WEST VIRGINIA CODE CHAPTER 11 ARTICLE 10E

WV Legislature

§11-10E-1. Short title.

This article may be cited as the "Tax Shelter Voluntary Compliance Act."

WV Legislature

§11-10E-2. Tax shelter voluntary compliance program.

(a) In general. -- The Tax Commissioner shall establish and administer a tax shelter voluntary compliance program for eligible taxpayers subject to tax under article twenty-one and article twenty-four of this chapter. The program shall be conducted from August 1, 2006, through November 1, 2006, and shall apply to personal income tax and corporation net income tax liabilities attributable to the use of tax avoidance transactions for taxable years beginning before January 1, 2006.

(b) The department is authorized to adopt rules (including interpretive and emergency rules), issue forms and instructions, issue administrative notices, and take such other actions as it deems necessary to implement the provisions of this article.

(c) Election. -- An eligible taxpayer that meets the requirements of subsection (d) of this section with respect to any taxable year to which this article applies may elect to participate in the program under either method below for any particular tax avoidance transaction period. Such election shall be made separately for each taxable year in the form and manner prescribed by the Tax Commissioner, and once made shall be irrevocable.

(1) Voluntary compliance without appeal. -- If an eligible taxpayer elects to participate under this paragraph: (i) The Tax Commissioner shall abate and not seek to collect any penalty that may be applicable to the underreporting or underpayment of West Virginia income tax attributable to the use of tax avoidance transactions for such taxable year; (ii) except as otherwise provided in this article, the Tax Commissioner shall not seek civil or criminal prosecution against the taxpayer for such taxable year with respect to tax avoidance transactions; and (iii) the taxpayer may not file a claim for credit or refund with respect to the tax avoidance transaction for such taxable year. Nothing in this subsection shall preclude a taxpayer from filing a claim for credit or refund for the same taxable year in which a tax avoidance transaction was reported if such credit or refund is not attributable to the tax avoidance transaction. No penalty may be waived or abated under this article if the penalty imposed relates to an amount of West Virginia income tax assessed prior to August 1, 2006.

(2) Voluntary compliance with appeal. -- If an eligible taxpayer elects to participate under this paragraph, then: (i) The Tax Commissioner shall abate and not seek to collect the penalties for failure to report listed transactions, with respect to such taxable year; (ii) except as otherwise provided in this article, the Tax Commissioner shall not seek civil or criminal prosecution against the taxpayer for such taxable year with respect to tax avoidance transactions; and (iii) the taxpayer may file a claim for credit or refund as provided in article ten of this chapter with respect to such taxable year. Notwithstanding any other provision of the code to the contrary, the taxpayer may not file an appeal until after either of the following: (i) The Tax Commissioner issues a notice of denial; or (ii) the earlier of: (1) The date which is one hundred eighty days after the date of a final determination by the Internal Revenue Service with respect to the transactions at issue; or (2) the date that is three years after the date the claim for refund was filed or one year after full payment of all

WV Legislature

tax, including penalty and interest. No penalty may be waived or abated under this article if the penalty imposed relates to an amount of West Virginia income tax assessed prior to August 1, 2006.

(d) Eligible taxpayer. -- The tax shelter voluntary compliance program applies to any eligible taxpayer who, during the period from August 1, 2006, to November 1, 2006, does both of the following: (1) Files an amended return for the taxable year for which the taxpayer used a tax avoidance transaction to underreport the taxpayer's West Virginia income tax liability, reporting the total West Virginia taxable income and income tax for such taxable year computed without regard to any tax avoidance transactions; and (2) makes full payment of the additional income tax and interest due for such taxable year that is attributable to the use of the tax avoidance transaction. For purposes of this subsection (d), if the Tax Commissioner subsequently determines that the correct amount of West Virginia income tax was not paid for the taxable year, then the penalty relief under this section shall not apply to any portion of the underpayment not paid to the state that is attributable to a tax avoidance transaction.

An "eligible taxpayer" is an individual, partnership, estate, trust, corporation, limited liability company, joint stock company, or any other company, trustee, receiver, assignee, referee, society, association, business or any other person as described in the tax law, who or which has a tax liability relating to income tax imposed under article twenty-one or article twenty-four of this chapter. However, an otherwise eligible taxpayer would be prohibited from participating in the voluntary compliance initiative if:

(a) The taxpayer is a party to any federal or state criminal investigation for underreporting or underpayment of tax;

(b) As of the taxpayer's application date under the voluntary compliance initiative, the taxpayer is a party to any pending administrative proceeding or civil or criminal litigation relating to the designated taxes under the voluntary compliance initiative. An administrative proceeding or civil litigation shall be deemed not to be pending on the application date if the taxpayer withdraws from that proceeding or litigation before the Tax Commissioner's penalty waiver under the voluntary compliance initiative;

(c) The taxpayer has a criminal conviction concerning the tax on which penalty relief is sought; or

(d) The taxpayer was eligible to participate in the amnesty program under article ten-d of this chapter but did not do so, and the taxpayer participated in the voluntary compliance programs of any other state.

WV Legislature

§11-10E-3. "Tax avoidance transaction" defined.

For purposes of this article, the term "tax avoidance transaction" means a plan or arrangement devised for the principal purpose of avoiding federal or state income tax or both. Tax avoidance transactions include, but are not limited to, "listed transactions" as defined in Treasury Regulations Section 1.6011-4(b)(2).

WV Legislature

§11-10E-4. Use of evidence of participation in the program.

The fact of a taxpayer's participation in the tax shelter voluntary compliance program shall not be considered evidence that the taxpayer in fact engaged in a tax avoidance transaction.

WV Legislature

§11-10E-5. Reportable transactions.

(a) For each taxable year in which a taxpayer is required to make a disclosure statement under Treasury Regulations Section 1.6011-4 (26 CFR 1.6011-4) (including any taxpayer that is a member of a consolidated group required to make such disclosure) with respect to a reportable transaction (including a listed transaction) in which the taxpayer participated in a taxable year for which a return is required, such taxpayer shall file a copy of such disclosure with the Tax Commissioner. Disclosure under this subsection is required to be made by any taxpayer that is a member of a unitary business group that includes any person required to make a disclosure statement under Treasury Regulations Section 1.6011-4. Disclosure under this subsection is required with respect to any transaction entered into after February 28, 2000, that becomes a listed transaction at any time, and shall be made in the manner prescribed by the Tax Commissioner. With respect to transactions in which the taxpayer participated for taxable years ending before December 31, 2004, disclosure shall be made by the due date (including extensions) of the first annual return due after the effective date of this article. With respect to transactions in which the taxpayer participated for taxable years ending on and after December 31, 2004, disclosure shall be made in the time and manner prescribed in Treasury Regulations Section 1.6011-4(e). Notwithstanding the above, no disclosure is required for transactions entered into after February 28, 2000, and before January 1, 2005: (i) If the taxpayer has filed an amended West Virginia income tax return which reverses the tax benefits of the potential tax avoidance transaction; or (ii) as a result of a federal audit the Internal Revenue Service has determined the tax treatment of the transaction and a West Virginia amended return has been filed to reflect the federal treatment.

(b) Reportable transaction understatement penalty. -- If a taxpayer has a reportable transaction understatement for any taxable year, there shall be added to the tax an amount equal to twenty percent of the amount of that understatement. This penalty shall be deemed assessed upon the assessment of the tax to which such penalty relates and shall be collected and paid on notice and demand in the same manner as the tax.

(1) Reportable transaction understatement. -- For purposes of this section, the term "reportable transaction understatement" means the product of: (i) The amount of the increase (if any) in taxable income, as determined by reference to the amount of post-apportioned income that results from a difference between the proper tax treatment of an item to which this subsection applies and the taxpayer's treatment of that item as shown on the taxpayer's return, including an amended return filed prior to the date the taxpayer is first contacted by the Tax Commissioner regarding the examination of the return; and (ii) the applicable tax rates.

(2) Items to which subsection (b) applies. -- This subsection shall apply to any item which is attributable to either of the following: (i) any listed transaction as defined in Treasury Regulations Section 1.6011-4; and (ii) any reportable transaction as defined in Treasury Regulations Section 1.6011-4 (other than a listed transaction) if a significant purpose of the transaction is the avoidance or evasion of federal income tax.

www.LegisNexis

(3) Subsection (b) shall be applied by substituting thirty percent for twenty percent with respect to the portion of any reportable transaction understatement with respect to which the requirements of this subsection are not met.

(4) Reasonable cause exception. --

(A) In general. -- No penalty shall be imposed under this subsection with respect to any portion of a reportable transaction understatement if it is shown by clear and convincing evidence that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.

(B) Special rules. -- Subparagraph (A) does not apply to any reportable transaction (including a listed transaction) unless all of the following requirements are met:

(C)The relevant facts affecting the tax treatment of the item are adequately disclosed in accordance with this article. A taxpayer failing to adequately disclose shall be treated as meeting the requirements of this subparagraph: (i) If the penalty for that failure was rescinded; (ii) there is or was substantial authority for such treatment; and (iii) the taxpayer reasonably believed that such treatment was more likely than not the proper treatment.

(c) One hundred percent interest penalty for failure to participate. -- If an eligible taxpayer who fails to participate in the program is contacted by the Internal Revenue Service or the Tax Commissioner regarding the potential use of a tax avoidance transaction with respect to a taxable year and has a deficiency with respect to such taxable year or years, there shall be added to the tax attributable to the potential tax avoidance transaction an amount equal to one hundred percent of the interest due under article ten of this chapter for the period beginning with the statutory due date of the return (determined without regard to extensions) on which the income should have been reported to the date of the notice of assessment. Such penalty shall be deemed assessed upon the assessment of the interest to which such penalty relates and shall be collected and paid in the same manner as such interest. The penalty imposed by this subsection is in addition to any other penalty imposed by this article or article ten. This subsection shall apply to taxable years ending on and after December 31, 2005.

(d) Coordination with other penalties. -- Unless provided otherwise by rules, the penalties imposed by this section are in addition to any other penalty imposed by this article or article ten of this chapter.

WV Legislature

§11-10E-6. Failure to register tax shelter or maintain list.

(a) Penalty imposed. -- Any person that fails to comply with the requirements of section eight or section nine of this article shall incur a penalty as provided in subsection (b). A person shall not be in compliance with the requirements of section eight unless and until the required registration has been filed and contains all of the information required to be included with such registration under such section eight or Section 6111 of the Internal Revenue Code. A person shall not be in compliance with the requirements of section nine unless, at the time the required list is made available to the Tax Commissioner, such list contains all of the information required to be maintained under such section nine or Section 6112 of the Internal Revenue Code.

(b) Amount of penalty. -- The following penalties apply:

(1) In the case of each failure to comply with the requirements of subsection (a), subsection (b) or subsection (d) of section eight, the penalty shall be $10,000;

(2) If the failure to comply with the requirements of subsection (a), subsection (b) or subsection (d) of section eight is with respect to a listed transaction described in subsection (c) of section eight, the penalty shall be $100,000;

(3) In the case of each failure to comply with the requirements of subsection (a) or subsection (b) of section nine, the penalty shall be $10,000; and

(4) If the failure to comply with the requirements of subsection (a) or subsection (b) of section nine is with respect to a listed transaction described in subsection (c) of section nine, the penalty shall be $100,000.

(c) Authority to rescind penalty. -- The office of tax appeals, with the written approval of the Tax Commissioner, may rescind all or any portion of any penalty imposed by this section with respect to any violation only if one or more of the following apply: (1) It is determined that failure to comply did not jeopardize the best interests of the state and is not due to any willful neglect or any intent not to comply; (2) it is shown that the violation is due to an unintentional mistake of fact; (3) rescinding the penalty would promote compliance with the requirements of this article and effective tax administration; or (4) the taxpayer can show that there was reasonable cause for the failure to disclose and that the taxpayer acted in good faith.

(d) Coordination with other penalties. -- The penalty imposed by this section is in addition to any penalty imposed by this article or article ten of this chapter.

WV Legislature

§11-10E-7. Promoting tax shelters.

Except as herein provided, the provisions of Section 6700 of the Internal Revenue Code shall apply for purposes of this article as if such section applied to a West Virginia deduction, credit, exclusion from income, allocation or apportionment rule, or other West Virginia tax benefit. Notwithstanding Section 6700(a) of the Internal Revenue Code, if an activity with respect to which a penalty imposed under Section 6700(a) of the Internal Revenue Code, as applied for purposes of this article, involves a false or fraudulent statement as described in Section 6700(a)(2)(A) of the Internal Revenue Code, as applied for purposes of this article, the amount of the penalty imposed under this section shall be fifty percent of the gross income derived (or to be derived) from such activity by the person upon which the penalty is imposed.

WV Legislature

§11-10E-8. Registration of tax shelters.

(a) Federal tax shelter. -- Any tax shelter organizer or material advisor required to register a tax shelter under Section 6111 of the Internal Revenue Code shall send a duplicate of the federal registration information to the Tax Commissioner not later than the day on which registration is required under federal law. Any person required to register under Section 6111 of the Internal Revenue Code who receives a tax registration number from the Secretary of the Treasury shall, within thirty days after request by the Tax Commissioner, file a statement of that registration number with the Tax Commissioner.

(b) Additional requirements for listed transactions. -- In addition to the requirements of subsection (a), for any transactions entered into on or after February 28, 2000, that become listed transactions (as defined under Treasury Regulations Section 1.6011-4) at any time, those transactions shall be registered with the Tax Commissioner (in the form and manner prescribed by the Tax Commissioner) by the later of: (i) Sixty days after entering into the transaction; (ii) sixty days after the transaction becomes a listed transaction; or (iii) July 1, 2006.

(c) Tax shelters subject to this section for taxable years commencing before January 1, 2007. -- The provisions of this section apply to any tax shelter herein described in which a person:

(1) Organizes or participates in the sale of an interest in a partnership, entity or other plan or arrangement; and

(2) Makes or causes another person to make a false or fraudulent statement with respect to securing a tax benefit or a gross valuation as to any material matter, and which is or was one or more of the following: (A) Organized in this state; (B) doing business in this state; or (C) deriving income from sources in this state.

(d) Tax shelters subject to this section for taxable years commencing on or after January 1, 2007. -- The provisions of this section apply to any tax shelter herein described in which a person organizes or participates in the sale of an interest in a partnership, entity or other plan or arrangement that is or was one or more of the following: (i) Organized in this state; (ii) doing business in this state; or (iii) deriving income from sources in this state.

(e) Tax shelter identification number. -- Any person required to file a return under this article and required to include on the person's federal income tax return a tax shelter identification number pursuant to Section 6111 of the Internal Revenue Code shall furnish such number when filing the person's West Virginia return.

WV Legislature

§11-10E-9. Investor lists.

(a) Federal abusive tax shelter. -- Any person required to maintain a list under Section 6112 of the Internal Revenue Code and Treasury Regulations Section 301.6112-1 with respect to a potentially abusive tax shelter shall furnish such list to the Tax Commissioner not later than the time such list is required to be furnished to the Internal Revenue Service under federal income tax law. The list required under this section shall include the same information required with respect to a potentially abusive tax shelter under Treasury Regulations Section 301.6112-1 and any other information that the Tax Commissioner may require.

(b) Additional requirements for listed transactions. -- For transactions entered into on or after February 28, 2000, that become listed transactions (as defined under Treasury Regulations Section 1.6011-4) at any time thereafter, the list shall be furnished to the Tax Commissioner by the later of sixty days after entering into the transaction or sixty days after the transaction becomes a listed transaction.

(c) Tax shelters subject to this section. -- The provisions of this section apply to any tax shelter herein described in which a person:

(1) Organizes or participates in the sale of an interest in a partnership, entity or other plan or arrangement; and

(2) Makes or causes another person to make a false or fraudulent statement with respect to securing a tax benefit or a gross valuation as to any material matter; and which is or was one or more of the following: (A) Organized in this state; (B) doing business in this state; or (C) deriving income from sources in this state.

(d) Tax shelters subject to this section for taxable years commencing on or after January 1, 2007. -- The provisions of this section apply to any tax shelter herein described in which a person organizes or participates in the sale of an interest in a partnership, entity or other plan or arrangement that is or was one or more of the following: (i) Organized in this state; (ii) doing business in this state; or (iii) deriving income from sources in this state.

WV Legislature

§11-10E-10. Suspension of inconsistent code provisions.

All provisions of article ten, chapter eleven of this code and all provisions of tax statutes administered under said article ten of this chapter that are inconsistent with the provisions of this article are suspended to the extent necessary to carry out the provisions of this article.

WV Legislature