) or is subsequently produced in this state(f)~~],
7 and then delivered in this state to the purchaser, the seller shall be [~~is-~~]subject to the sales tax if the
8 sale is at retail and is consummated in Kentucky. A sale shall not be [~~is not-~~]presumed to be made
9 in interstate commerce if the purchaser or its [~~his-~~]representative receives [~~physical-~~]possession of
10 tangible personal property, receives digital property or makes first use of taxable services [~~such~~
11 ~~property~~] in this state. This is true notwithstanding the fact that the purchaser may, after receiving
12 [~~physical~~] the property in this state, transport or send the property out of the state for use outside
13 the state or for use in the conduct of interstate commerce.

14 (2) (a) The sales tax shall [~~does-~~]not apply to gross receipts from sales if, under the terms of its
15 agreement with the purchaser, the seller makes delivery of tangible personal property sold from a
16 point in this state to a point outside this state, not to be returned to a point within this state if
17 delivery is actually made. Tangible personal property may be delivered by carrier, mail, or any
18 other method of delivery.

19 (b) The sales tax shall not apply if a shipping company, on behalf of a purchaser, takes
20 possession of the tangible personal property in this state for delivery outside this state, not to be
21 returned to a point within this state, and delivery is actually made.

22 (3) The sales tax shall not apply to gross receipts from sales of tangible personal property to a
23 common carrier under the conditions that are exempt pursuant to KRS 139.470(4).

1 (a) ~~[in which the seller is obligated, under the terms of his agreement with the purchaser, to~~
2 ~~make physical delivery of the goods sold from a point in this state to a point outside this state, not~~
3 ~~to be returned to a point within this state, provided that such delivery is actually made. The tax~~
4 ~~does not apply to gross receipts from sales in which the seller, under the terms of his agreement~~
5 ~~with the purchaser, delivers the goods by carrier or by mail from a point in this state to a point~~
6 ~~outside this state not to be returned to a point within this state.~~

7 (3) ~~Pursuant to KRS 139.470(5), the sales tax does not apply to gross receipts from sales of~~
8 ~~tangible personal property to a common carrier, shipped by the seller via the purchasing carrier~~
9 ~~under a bill of lading, whether the freight is paid in advance or the shipment is made freight charges~~
10 ~~collect, to a point outside this state and the property is actually transported to an out-of-state~~
11 ~~destination for use by the carrier in the conduct of its business as a common carrier.]~~

12 Normally, when a sale by a Kentucky retailer involves a transfer of title and possession of the
13 goods to the purchaser outside this state, the sale shall not be ~~[is not]~~ subject to Kentucky sales
14 tax. The purpose of the exemption in KRS 139.470(4)~~(5)~~ is to place common carriers on the same
15 footing as other out-of-state purchasers who take title and possession of goods outside this state
16 ~~[out-of-state]~~ without requiring retailers to use some other common carrier to transport the goods
17 outside this state ~~[out-of-state]~~ to the purchasing common carrier. Thus, the exemption shall apply
18 ~~only applies~~ to tangible personal property shipped as cargo via the purchasing carrier. It shall
19 ~~does~~ not apply to tangible personal property placed in use by the purchasing common carrier in
20 this state.

21 (b) Examples of when the exemption shall ~~does~~ apply include:

22 1. Bulk ~~[bulk]~~ purchases of inventory items by a common carrier for immediate transport and
23 storage outside this state;

1 2. Purchases [~~purchases~~] of tangible personal property by a common carrier for immediate
2 shipment outside this state [~~out of state~~] without removal of the property from its original
3 container within this state; and

4 3. Purchases [~~purchases~~] of jet fuel by a common carrier placed in a tanker vehicle in this state
5 for immediate transport outside this state [~~out of state~~] where the fuel will be placed in the tanks
6 of the planes which will consume it.

7 (c) Examples of when the exemption shall [~~does~~] not apply include:

8 1. Purchases [~~purchases~~] of repair parts by a common carrier for the carrier's own vehicles
9 which are installed with—in this state;

10 2. Purchases [~~purchases~~] of components and furnishings for the common carrier's vehicles
11 which are placed in use in this state; and

12 3. Purchases [~~purchases~~] of jet fuel placed in the tanks of the common carrier's plane which
13 will consume it within this state, regardless of whether all of the fuel purchased will be consumed
14 within this state.

15 (d) Mere compliance with the bill of lading requirements pursuant to KRS 139.470(4) shall not
16 exempt a purchase [~~of the exemption statute does not entitle a purchase to exempt status~~] if the
17 tangible personal property is placed in use before leaving this state.

18 (4) The sales tax shall [~~does~~] not apply to gross receipts from sales of property sold to a foreign
19 purchaser for shipment abroad and delivered to a ship, airplane, or other conveyance furnished by
20 the purchaser for the purpose of carrying the property abroad if the property is actually carried to
21 a foreign destination, with title and control of the property passing to the foreign purchaser upon
22 delivery, and no portion of the property is being used or consumed in the United States.

23 (5) The sales tax shall not apply to gross receipts from sales of industrial machinery for use out

1 of state pursuant to KRS 139.486. ~~[As defined by KRS 139.486 when such machinery is delivered~~
2 ~~to a manufacturer or processor, or their agent for use out of state. Industrial machinery will be~~
3 ~~presumed for sale, use, storage or consumption out of state if:~~

4 (a) ~~Delivery is to a common carrier, whether chosen by the seller or by the purchaser, and~~
5 ~~whether F.O.B. seller's shipping point or F.O.B. purchaser's destination, provided the shipping~~
6 ~~document indicates delivery to a location outside the state; or~~

7 (b) ~~Delivery is made by seller's own transportation vehicles to a location outside the state.]~~

8 (6) To establish that the gross receipts from any given sale are exempt because the tangible
9 personal property is delivered by the seller from a point within this state to a point outside this
10 state, under the terms of an agreement with the purchaser, the seller shall ~~[will]~~ be required to
11 retain in its ~~[his]~~ records documentary evidence which satisfies the department ~~[cabinet]~~ that there
12 was such an agreement and a bona fide delivery outside this state of the property ~~[which was]~~ sold.

13 Section 3. Use Tax: Transactions Consummated Outside Kentucky. (1) The use tax shall apply
14 ~~[applies]~~ to sales consummated outside Kentucky when the tangible personal property sold is
15 delivered ~~[shipped]~~ to the purchaser in this state or digital property is purchased for storage, use,
16 or other consumption in this state. Examples of ~~[]~~ transactions subject to use tax shall include:

17 (a) An order for goods ~~[is]~~ consummated ~~[completed and accepted (consummated)]~~ outside
18 Kentucky and the seller's branch office or other place of business in this state is utilized in any
19 way, such as in receiving the order, distributing the goods, ~~[and]~~ or billing for the merchandise; ~~[;~~
20 ~~or]~~

21 (b) An order for goods ~~[is]~~ given in this state to an agent of an out-of-state seller who transmits
22 the order to a point outside Kentucky for acceptance; ~~[;]~~ or

23 (c) An order for goods that results from the solicitation in this state of the purchaser by an agent

1 of an out-of-state seller and the order is sent by the purchaser directly to a point outside Kentucky
2 for acceptance.

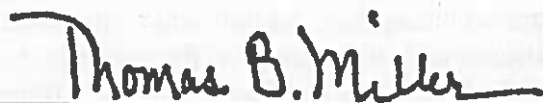
3 (2) The use tax applies with respect to any tangible personal property or digital property
4 purchased for storage, use, or other consumption in this state, the sale of which is exempt from
5 sales tax under this administrative regulation, except property not subject to the sales or use tax or
6 property held or stored in this state for sale in the regular course of business or subsequent use
7 solely outside this state, and except property purchased for use in interstate or foreign commerce,
8 placed in use in interstate or foreign commerce, prior to its entry into this state, and thereafter used
9 continuously in interstate or foreign commerce.

10 ~~[(3) "Storage" and "use" do not include the keeping, retaining, or exercising any right or power~~
11 ~~over tangible personal property for the purpose of subsequently transporting it outside the state for~~
12 ~~use thereafter solely outside the state, or for the purpose of being processed, or manufactured into,~~
13 ~~attached to, or incorporated into, other tangible personal property to be transported outside the~~
14 ~~state and thereafter used solely outside the state.~~

15 ~~Section 4. The term "consummated" as used in this administrative regulation means the point~~
16 ~~at which a sales transaction is completed and accepted to the extent that both the seller and the~~
17 ~~purchaser are legally committed to fulfill the transaction.]~~

103 KAR 30:190

APPROVED BY AGENCY:



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

07/13/2021

Date

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, KY 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, (502) 564-0424 (telephone), (502) 564-3875(fax) Gary.Morris@ky.gov (email).

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation No. 103 KAR 30:190

Contact Person: Gary Morris
Phone Number: (502) 564-0424
Email: Gary.Morris@ky.gov

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation is an amendment that updates regulatory language to clarify previous guidance contained, update definitions and make updates to conform with 13A drafting requirements related to transactions in interstate and foreign commerce.

(b) The necessity of this administrative regulation: The amendment is necessary to update outdated regulatory language; to clarify the guidance previously contained herein; to clarify previous guidance contained, update definitions and make updates to conform with 13A drafting requirements

(c) How this administrative regulation conforms to the content of the authorizing statutes: The proposed amendment updates regulatory language to conform with KRS 131.130 and KRS 131.131.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: The proposed amendment updates regulatory language to clarify the tax treatment of transactions in interstate and foreign commerce.

(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 adding definitions for "industrial machinery", "seller", and "use", moving the definitions for "consummated" and "receive" into Section 1 per 13A drafting requirements, updating other 13A requirements (for instance, "shall" versus "will"), adding statutory references, and clarifying language on the tax treatment of transactions in interstate and foreign commerce.

(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 individuals, businesses and organizations, or state and local governments that provide sell or buy in interstate and foreign commerce would be affected by the amendment to this 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 required by the amendment to the regulation.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): No additional actions are required by complying with the amendment to the regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question

(3): Taxpayers will benefit from the updated guidance herein to help them stay in good standing with the Department of Revenue.

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

(a) Initially: There is no expected cost to implement the proposed amendment.

(b) On a continuing basis: There is no 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 amendment.

(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 amendment.

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

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation No. 103 KAR 30:190

Contact Person: Gary Morris
Phone Number: (502) 564-0424
Email: Gary.Morris@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 is the only government entity impacted by this amendment.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 131.130 and KRS 131.131.

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? None.

(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 (+/-): + See 3.(a) for explanation.

Expenditures (+/-): None.

Other Explanation:

