WEST VIRGINIA CODE CHAPTER 11 ARTICLE 13C

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§11-13C-1. Short title.

This article may be cited as the "West Virginia Business Investment and Jobs Expansion Tax Credit Act."

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§11-13C-2. Legislative finding and purpose.

The Legislature finds that the encouragement of economic growth and development in this state is in the public interest and promotes the general welfare of the people of this state. In order to encourage capital investment in businesses in this state and thereby increase employment and economic development, there is hereby provided a business investment and jobs expansion tax credit.

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§11-13C-3. Definitions.

(a) General. -- When used in this article, or in the administration of this article, terms defined in subsection (b) shall have the meanings ascribed to them by this section, unless a different meaning is clearly required by either the context in which the term is used, or by specific definition, in this article.

(b) Terms defined.

(1) Business. -- The term "business" means any activity taxable under article twelve-a or thirteen (or both) of this chapter, which is engaged in by any person in this state: Provided, That on and after July 1, 1987, the phrase "taxes imposed by article twelve-a or thirteen, (or both) of this chapter" shall mean "taxes imposed by article thirteen, thirteen-a, thirteen-b twenty-one, twenty-three and twenty-four of this chapter (or any one or combination of such articles of this chapter)."

(2) Business expansion. -- The term "business expansion" means capital investment in a new or expanded business facility in this state.

(3) Business facility. -- The term "business facility" means any factory, mining operation, mill, plant, refinery, warehouse, building or complex of buildings located within this state, including the land on which it is located, and all machinery, equipment and other real and personal property located at or within such facility, used in connection with the operation of such facility, in a business that is taxable in this state, and all site preparation and start-up costs of the taxpayer for the business facility which it capitalizes for federal income tax purposes.

(A) "Mining operation" means the place at which a person extracts ores or minerals from the ground. It includes both surface and underground mining operations.

(B) "Surface mine" means the surface of land upon which activities are conducted which disturb the natural surface of the land and result in the production of ores or minerals.

(C) "Underground mine" means the surface effects associated with the shafts, slopes, lifts or inclines connected with excavations penetrating seams or strata of minerals, and the equipment connected therewith which contribute to the mining, preparation or handling of ores or minerals.

(4) Commissioner or Tax Commissioner. -- The terms "commissioner" and "Tax Commissioner" are used interchangeably herein and mean the Tax Commissioner of the State of West Virginia, or his delegate.

(5) Compensation. -- The term "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(6) Controlled group. -- The term "controlled group" means one or more chains of

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corporations connected through stock ownership with a common parent corporation if stock possessing at least fifty percent of the voting power of all classes of stock of each of the corporations is owned directly or indirectly by one or more of the corporations; and the common parent owns directly stock possessing at least fifty percent of the voting power of all classes of stock of at least one of the other corporations.

(7) Corporation. -- The term "corporation" means any corporation, joint-stock company or association, and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by a certificate of interest or ownership or similar written instrument.

(8) Delegate. -- The term "delegate" in the phrase "or his delegate," when used in reference to the Tax Commissioner, means any officer or employee of the State Tax Department duly authorized by the Tax Commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this article.

(9) Eligible taxpayer. -- The term "eligible taxpayer" means any person subject to the taxes imposed by article twelve-a or thirteen (or both) of this chapter who makes qualified investment in a new or expanded business facility located in this state that results in the creation of at least fifty new jobs: Provided, That on and after July 1, 1987, the phrase "taxes imposed by article twelve-a or thirteen, (or both) of this chapter" shall mean "taxes imposed by articles thirteen, thirteen-a, thirteen-b twenty-one, twenty-three and twenty-four of this chapter (or any one or combination of such articles of this chapter). "Eligible taxpayer" shall also include an affiliated group of taxpayers if such group elects to file a consolidated corporation net income tax return under article twenty-four of this chapter.

(10) Expanded facility. -- The term "expanded facility" means any business facility (other than a new or replacement business facility) resulting from the acquisition, construction, reconstruction, installation or erection of improvements or additions to existing property if such improvements or additions are purchased on or after March 1, 1985, but only to the extent of the taxpayer's qualified investment in such improvements or additions.

(11) Includes and including. -- The terms "includes" and "including," when used in a definition contained in this article, shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(12) New business facility. -- The term "new business facility" means a business facility which satisfies all the requirements of subparagraphs (A), (B), (C) and (D) of this subdivision.

(A) The facility is employed by the taxpayer in the conduct of a business the net income of which is taxable under article twenty-one or twenty-four of this chapter. Such facility shall not be considered a new business facility in the hands of the taxpayer if the taxpayer's only activity with respect to such facility is to lease it to another person or persons.

(B) Such facility is purchased by, or leased to, the taxpayer and is placed in service or use on

or after March 1, 1985.

(C) The facility was not acquired by the taxpayer from a related person. The Tax Commissioner can waive this requirement if the facility was acquired from a related party for its fair market value.

(D) Such facility was not in service or use during the ninety days immediately prior to transfer of the title to such facility, or to the commencement of the term of the lease of such facility, unless upon application of the taxpayer, setting forth good and sufficient cause, the Tax Commissioner consents to waiving this ninety-day period.

(13) New employee. -- The term "new employee" means a person residing and domiciled in this state, hired by the taxpayer to fill a position for a job in this state, which previously did not exist in the business enterprise in this state, prior to the date on which the taxpayer's qualified investment is placed in service or use in this state. In no case shall the new employees allowed for purposes of this credit exceed the total increase in the taxpayer's employment in this state. A person shall be deemed to be a "new employee" if such person's duties in connection with the operation of the business enterprise are on:

(A) A regular, full-time and permanent basis.

(1) "Full-time employment" means employment for at least one hundred twenty hours per month at a wage not less than the prevailing state or federal minimum wage, depending on which minimum wage provision is applicable to the business.

(2) "Permanent employment" does not include employment that is temporary or seasonal.

(B) A part-time basis, provided such person is customarily performing such duties at least twenty hours per week for at least six months during the taxable year.

(14) New job. -- The term "new job" means a job which did not exist in the business of the taxpayer in this state prior to the taxpayer's qualified investment being made, and which is filled by a new employee.

(15) New property. -- The term "new property" means:

(A) Property the construction, reconstruction or erection of which is completed on or after March 1, 1985, and placed in service or use after such date; and

(B) Property leased or acquired by the taxpayer that is placed in service or use in this state on or after March 1, 1985, if the original use of such property commences with the taxpayer and commences after such date.

(16) Original use. -- The term "original use" means the first use to which the property is put, whether or not such use corresponds to the use of the property by the taxpayer.

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(17) Partnership and partner. -- The term "partnership" includes a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business, financial operation or venture is carried on, and which is not a trust or estate, a corporation or a sole proprietorship. The term "partner" includes a member in such a syndicate, group, pool, joint venture or organization.

(18) Person. -- The term "person" includes any natural person, corporation or partnership.

(19) Property purchased or leased for business expansion.

(A) Included property. -- Except as provided in subparagraph (B), the term "property purchased or leased for business expansion" means real property and improvements thereto, and tangible personal property, but only if such real or personal property was constructed, purchased, or leased and placed in service or use by the taxpayer, for use as a component part of a new or expanded business facility, as defined in this section, which is located within West Virginia. This term includes only:

(1) Real property and improvements thereto having a useful life of four or more years, placed in service or use on or after March 1, 1985, by the taxpayer.

(2) Real property and improvements thereto, or tangible personal property acquired by written lease having a primary term of ten or more years and placed in service or use by the taxpayer on or after March 1, 1985.

(3) Tangible personal property placed in service or use by the taxpayer on or after March 1, 1985, with respect to which depreciation, or amortization in lieu of depreciation, is allowable in determining the personal or corporation net income tax liability of the business taxpayer under article twenty-one or twenty-four of this chapter, and which has a useful life at the time such property is placed in service or use in this state, of four or more years.

(4) Tangible personal property acquired by written lease having a primary term of four years or longer, that commenced and was executed by the parties thereto on or after February 1, 1986, if used as a component part of a new or expanded business facility, shall be included within this definition.

(5) Tangible personal property owned or leased, and used by the taxpayer at a business location outside this state which is moved into this state on or after February 1, 1986, for use as a component part of a new or expanded business facility located in this state: Provided, That if the property is owned, it must be depreciable or amortizable personal property for income tax purposes, and have a useful life of four or more years remaining at the time it is placed in service or use in this state, and if the property is leased, the primary term of the lease remaining at the time the leased property is placed in service or use in this state, must be four or more years:

(B) Excluded property. -- The term "property purchased or leased for business expansion"

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shall not include:

(1) Property owned or leased by the taxpayer and for which credit was taken under article thirteen-c of this chapter prior to its repeal, on April 13, 1985, or under article thirteen-d or thirteen-e of this chapter;

(2) Repair costs, including materials used in the repair, unless for federal income tax purposes, the cost of the repair must be capitalized and not expensed;

(3) Motor vehicles licensed by the department of motor vehicles: Provided, That such property, if purchased or leased on or after February 1, 1986, shall not be excluded by virtue of this clause (3);

(4) Airplanes;

(5) Off-premise transportation equipment: Provided, That such property, if purchased or leased on or after February 1, 1986, shall not be excluded by virtue of this clause (5);

(6) Property which is primarily used outside this state; and

(7) Property which is acquired incident to the purchase of the stock or assets of the seller, unless for good cause shown, the Tax Commissioner consents to waiving this requirement.

(C) Purchase date. -- Property shall be deemed to have been purchased prior to a specified date only if:

(1) The physical construction, reconstruction or erection of the property was begun prior to the specified date, or such property was constructed, reconstructed, erected or acquired pursuant to a written contract as existing and binding on the purchase prior to the specified date;

(2) The machinery or equipment was owned by the taxpayer prior to the specified date or was acquired by the taxpayer pursuant to a binding purchase contract which was in effect prior to the specified date; or

(3) In the case of leased property, there was a binding written lease or contract to lease identifiable property in effect prior to the specified date.

(20) Purchase. -- The term "purchase" means any acquisition of property, but only if:

(A) The property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under Section 267 or 707 (b) of the United States Internal Revenue Code of 1954, as amended, and in effect on January 1, 1985;

(B) The property is not acquired by one component member of a controlled group from another component member of the same controlled group. The Tax Commissioner can waive

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this requirement if the property was acquired from a related party for its then fair market value; and

(C) The basis of the property for federal income tax purposes, in the hands of the person acquiring it, is not determined:

(1) In whole or in part by reference to the federal adjusted basis of such property in the hands of the person from whom it was acquired; or

(2) Under Section 1014 (e) of the United States Internal Revenue Code of 1954, as amended, and in effect on January 1, 1985.

(21) Qualified activity. -- The term "qualified activity" means any business or other activity subject to the tax imposed by article twelve-a or thirteen (or both) of this chapter: Provided, That on and after July 1, 1987, the phrase "taxes imposed by article twelve-a or thirteen (or both) of this chapter" shall mean "taxes imposed by articles thirteen, thirteen-a, thirteen-b, twenty-one, twenty-three and twenty-four of this chapter (or any one or combination of such articles of this chapter)."

(22) Related person. -- The term "related person" means:

(A) A corporation, partnership, association or trust controlled by the taxpayer;

(B) An individual, corporation, partnership, association or trust that is in control of the taxpayer;

(C) A corporation, partnership, association or trust controlled by an individual, corporation, partnership, association or trust that is in control of the taxpayer; or

(D) A member of the same controlled group as the taxpayer.

For purposes of subdivisions (20) and (22) of this section, "control," with respect to a corporation, means ownership, directly or indirectly, of stock possessing fifty percent or more of the total combined voting power of all classes of the stock of such corporation entitled to vote. "Control," with respect to a trust, means ownership, directly or indirectly, of fifty percent or more of the beneficial interest in the principal or income of such trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association or of a beneficial interest in a trust shall be determined in accordance with the rules for constructive ownership of stock provided in Section 267 (c) of the United States Internal Revenue Code of 1954, as amended, other than paragraph (3) of such section.

(23) Replacement facility. -- The term "replacement facility" means any property (other than an expanded facility) that replaces or supersedes any other property located within this state that:

(A) The taxpayer or a related person used in or in connection with any activity for more than

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two years during the period of five consecutive years ending on the date the replacement or superseding property is placed in service by the taxpayer; or

(B) Is not used by the taxpayer or a related person in or in connection with any qualified activity for a continuous period of one year or more commencing with the date the replacement or superseding property is placed in service by the taxpayer.

(24) Taxpayer. -- The term "taxpayer" means any person subject to the tax imposed by article twelve-a or thirteen (or both) of this chapter: Provided, That on and after July 1, 1987, the phrase "taxes imposed by article twelve-a or thirteen (or both) of this chapter" shall mean "taxes imposed by articles thirteen, thirteen-a, thirteen-b, twenty-one, twenty-three and twenty-four of this chapter (or any one or combination of such articles of this chapter)."

(25) This code. -- The term "this code" means the Code of West Virginia, 1931, as amended.

(26) This state. -- The term "this state" means the State of West Virginia.

(27) Used property. -- The term "used property" means property acquired after the twenty-eighth day of February, 1985, that is not "new property."

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§11-13C-4. Amount of credit allowed.

(a) Credit allowed. -- Eligible taxpayers shall be allowed a credit against the portion of taxes imposed by this state that are attributable to and the consequence of the taxpayer's qualified investment in a new or expanded business in this state, which results in the creation of new jobs. The amount of this credit shall be determined and applied as hereinafter provided in this article.

(b) Amount of credit. -- The amount of credit allowable is determined by multiplying the amount of the taxpayer's "qualified investment" (determined under section four-a or six, or both) in "property purchased for business expansion" (as defined in section three) by the taxpayer's new jobs percentage (determined under section seven). The product of this calculation establishes the maximum amount of credit allowable under this article, due to the qualified investment.

(c) Application of credit over ten years. -- The amount of credit allowable must be taken over a ten-year period, at the rate of one tenth of the amount thereof per taxable year, beginning with the taxable year in which the taxpayer places the qualified investment in service or use in this state, unless the taxpayer elected to delay the beginning of the ten-year period until the next succeeding taxable year. This election shall be made in the annual income tax return filed for the taxable year in which credit is first taken on the qualified investment placed into service or use by the taxpayer. Once made, the election cannot be revoked. The annual credit allowance shall be taken in the manner prescribed in section four of this article.

(d) Placed in service or use. -- For purposes of the credit allowed by this section, property shall be considered placed in service or use in the earlier of the following taxable years:

(1) The taxable year in which, under the taxpayer's depreciation practice, the period for depreciation with respect to such property begins; or

(2) The taxable year in which the property is placed in a condition or state of readiness and availability for a specifically assigned function.

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§11-13C-4a. Credit allowed for locating corporate headquarters in this state.

(a) Credit allowed. -- A corporation that presently has its corporate headquarters located outside this state that relocates its corporate headquarters in this state and employs, on a full-time basis, at its new corporate headquarters location, at least fifteen people, who are domiciled in this state, shall be allowed credit under this article, the amount of which shall be determined as provided in subsection (b). For corporate headquarters relocations occurring on and after January 1, 1998, the restrictions set forth in subsection (a), section fifteen of this article shall not apply to the credit allowed under this section. However, the restrictions set forth in subsection (a), section fifteen of this article and the exceptions thereto set forth in subsection (b) of said section fifteen, shall remain fully applicable and in force and effect for all other tax credits provided or allowable under this article.

(b) Determination of credit. -- The amount of credit allowed by subsection (a) shall be determined at the election of the taxpayer:

(1) By multiplying its adjusted qualified investment by its new jobs percentage (as determined under section seven of this article); or

(2) By multiplying its adjusted qualified investment by ten percent.

(c) Corporate headquarters relocations after December 31, 1997. -- For purposes of corporate headquarters relocations occurring on or after January 1, 1998, and notwithstanding any other provision of this article to the contrary:

(1) New jobs created in this state by relocation of a corporate headquarters may include jobs created in this state within twelve months before or after the month in which the qualified investment in the corporate headquarters relocation is placed into service or use in this state by:

(A) Relocation or transfer of employees of the corporation or employees of a related corporation or related person from an out-of-state location to the relocated corporate headquarters in this state, who: (i) Are or become employees of the corporation within twelve months before or after the month in which the qualified investment in the corporate headquarters is placed into service or use in this state; and (ii) whose regular place of work is in the corporate headquarters, or

(B) New employees of the corporation whose regular place of work is in the corporate headquarters.

(2) Multiple year projects certified under section four-b of this article may be allowed for corporate headquarters relocations under this section.

(d) Application of credit. -- The credit allowed by this section shall be applied in the manner prescribed in section five of this article: Provided, That the amount of corporation net income taxes against which the credit allowed by this section may be applied shall be the

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sum of the corporation net income tax due on adjusted federal taxable income allocated to this state under section seven, article twenty-four of this chapter, plus that portion of the corporation net income tax due on adjusted federal taxable income apportioned to this state under section seven, article twenty-four of this chapter, that is further apportioned to the qualified investment using the payroll factor provided in paragraph (1), subsection (h) of said section five or an alternative means of apportionment as prescribed by the Tax Commissioner under said section five. For all other purposes, the credit allowed by this section shall be treated as credit allowed by section four of this article.

(e) Definitions. -- For purposes of this section:

(1) Adjusted qualified investment. -- The term "adjusted qualified investment" means the taxpayer's qualified investment in the corporate headquarters as determined under section six of this article and rules of the Tax Commissioner, plus the cost of the reasonable and necessary expenses it incurred to relocate its corporate headquarters at a location in this state from its present location outside this state.

(2) Corporate headquarters. -- The term "corporate headquarters" means the place at which the corporation has its commercial domicile and from which the business of the corporation is primarily conducted.

(3) Reasonable and necessary expenses incurred to relocate corporate headquarters. -- The phrase "reasonable and necessary expenses incurred to relocate corporate headquarters" means only those expenses incurred and paid by the corporation, to unrelated third parties, to move its corporate headquarters and its corporate headquarters employees to this state that are, upon application by the corporation, determined by the Tax Commissioner to have been both reasonable and necessary to effectuate the move.

(4) The corporation. -- For purposes of this section, the term "the corporation" means the corporation for which the corporate headquarters is relocated.

(f) Effective date. -- The credit allowed by this section as amended in the year 1998 shall be allowable for corporate headquarters placed in service or use on or after January 1, 1998.

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§11-13C-4b. Credit allowable for certified projects.

(a) In general. -- A project certified by the Tax Commissioner shall be eligible for the credit allowable by this article. A project eligible for certification under this section is one where:

(1) The qualified investment under this article creates at least fifty new jobs but such qualified investment is placed in service or use over a period of three successive tax years: Provided, That such qualified investment is made pursuant to a written business facility development plan of the taxpayer providing for an integrated project for investment at one or more new or expanded business facilities, a copy of which must be attached to the taxpayer's application for project certification and approved by the Tax Commissioner, and the qualified investment placed in service or use during the first tax year would not have been made without the expectation of making the qualified investment placed in service or use during the next two succeeding tax years;

(2) The qualified investment is made by one or more persons, but some or all of the new jobs created at each new or expanded business facility as a result of the qualified investment are created by one or more other persons: Provided, That at least fifty new jobs are created at the new or expanded business facility or facilities in which the qualified investment is made, and such jobs are, upon application, certified by the Tax Commissioner as new jobs created as a direct result of the qualified investment, and that such qualified investment is made pursuant to a written business facility development plan of the taxpayer providing for an integrated project for investment at one or more new or expanded business facilities, a copy of which must be attached to the taxpayer's application for project certification and approved by the Tax Commissioner;

(3) The qualified investment is made by one or more persons but some or all of the new jobs created as a direct result of the qualified investment are created by one or more other persons: Provided, That at least fifty new jobs are created within a fifty mile radius of each new or expanded business facility in which the qualified investment is made, and such jobs are, upon application, certified by the Tax Commissioner as being new jobs created as a direct result of the qualified investment, and that such qualified investment is made pursuant to a written business facility development plan of the taxpayer providing for an integrated project for investment at one or more new or expanded business facilities, a copy of which must be attached to the taxpayer's application for project certification and approved by the Tax Commissioner.

(b) Application for certification. -- The application for certification of a project under this section shall be filed with and approved by the Tax Commissioner prior to any credit being claimed or allowed for the project's qualified investment and new jobs created as a direct result of the qualified investment. This application shall be approved in writing by all the participants in the project and shall contain such information as the Tax Commissioner may require to determine whether the project should be certified as eligible for credit under this article.

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(c) Taking of credit.

(1) If the certified project for which qualified investment is made involves one or more persons making the capital investment and one or more persons, or a combination thereof, creating at least fifty new jobs at the site of the new or expanded business facility or facilities, then credit shall be allowed under this article for the certified project based upon the qualified investment in the certified project (as determined under section six) multiplied by the project's new jobs percentage (determined under section seven).

(2) If the certified project for which qualified investment is made involves one or more persons making the capital investment and one or more persons, or a combination thereof, creating at least fifty new jobs located within a fifty mile radius of each new or expanded business facility in which the qualified investment is made, then credit shall be allowed under this article for the certified project based upon the qualified investment in the certified project (as determined under section six) multiplied by fifty percent.

(3) The amount of credit allowable, as determined under subdivision (1) or (2), above, shall be applied as provided in section five, and shall be claimed in the manner specified in the project's application to the Tax Commissioner for certification under this section, by one participant in the project or divided among the several participants in the project, and for this purpose the numerator of the payroll factor shall be the total compensation paid in this state during the taxable year by all project participants to all new employees filling the new jobs created and the denominator shall be the total compensation paid in this state during the taxable year by all project participants to their employees. Such allocation, if approved by the Tax Commissioner, shall constitute a binding election by the participants in the project for the entire term during which the credit attributable to the qualified investment in the certified project may be applied to reduce tax liabilities. The participant or participants claiming the credit for qualified investments in a certified project shall annually file with their income tax returns filed under this chapter:

(A) Certification that the participant's qualified investment property continues to be used in the project and if disposed of during the tax year, was not disposed of prior to expiration of its useful life;

(B) Certification that the new jobs created by the project's qualified investment continue to exist and are filled by persons who are residents of this state; and

(C) Such other information as the Tax Commissioner requires to determine continuing eligibility to claim the annual credit allowance for the project's qualified investment.

(d) Terms defined. -- For purposes of this section:

(1) New employee. -- The term "new employee" means a person residing and domiciled in this state, hired by a participant to fill a position for a job which previously did not exist in this state prior to the date on which the project's qualified investment is placed in service or

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use in this state. In no case shall the new employees allowed for purposes of this credit exceed the total increases in the number of persons employed by the project's participants (considered as a group) in this state. A person shall be deemed to be a "new employee" if such person's duties in connection with the operation of the certified project are on:

(A) A regular, full-time and permanent basis.

(1) "Full-time employment" means employment for at least one hundred twenty hours per month at a wage not less than the prevailing state or federal minimum wage, depending on which minimum wage provision is applicable to the business.

(2) "Permanent employment" does not include employment that is temporary or seasonal.

(B) A part-time basis, provided such person is customarily performing such duties at least twenty hours per week for at least six months during the taxable year.

(2) New job. -- The term "new job" means a job which did not exist in this state prior to the project's qualified investment being made, and which is filled by a new employee.

(3) Participant. -- The term "participant" means any person who directly makes a qualified investment in a certified project, or who employs persons filling the jobs certified by the Tax Commissioner as being new jobs created as a direct result of the project's qualified investment.

(e) Effective date.

(1) This section shall apply to a project having qualified investment of at least $50,000,000 placed in service or use between March 1, 1985, and February 1, 1986, and shall also apply to qualified investment made on or after February 1, 1986.

(2) The application for project certification for a project having qualified investment of at least $50,000,000 placed in service or use between March 1, 1985, and February 1, 1986, shall be deemed timely filed under subsection (b) of this section only if such application is filed with the Tax Commissioner prior to December 31, 1986: Provided, That the Tax Commissioner shall not certify such project until the project participants certify that at least fifty new jobs were created by them prior to January 1, 1988, as a direct result of their qualified investment in the project, and that such jobs did not previously exist in this state, determined as of January 1, 1986; that the inclusion of such property shall not give rise to a refund or credit of any taxes administered under this chapter for taxable years ending before January 1, 1987; and that the ten-year credit period for such certified project shall begin with the current taxable year of the project participant or participants who will be claiming the allowable credit.

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§11-13C-5. Application of annual credit allowance.

(a) In general. -- The aggregate annual credit allowance for the current taxable year is an amount equal to the sum of the following as modified under subsections (o) and (p) of this section:

(1) The one-tenth part allowed under section four of this article for qualified investment placed into service or use during a prior taxable year; plus

(2) The one-tenth part allowed under section four of this article for qualified investment placed into service or use during the current taxable year; plus

(3) The one-tenth part allowed under section four-a of this article for locating corporate headquarters in this state; or the amount allowed under section seven-a of this article of the taxable year.

(b) Application of current year annual credit allowance. -- The amount determined under subsection (a) of this section shall be allowed as a credit against that portion of the taxpayer's state tax liability which is attributable to and the direct result of the taxpayer's qualified investment, and shall be applied as provided in subsections (c) through (k), both inclusive, of this section, and in that order.

(c) Business and occupation taxes. --

(1) That portion of the allowable credit attributable to qualified investment in a business or other activity subject to the taxes imposed by article thirteen of this chapter shall first be applied to reduce up to eighty percent of the taxes imposed by said article for the taxable year (determined before application of allowable credits against tax and the annual exemption).

(2) If the taxes due under article thirteen of this chapter are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under said article, the amount of such taxes, which are so attributable, shall be determined by multiplying the amount of taxes due under said article, for the taxable year (determined before application of any allowable credits against tax and the annual exemption), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state, whose positions are directly attributable to the qualified investment in a business or other activity taxable under said article. The denominator of the fraction shall be the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state, whose positions are directly attributable to the business or other activity of the taxpayer that is taxable under said article.

(3) The annual exemption allowed by section three, article thirteen of this chapter, plus any credits allowable under articles thirteen-d and thirteen-e of this chapter, shall be applied

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against and reduce only the portion of article thirteen taxes not apportioned to the qualified investment under this article: Provided, That any excess exemption or credits may be applied against the amount of article thirteen taxes apportioned to the qualified investment under this article, that is not offset by the amount of annual credit against such taxes allowed under this article for the taxable year, unless their application is otherwise prohibited by this chapter.

(d) Carrier income taxes. --

(1) That portion of the allowable credit attributable to qualified investment in a business or other activity subject to the taxes imposed by article twelve-a of this chapter shall first be applied to reduce up to eighty percent of the taxes imposed by said article for the taxable year.

(2) If the taxes due under article twelve-a of this chapter are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under said article, the amount of such taxes, which are so attributable, shall be determined by multiplying the amount of taxes due under said article for the taxable year, by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state, whose positions are directly attributable to the qualified investment in a business or other activity taxable under said article. The denominator of the fraction shall be the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer, employed in this state, whose positions are directly attributable to the business or other activity of the taxpayer that is taxable under said article.

(e) Severance taxes. --

(1) On and after July 1, 1984, that portion of the allowable credit attributable to qualified investment in a business or other activity subject to the tax imposed by article thirteen-a of this chapter, and qualified investment in a business or activity that was subject to the tax imposed by article thirteen of this chapter prior to said first day of July, but on and after said first day of July, is subject to the tax imposed by article thirteen-a of this chapter, shall first be applied to reduce up to eighty percent of the taxes imposed by said article for the taxable year (determined before application of any allowable credits against tax).

(2) If the taxes due under article thirteen-a of this chapter are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under said article, the amount of such taxes which are so attributable, shall be determined by multiplying the amount of taxes due under said article for the taxable year (determined before application of any allowable credits against tax), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state, whose positions are directly attributable to the qualified investment in a business or other activity taxable under said article. The denominator of the fraction shall be the wages, salaries and other compensation paid during

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the taxable year to all employees of the taxpayer employed in this state, whose positions are directly attributable to the business or other activity of the taxpayer that is taxable under said article.

(3) Any credits allowable under articles thirteen-d and thirteen-e of this chapter shall be applied against and reduce only the portion of article thirteen-a taxes not apportioned to the qualified investment under this article: Provided, That any excess credits may be applied against the amount of article thirteen taxes apportioned to the qualified investment under this article, that is not offset by the amount of annual credit against such taxes allowed under this article for the taxable year, unless their application is otherwise prohibited by this chapter.

(f) Telecommunications taxes. --

(1) On and after July 1, 1987, that portion of the allowable credit attributable to qualified investment in a business or other activity subject to the taxes imposed by article thirteen-b of this chapter, shall first be applied to reduce up to eighty percent of the taxes imposed by said article for the taxable year (determined before application of allowable credits against tax) and qualified investment in a business or activity that was subject to the taxes imposed by article twelve-a of this chapter prior to said first day of July, but on and after said first day of July is subject to the tax imposed by article thirteen-b of this chapter.

(2) If the taxes due under article thirteen-b of this chapter are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under said article, the amount of such taxes, which are so attributable, shall be determined by multiplying the amount of taxes due under said article for the taxable year (determined before application of any allowable credits against tax), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state whose positions are directly attributable to the qualified investment in a business or other activity taxable under said article. The denominator of the fraction shall be the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state whose positions are directly attributable to the business or other activity of the taxpayer that is taxable under said article.

(g) Business franchise tax. --

(1) On and after July 1, 1987, that portion of the allowable credit attributable to qualified investment in a business or activity subject to the taxes imposed by article twenty-three of this chapter, and qualified investment in a business or activity that was subject to the taxes imposed by article thirteen of this chapter prior to said first day of July, but on and after said first day of July, is subject to the tax imposed by article twenty-three of this chapter, shall first be applied to reduce up to eighty percent of the taxes imposed by said article for the taxable year (determined after application of the credits against tax provided in section seventeen of said article, but before application of any other allowable credits against tax).

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(2) If the taxes due under article twenty-three of this chapter are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under said article for the taxable year (determined after application of the credits against tax provided in section seventeen of said article, but before application of any other allowable credits), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state, whose positions are directly attributable to the qualified investment in a business or other activity taxable under said article. The denominator of the fraction shall be wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state, whose positions are directly attributable to the business or other activity of the taxpayer that is taxable under said article.

(3) Any credits allowable under articles thirteen-d and thirteen-e of this chapter shall be applied against and reduce only the portion of article twenty-three taxes not apportioned to the qualified investment under this article: Provided, That any excess exemption or credits may be applied against the amount of article twenty-three taxes apportioned to the qualified investment under this article that is not offset by the amount of annual credit against such taxes allowed under this article for the taxable year, unless their application is otherwise prohibited by this chapter.

(h) Corporation net income taxes. --

(1) After application of subsections (c) through (g), both inclusive of this section, any unused credit shall next be applied to reduce up to eighty percent of the taxes imposed by article twenty-four of this chapter for the taxable year (determined before application of allowable credits against tax).

(2) If the taxes due under article twenty-four of this chapter (determined before application of allowable credits against tax) are not solely attributable to and the direct result of the taxpayer's qualified investment, the amount of such taxes which are so attributable, shall be determined by multiplying the amount of taxes due under said article for the taxable year (determined before application of allowable credits against tax), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state whose positions are directly attributable to the qualified investment. The denominator of the fraction shall be the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state.

(3) Any credits allowable under article twenty-four of this chapter shall be applied against and reduce only the amount of article twenty-four taxes not apportioned to the qualified investment under this article: Provided, That any excess credits may be applied against the amount of article twenty-four taxes apportioned to the qualified investment under this article that is not offset by the amount of annual credit against such taxes allowed under this article for the taxable year, unless their application is otherwise prohibited by this chapter.

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(i) Personal income taxes. --

(1) If the person making the qualified investment is an electing small business corporation (as defined in Section 1361 of the United States Internal Revenue Code of 1954, as amended), a partnership or a sole proprietorship, then any unused credit (after application of subsections (c), (d), (e), (f) and (g)) shall be allowed as a credit against up to eighty percent of the taxes imposed by article twenty-one of this chapter on the income from business or other activity subject to tax under article twelve-a, thirteen, thirteen-a, thirteen-b or twenty-three of this chapter.

(2) Electing small business corporations, partnerships and other unincorporated organizations shall allocate the credit allowed by this article among its members in the same manner as profits and losses are allocated for the taxable year.

(3) If the amount of taxes due under article twenty-one of this chapter (determined before application of allowable credits against tax) that is attributable to business, is not solely attributable to and the direct result of the qualified investment of the electing small business corporation, partnership, other unincorporated organization or sole proprietorship, the amount of such taxes which are so attributable shall be determined by multiplying the amount of taxes due under said article (determined before application of allowable credits against tax), that is attributable to business by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the electing small business corporation, partnership, other unincorporated organization or sole proprietorship employed in this state, whose positions are directly attributable to the qualified investment. The denominator of the fraction shall be the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer.

(4) No credit shall be allowed under this section against any employer withholding taxes imposed by article twenty-one of this chapter.

(j) For tax years beginning after December 31, 1992, and thereafter, if the formula provisions of subsections (c) through (i) of this section, inclusive, do not fairly represent the taxes solely attributable to and the direct result of the taxpayer's qualified investment of the taxpayer and all other project participants in the business or other activity subject to tax, the commissioner may require, in respect to all or any part of the taxpayer's businesses or activities, if reasonable:

(1) Separate accounting or identification; or

(2) Adjustment to the wages formula to reflect all components of the tax liability; or

(3) The inclusion of one or more additional factors which will fairly represent the taxes solely attributable to and the direct result of the qualified investment of the taxpayer and all other project participants in the businesses or other activities subject to tax; or

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(4) The employment of any other method to effectuate an equitable attribution of the taxes.

In order to effectuate the purposes of this subsection, the commissioner shall propose for promulgation legislative rules in accordance with article three, chapter twenty-nine-a of this code: Provided, That the initial promulgation may be by emergency rule. The rule shall set forth the standards by which this subsection will be implemented and enforced: Provided, however, That with regard to investment placed in service prior to the passage of this provision, taxpayers having a specific written determination from the Tax Commissioner that the taxpayer is authorized or required to take credit against tax not attributable to qualified investment shall not be subject to the alternative allocation of credit provided for under this subsection.

(k) Sales and use taxes. --

On and after July 1, 1987, for purchases of tangible personal property and taxable services made on or after that date, that portion of the allowable credit, which is attributable to qualified investment in a business or activity subject to the taxes imposed by articles fifteen and fifteen-a of this chapter on purchases for use or consumption in the conduct of such business or activity, shall be applied to reduce up to eighty percent of the taxes imposed by said articles on purchases that are directly used or consumed in the qualified investment activity. When property and services purchased for use or consumption are not solely used or consumed in the qualified investment activity, the cost thereof shall be apportioned between such activities. Only that amount apportioned to purchases directly used or consumed in the qualified investment activity shall be included when applying the credit allowable under this subsection. On and after July 1, 1993, for purchases of tangible personal property and taxable services made on or after that date for use or consumption in the conduct of business, no portion of the allowable credit may be applied against the taxes imposed by said articles.

(l) Ad valorem property taxes; unemployment taxes and workers' compensation premiums. --

(1) After application of subsections (a) through (i), both inclusive, of this section, any unused credit shall be applied as a rebate for payment of the sum of the following amounts:

(A) Eighty percent of the ad valorem property taxes imposed by levying bodies pursuant to article eight of this chapter, for the taxable year (including payments in lieu of such taxes), on property of the taxpayer that is directly attributable to the qualified investment (including property having a useful life of less than four years) of the taxpayer, in the new or expanded business facility of the taxpayer resulting in new jobs; plus

(B) Eighty percent of the taxes imposed by article five, chapter twenty-one-a of this code for the taxable year attributable to the compensation of new employees filling the new jobs that are directly attributable to the qualified investment; plus

(C) Twenty percent of the workers' compensation premiums imposed by article two, chapter

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twenty-three of this code, for the taxable year attributable to the compensation paid new employees filling the new jobs, that are directly attributable to the qualified investment.

(2) A taxpayer eligible to claim this rebate shall apply either the amount of the unused credit or the sum determined under subdivision (1) of this subsection, whichever is less, against the remaining twenty percent of the taxes imposed by articles twelve-a, thirteen, thirteen-a, thirteen-b, twenty-one, twenty-three and twenty-four of this chapter, attributable to the qualified investment under this article. If any amount of rebate remains after its application against the remaining twenty percent of taxes as aforesaid, the amount remaining shall be carried forward to each ensuing tax year until used or the expiration of the twelfth subsequent tax year in which the qualified investment was placed in service or use in this state by the taxpayer.

(m) Unused credit forfeited. -- If any credit remains after application of subsection (b) of this section, the amount thereof shall be forfeited. No carryover to a subsequent taxable year or carryback to a prior taxable year shall be allowed for the amount of any unused portion of any annual credit allowance, except as specifically provided in subsection (l), (o) or (p) of this section.

(n) Notwithstanding any provision of this section to the contrary and notwithstanding the reenactment of this section later in time than the enactment or reenactment of section fourteen of this article, the restrictions, limitations, constraints and provisions of said section shall apply to and supersede the provisions of this section.

(o) Deferral of twenty percent of annual credit, eighty percent current limitation. --

(1) Eighty percent of the amount of annual credit calculated under subsections (a) through (n) of this section before application of the minimum severance tax against coal and before the adjustment set forth in subsection (p) of this section, shall be applied against the taxes enumerated in subsections (c) through (i), inclusive, of this section for the current tax year.

(2) The remaining twenty percent of such annual credit so calculated in subsections (c) through (n) of this section shall be applied against the taxes enumerated in subsections (c) through (i), inclusive, of this section beginning in the tenth tax year subsequent to the tax year in which qualified investment was first placed in service or use in this state by the taxpayer, and the amount thereof remaining shall be carried forward each ensuing tax year until used or until the expiration of the twelfth tax year subsequent to the tax year in which qualified investment was first placed in service or use in this state by the taxpayer. No deferral of credit under this subsection shall apply to this credit when applied in such tenth through twelfth years.

(p) Additional allowance. --

(1) After application of up to eighty percent of annual credit against the taxes enumerated in subsections (c) through (i), inclusive, of this section for the current tax year under

subsection (o) of this section, there shall be allowed an additional amount of credit, as determined under subdivision (2) of this subsection, which may offset up to one hundred percent of the remaining taxes enumerated in subsections (g), (h) and (i), in that order, of this section for the current tax year. Any credit calculated and determined under this section which remains after application against the taxes enumerated in subsections (g), (h) and (i) under this section shall be forfeited and shall not carryover to any other taxable year.

(2) The amount of credit allowable under this subsection shall be the lesser of one third of the taxpayer's minimum severance tax on coal payable, or the taxpayer's net minimum severance tax on coal payable. For purposes of this subsection, the term "net minimum severance tax on coal payable" means the amount of the excess of the minimum severance tax on coal over the amount of the state severance tax on coal severed and extracted by the taxpayer in this state not including the additional severance tax on coal imposed by section six, article thirteen-a of this chapter, calculated after application of the credit allowed under this article, and before application of all other credits, and after application of the $500 exemption to the said severance tax on coal.

(q) Effective date. --

(1) This section, as amended in the year 1986, shall be effective upon passage. It shall be retroactive, and shall be in lieu of the method provided by this section for application of this credit prior to this amendment, for qualified investment made on or after March 1, 1985.

(2) This section, as amended in the year 1987, shall be effective for taxable years ending after June 30, 1987.

(3) This section, as amended in the year 1993, shall be effective for taxable years ending after May 31, 1993.

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§11-13C-6. Qualified investment.

(a) General. -- The qualified investment in property purchased or leased for business expansion shall be the applicable percentage of the cost of each property purchased or leased for the purpose of business expansion which is placed in service or use in this state by the taxpayer during the taxable year.

(b) Applicable percentage. -- For the purpose of subsection (a), the applicable percentage of any property shall be determined under the following table:

If useful life is: The applicable percentage is:

4 years or more but less than 6 years 33 1/3%

6 years or more but less than 8 years 66 2/3%

8 years or more 100%

The useful life of any property, for purposes of this section, shall be determined as of the date such property is first placed in service or use in this state by the taxpayer, determined in accordance with federal income tax law.

(c) Cost. -- For purposes of subsection (a), the cost of each property purchased for business expansion shall be determined under the following rules:

(1) Trade-ins. -- Cost shall not include the value of property given in trade or exchange for the property purchased for business expansion.

(2) Damaged, destroyed or stolen property. -- If property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, then the cost of replacement property shall not include any insurance proceeds received in compensation for the loss.

(3) Rental property.

(A) The cost of real property acquired by written lease for a primary term of ten years or longer shall be one hundred percent of the rent reserved for the primary term of the lease, not to exceed twenty years.

(B) The cost of tangible personal property acquired by written lease for a primary term of:

(i) Four years, or longer, shall be one third of the rent reserved for the primary term of the lease;

(ii) Six years, or longer, shall be two thirds of the rent reserved for the primary term of the lease; or

(iii) Eight years, or longer, shall be one hundred percent of the rent reserved for the primary

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term of the lease, not to exceed twenty years: Provided, That in no event shall rent reserved include rent for any year subsequent to expiration of the book life of the equipment, determined using the straight-line method of depreciation.

(4) Property purchased for multiple use. -- In the case of property purchased for use as a component part of a new or expanded business taxable under article twelve-a of this chapter, and use as a component part of a new or expanded business taxable under article thirteen of this chapter, the cost thereof shall be apportioned between such businesses. The amount apportioned to each such new or expanded business for which credit is allowed under this article, shall be considered as a qualified investment subject to the conditions and limitations of this article.

(5) Self-constructed property. -- In the case of self-constructed property, the cost thereof shall be the amount properly charged to the capital account for depreciation in accordance with federal income tax law.

(6) Transferred property. -- The cost of property used by the taxpayer out-of-state and then brought into this state, shall be determined based on the remaining useful life of the property at the time it is placed in service or use in this state, and the cost shall be the original cost of the property to the taxpayer less straight line depreciation allowable for the tax years or portions thereof taxpayer used the property outside this state. In the case of leased tangible personal property, cost shall be based on the period remaining in the primary term of the lease after the property is brought into this state for use in a new or expanded business facility of the taxpayer, and shall be the rent reserved for the remaining period of the primary term of the lease, not to exceed twenty years, or the remaining useful life of the property (determined as aforesaid), whichever is less.

(7) Natural resources in place. -- In the case of natural resources in place, the property must be capable of sustained production for a period of at least ten years. If this qualification is met, then the qualified investment is one hundred percent of the purchase price of the natural resource in place that is attributable to ten years of production, but not more than twenty years of production. If such price is not quantifiable at the time the mining operation is placed into production, cost shall be determined annually and shall be the amount of royalties actually paid to the owner of the natural resource in place during each year for a total period of ten years. The amount of such royalties multiplied by the taxpayer's new jobs percentage (determined at the time the mining operation is placed in service or use) divided by ten establishes the credit allowable each year for ten successive years beginning with the year in which the royalties were paid.

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§11-13C-7. New jobs percentage.

(a) In general. -- The new jobs percentage is based on the number of new jobs created in this state that are directly attributable to the qualified investment of the taxpayer.

(b) Applicable percentage. -- For the purpose of subsection (a), the applicable new jobs percentage shall be determined under the following table:

If number of new jobs is:	The applicable percentage is:
1,000	90%
760	80%
520	70%
280	60%
50	50%

(c) When a job is attributable. -- An employee's position is directly attributable to the qualified investment if:

(1) The employee's service is performed or his base of operations is at the new or expanded business facility;

(2) The position did not exist prior to the construction, renovation, expansion or acquisition of the business facility and the making of the qualified investment; and

(3) But for the qualified investment, the position would not have existed.

(d) Certification of new jobs. -- With the annual return for the taxes imposed by article twelve-a or thirteen of this chapter, filed for the taxable year in which the qualified investment is first placed in service or use in this state, the taxpayer shall estimate and certify the number of new jobs reasonably projected to be created by it in this state within the period prescribed in subsection (f), that are, or will be, directly attributable to the qualified investment of the taxpayer: Provided, That on and after July 1, 1987, the phrase "taxes imposed by article twelve-a or thirteen (or both) of this chapter" shall mean "taxes imposed by articles thirteen, thirteen-a, thirteen-b, twenty-one, twenty-three and twenty-four of this chapter (or any one or combination of such articles of this chapter)."

(e) Equivalency of permanent employees. -- The hours of part-time employees shall be aggregated to determine the number of equivalent full-time employees for the purpose of subsection (b) hereof but not for the purposes of subsection (c) hereof.

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(f) Redetermination of new jobs percentage. -- With the annual return for the taxes imposed by article twenty-one or twenty-four of this chapter, filed for the third taxable year in which the qualified investment is in service or use, the taxpayer shall certify the actual number of new jobs created by it in this state, that are directly attributable to the qualified investment of the taxpayer: Provided, That on and after July 1, 1987, the phrase "taxes imposed by article twelve-a or thirteen (or both) of this chapter" shall mean "taxes imposed by articles thirteen, thirteen-a, thirteen-b, twenty-one, twenty-three and twenty-four of this chapter (or any one or combination of such articles of this chapter)."

(1) If the actual number of jobs created would result in a higher new jobs percentage, the credit allowed under this article shall be redetermined and amended returns filed for the first and second taxable years that the qualified investment was in service or use in this state.

(2) If the actual number of jobs created would result in a lower new jobs percentage, the credit previously allowed under this article shall be redetermined and amended returns filed for the first and second taxable years. In applying the amount of redetermined credit allowable for the two preceding taxable years, the redetermined credit shall first be applied to the extent it was originally applied in such prior two years to personal income taxes, then to corporation net income taxes, then to business franchise taxes, then to telecommunications taxes, then to severance taxes, then to carrier income taxes and lastly to business and occupation taxes. Any additional taxes due under this chapter shall be remitted with the amended returns filed with the Tax Commissioner, along with interest, as provided in section seventeen, article ten of this chapter, and a ten percent penalty, which may be waived by the Tax Commissioner if the taxpayer shows that the overclaimed amount of the new jobs percentage was due to reasonable cause and not due to willful neglect.

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§11-13C-7a. Small business credit.

(a) "Small business" defined. -- For purposes of this section, the term "small business" means a business which has an annual payroll of $1,500,000 or less, or annual gross sales of not more than $5,000,000: Provided, That beginning January 1, 1989, and each January 1 thereafter, the Tax Commissioner shall prescribe amounts which shall apply in lieu of the above amounts during that calendar year. These amounts shall be prescribed by increasing the amount of each by the cost-of-living adjustment for such calendar year. The requirements for annual payroll and annual gross receipts, once met by a given taxpayer in that taxable year when qualified investment is first placed in service or use shall not again be applied to that same taxpayer in subsequent years to defeat the small business credit to which the taxpayer gained entitlement in that year. However, the median compensation requirements applicable to any small business, except a small business entitled to a certified project credit, shall be determined when qualified investment is first placed in service or use; and subsequently redetermined inflation adjusted amounts for median compensation for each year shall be the requirements applicable to that small business for each year throughout the ten-year credit period and any further carryover or other extended credit period for the original credit to which the requirements relate.

(1) Cost-of-living adjustment. -- For purposes of subsection (a), the cost-of-living adjustment for any calendar year is the percentage (if any) by which:

(A) The consumer price index for the preceding calendar year exceeds;

(B) The consumer price index for the calendar year 1987.

(2) Consumer price index for any calendar year. -- For purposes of subdivision (1), the consumer price index for any calendar year is the average of the federal consumer price index as of the close of the twelve-month period ending on the thirty-first day of August of such calendar year.

(3) Consumer price index. -- For purposes of subdivision (2), the term "Federal Consumer Price Index" means the last consumer price index for all urban consumers published by the United States department of labor.

(4) Rounding. -- If any increase under subdivision (1) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(b) Amount of credit allowed.

(1) Credit allowed. -- An eligible small business taxpayer shall be allowed a credit against the portion of taxes imposed by this state that are attributable to and the direct consequence of the eligible small business taxpayer's qualified investment in a new or expanded business in this state which results in the creation of at least ten new jobs. The amount of this credit shall be determined as provided in this section.

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(2) Amount of credit. -- The amount of credit allowable under this section is determined by dividing the amount of the eligible small business taxpayer's "qualified investment" (determined under section six) in "property purchased for business expansion" (as defined in section three) by ten. The amount of qualified investment so apportioned to each year of the ten-year credit period shall be the annual measure against which taxpayer's annual new jobs percentage (determined under subsection (d)) is applied. The product of this calculation establishes the maximum amount of credit allowable each year for ten consecutive years under this section due to the qualified investment.

(3) Application of credit. -- The annual credit allowance must be taken beginning with the taxable year in which the taxpayer places the qualified investment into service or use in this state, unless the taxpayer elects to delay the beginning of the ten-year credit period until the next succeeding taxable year. This election shall be made in the annual income tax return filed under this chapter by the taxpayer for the taxable year in which the qualified investment is placed in service or use. Once made, this election cannot be revoked. The annual credit allowance shall be taken and applied in the manner prescribed in section five.

(c) New jobs. -- The term "new jobs" has the meaning ascribed to it in subdivision (14), subsection (b), section three of this article: Provided, That the median compensation of such new jobs shall not be less than $11,000 per year and that beginning January 1, 1989, and each January 1 thereafter, the Tax Commissioner shall adjust the median annual compensation specified in this subsection by increasing the amount thereof by the annual cost-of-living adjustment determined under subsection (a).

(1) The term "new employee" shall have the meaning ascribed to it in subdivision (13), subsection (b), section three of this article: Provided, That such term shall not include employees filling new jobs who:

(A) Are related individuals, as defined in subsection (i), section 51 of the Internal Revenue Code of 1986, or a person who owns ten percent or more of the business with such ownership interest to be determined under rules set forth in subsection (b), section 267 of said Internal Revenue Code; or

(B) Worked for the taxpayer during the six-month period ending on the date taxpayer's qualified investment is placed in service or use and is rehired by the taxpayer during the six-month period beginning on the date taxpayer's qualified investment is placed in service or use.

(2) When a job is attributable. -- An employee's position is directly attributable to the qualified investment if:

(A) The employee's service is performed or his or her base of operations is at the new or expanded business facility;

(B) The position did not exist prior to the construction, renovation, expansion or acquisition

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of the business facility and the making of the qualified investment; and

(C) But for the qualified investment, the position would not have existed.

(d) New jobs percentage. -- The annual new jobs percentage is based on the number of new jobs created in this state by the taxpayer that is directly attributable to taxpayer's qualified investment.

(1) If at least ten new jobs are created and filled during the taxable year in which the qualified investment is placed in service or use, the applicable new jobs percentage shall be thirty percent: Provided, That for each new job over ten, up to forty such additional new jobs, the applicable new jobs percentage shall be increased by adding thereto one half of one percent, with the maximum new jobs percentage not to exceed fifty percent.

(2) During each of the remaining nine years of the ten-year credit period, the annual new jobs percentage shall be based on the average number of new jobs that were filled during that taxable year: Provided, That for purposes of estimating the new jobs percentage that will be applicable for each subsequent credit year, the taxpayer shall use the new jobs percentage allowable for the taxable year immediately prior thereto, and in the annual income tax return filed under this chapter for the then current tax year, taxpayer shall redetermine his or her allowable new jobs percentage for that year based on the average number of new employees employed in new jobs during that year (determined on a monthly basis) created as the direct result of taxpayer's qualified investment.

(e) Certification of new jobs. -- With the annual income tax return filed under this chapter for each taxable year during the ten-year credit period, the taxpayer shall certify:

(1) The new jobs percentage for that taxable year;

(2) The amount of the credit allowance for that year;

(3) If the business is a partnership or electing small business corporation, the amount of credit allocated to the partners or shareholders, as the case may be;

(4) That qualified investment property continue to be used in the business, or if any of it was disposed of during the year the date of disposition and that such property was not disposed of prior to expiration of its useful life, as determined under section six;

(5) That the new jobs created by the qualified investment continue to exist and are filled by persons who meet the definition of new employee (as defined in subdivision (1), subsection (c) of this section) and are paid an average annual compensation equal to or greater than the minimum average annual compensation required by this section.

(f) Small business project. -- A small business may apply to the Tax Commissioner under section four-b for certification of subdivision (1), subsection (a), section four-b project if that project will create at least ten new jobs.

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(g) Regulations. -- The Tax Commissioner shall prescribe such regulations as he or she may deem necessary in order to determine the amount of credit allowed under this section to a taxpayer; to verify taxpayer's continued entitlement to claim such credit; and to verify proper application of the credit allowed. The Tax Commissioner may, by regulation, require a taxpayer intending to claim credit under this section to file with the Tax Commissioner a notice of intent to claim this credit, before the taxpayer begins reducing his or her monthly or quarterly installment payments of estimated tax for the credit provided in this section.

(h) Effective date.

(1) The credit provided in this section shall be allowed for qualified investment property purchased or leased after June 30, 1987.

(2) The amendments to this section, enacted in the year 1998, shall be retroactive to tax years beginning on or after January 1, 1995.

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§11-13C-8. Forfeiture of unused tax credits; redetermination of credit allowed.

(a) Disposition of property or cessation of use. -- If during any taxable year, property with respect to which a tax credit has been allowed under this article:

(1) Is disposed of prior to the end of its useful life, as determined under section six of this article; or

(2) Ceases to be used in an eligible business of the taxpayer in this state prior to the end of its useful life, as determined under said section six, then the unused portion of the credit allowed for such property shall be forfeited for the taxable year and all ensuing years. Additionally, except when the property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, the taxpayer shall redetermine the amount of credit allowed in all earlier years by reducing the applicable percentage of cost of such property allowed under said section six, to correspond with the percentage of cost allowable for the period of time that the property was actually used in this state in the new or expanded business of the taxpayer. Taxpayer shall then file a reconciliation statement with its annual business and occupation tax return or carrier income tax return, for the year in which the forfeiture occurs and pay any additional taxes owed due to reduction of the amount of credit allowable for such earlier years, plus interest and any applicable penalties: Provided, That for taxable periods beginning on or after July 1, 1987, such reconciliation statement shall be filed with the annual return for the primary tax for which the taxpayer is liable under articles thirteen, thirteen-a, thirteen-b and twenty-three of this chapter.

(b) Cessation of operation of business facility. -- If during any taxable year the taxpayer ceases operation of a business facility in this state for which credit was allowed under this article, before expiration of the useful life of property with respect to which tax credit has been allowed under this article, then the unused portion of the allowed credit shall be forfeited for the taxable year and all ensuing years. Additionally, except when the cessation is due to fire, flood, storm or other casualty, the taxpayer shall redetermine the amount of credit allowed in earlier years by reducing the applicable percentage of cost of such property allowed under section six, to correspond with the percentage of cost allowable for the period of time that the property was actually used in this state in a business of the taxpayer that is taxable under article twelve-a or thirteen of this chapter. Taxpayer shall then file a reconciliation statement with its annual business and occupation tax return or carrier income tax return for the year in which the forfeiture occurs, and pay any additional taxes owed due to reduction of the amount of credit allowable for such earlier years, plus interest and any applicable penalties: Provided, That for taxable periods beginning on or after July 1, 1987, such reconciliation statement shall be filed with the annual return for the primary tax for which the taxpayer is liable under articles thirteen, thirteen-a, thirteen-b and twenty-three of this chapter.

(c) Reduction in number of employees. -- If during any taxable year subsequent to the taxable year in which the new jobs percentage is redetermined as provided in section seven of this article, the average number of employees of the taxpayer, for the then current taxable

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year, employed in positions created because of and directly attributable to the qualified investment falls below the minimum number of new jobs created upon which the taxpayer's annual credit allowance is based, the taxpayer shall calculate what his annual credit allowance would have been had his new jobs percentage been determined based upon the average number of employees, for the then current taxable year, employed in positions created because of and directly attributable to the qualified investment. The difference between the result of this calculation and the taxpayer's annual credit allowance for the qualified investment as determined under section four of this article, shall be forfeited for the then current taxable year, and for each succeeding taxable year unless for such succeeding taxable year the taxpayer's average employment in positions directly attributable to the qualified investment once again meets the level required to enable the taxpayer to utilize its full annual credit allowance for that taxable year.

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§11-13C-8a. Recapture of credit; recapture tax imposed.

(a) When recapture tax applies. --

(1) Any person who places business investment and jobs expansion tax credit property in service or use after March 12, 1994, and who fails to use such qualified investment property for at least the period of its useful life (determined as of the time the property was placed in service or use), or the period of time over which tax credits allowed under this article with respect to such property are applied under this article, which ever period is less, and who reduces the number of its employees filling new jobs in its business in this state, which were created and are directly attributable to the qualified investment property, after the third taxable year in which the qualified investment property was placed in service or use, or fails to continue to employ individuals in all the new jobs created as a direct result of the qualified investment property and used to qualify for the credit allowed by this article, prior to the end of the tenth taxable year after the qualified investment property was placed in service or use, such person shall pay the recapture tax imposed by subsection (b) of this section.

(2) This section shall not apply when section nine of this article applies. However, the successor, or the successors, and the person, or persons, who previously claimed credit under this article with respect to such qualified investment property and the new jobs attributable thereto, shall be jointly and severally liable for payment of any recapture tax subsequently imposed under this section with respect to such qualified investment property and new jobs.

(b) Recapture tax imposed. --

The recapture tax imposed by this subsection shall be the amount determined as follows:

(1) Full recapture. -- If taxpayer prematurely removes qualified investment property placed in service after March 12, 1994, (when considered as a class) from economic service in such taxpayer's qualified investment business activity in this state, and the number of employees filling the new jobs created by such person falls below fifty, taxpayer shall recapture the amount of credit claimed under section five of this article for the taxable year, and all preceding taxable years, on qualified investment property which has been prematurely removed from service. The amount of tax due under this subdivision of subsection (b) shall be an amount equal to the amount of credit that is recaptured under this subdivision (1).

(2) Partial recapture. -- If taxpayer prematurely removes qualified investment property placed in service after March 12, 1994, (when considered as a class) from economic service in such taxpayer's qualified investment business activity in this state, and the number of employees filling the new jobs created by such person remains fifty or more, but falls below the number necessary to sustain continued application of credit determined by use of the new job percentage upon which such taxpayer's one-tenth annual credit allowance was determined under section four, or seven-a of this article, taxpayer shall recapture an amount

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of credit equal to the difference between (A) the amount of credit claimed under section five of this article for the taxable year, and all preceding taxable years, and (B) the amount of credit that would have been claimed in such years if the amount of credit allowable under section four, or seven-a of this article had been determined based on the qualified investment property which remains in service using the average number of new jobs filled by employees in the taxable year for which recapture occurs. The amount of tax due under this subdivision of subsection (b) shall be an amount equal to the amount of credit that is recaptured under this subdivision (2).

(3) Additional recapture. -- If after a partial recapture under subdivision (2) of this subsection, such taxpayer further reduces the number of employees filling new jobs below fifty, taxpayer shall recapture an additional amount determined as provided under subdivision (1) of this subsection. The amount of tax due under this subdivision of subsection (b) shall be an amount equal to the amount of credit that is recaptured under this subdivision (3).

(c) Recapture of credit allowed for projects. -- The Tax Commissioner shall file in the West Virginia register by July 1, 1994, an emergency legislative regulation explaining how the rules of this section shall be applied in the case of projects certified under section four-b of this article.

(d) Payment of recapture tax. -- The amount of tax recaptured under this section shall be due and payable on the day such person's annual return is due for the taxable year in which this section applies, under article twenty-one, or twenty-four, of this chapter. When the employer is a partnership, or s corporation, for federal income tax purposes, the recapture tax shall be paid by those persons who are partners in such partnership, or shareholders in such s corporation, in the taxable year in which recapture occurs under this section.

(e) Regulations. -- The Tax Commissioner shall promulgate such legislative regulations as may be necessary to carry out the purpose of this section and to implement the intent of the Legislature. Such regulations shall be promulgated in accordance with the provisions of article three, chapter twenty-nine-a of this code.

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§11-13C-9. Transfer of qualified investment to successors.

(a) Mere change in form of business. -- Property shall not be treated as disposed of under section eight of this article, by reason of a mere change in the form of conducting the business as long as the property is retained in a business in this state, and the taxpayer retains a controlling interest in the successor business. In this event, the successor business shall be allowed to claim the amount of credit still available with respect to the business facility or facilities transferred, and the taxpayer (transferor) shall not be required to redetermine the amount of credit allowed in earlier years.

(b) Transfer or sale to successor. -- Property shall not be treated as disposed of under section eight by reason of any transfer or sale to a successor business which continues to operate the business facility in this state. Upon transfer or sale, the successor shall acquire the amount of credit that remains available under this article for each subsequent taxable year and the taxpayer (transferor) shall not be required to redetermine the amount of credit allowed in earlier years.

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§11-13C-10. Identification of investment credit property.

Every taxpayer who claims credit under this article shall maintain sufficient records to establish the following facts for each item of qualified property:

(1) Its identity;

(2) Its actual or reasonably determined cost;

(3) Its straight-line depreciation life;

(4) The month and taxable year in which it was placed in service;

(5) The amount of credit taken; and

(6) The date it was disposed of or otherwise ceased to be qualified property.

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§11-13C-11. Failure to keep records of investment credit property.

A taxpayer who does not keep the records required for identification of investment credit property, is subject to the following rules:

(1) A taxpayer shall be treated as having disposed of, during the taxable year, any investment credit property which the taxpayer cannot establish was still on hand, in this state, at the end of that year.

(2) If a taxpayer cannot establish when investment credit property reported for purposes of claiming this credit returned during the taxable year was placed in service, the taxpayer shall be treated as having placed it in service in the most recent prior year in which similar property was placed in service, unless the taxpayer can establish that the property placed in service in the most recent year is still on hand. In that event, the taxpayer will be treated as having placed the returned property in service in the next most recent year.

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§11-13C-12. Interpretation and construction.

(a) No inference, implication or presumption of legislative construction or intent shall be drawn or made by reason of the location or grouping of any particular section, provision or portion of this article; and no legal effect shall be given to any descriptive matter or heading relating to any section, subsection or paragraph of this article.

(b) The provisions of this article shall be liberally construed in order to effectuate the legislative intent recited in section two of this article.

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§11-13C-13. Severability.

(a) If any provision of this article or the application thereof shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of said article, but shall be confined in its operation to the provision thereof directly involved in the controversy in which such judgment shall have been rendered, and the applicability of such provision to other persons or circumstances shall not be affected thereby.

(b) If any provision of this article or the application thereof shall be made invalid or inapplicable by reason of the failure of the Legislature to enact any statute therein addressed or referred to, or by reason of the repeal or any other invalidation of any statute therein addressed or referred to, such failure to reenact on such repeal or invalidation of any such statute shall not affect, impair or invalidate the remainder of the said article, but shall be confined in its operation to the provision thereof directly involved with, pertaining to, addressing or referring to the said statute, and the application of such provision with regard to other statutes or in other instances not affected by any such invalid or repealed statute shall not be abrogated or diminished in any way.

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§11-13C-14. Restrictions and limitations on credits allowed by this article.

(a) Findings. -- The Legislature finds that the tax credits allowed under provisions of this article heretofore enacted have not effectively and efficiently increased employment through investment in certain industry segments; that while there has been a significant net decrease in employment in the coal industry in recent years the amount of credit being claimed by producers of coal has significantly increased; that the increasing cost of the credits allowed by this article to coal producers is eroding the state's ability to reasonably fund essential state services such as public education, public safety and basic human services; and that this erosion will continue unless remedial legislation is enacted.

(b) Construction. -- The rule of statutory construction codified in subsection (b), section twelve of this article, is hereby replaced with a rule of reasonable construction in which the burden of proof is on the taxpayer to establish by clear and convincing evidence that the taxpayer is entitled to the benefits allowed by this article.

(c) Credit not to be applied against severance taxes.

(1) Notwithstanding any provision in this chapter to the contrary, no credit shall be allowed against the taxes imposed by article thirteen-a of this chapter for taxable years ending on or after March 10, 1990, unless one of the transition rules in paragraph (2) of this subsection (c) applies.

(2) Transition rules. -- The general rule stated in paragraph (1) of this subsection (c) shall not apply:

(A) To qualified investment property placed in service or use prior to March 10, 1990.

(B) To property purchased or leased for business expansion that is placed in service or use on or after March 10, 1990, if at least one of the following clauses applies to such property:

(i) The new or expanded business facility was constructed, reconstructed or erected, pursuant to a written construction contract executed prior to March 10, 1990, as limited to the provisions of such contract as of such date then binding on the taxpayer, but only to the extent such new or expanded business facility is placed in service or use prior to January 1, 1992.

(ii) The new or expanded business facility which is part of a project described in paragraph (1), subsection (a), section four-b of this article, was constructed, reconstructed or erected, pursuant to a written construction contract executed prior to March 10, 1990, as limited to the provisions of such contract as of such date then binding on the taxpayer: Provided, That only that portion of the contract price attributable to that percentage of the construction contract completed prior to January 1, 1992, (determined under principles set forth in Section 460(b) of the Internal Revenue Code of 1986, as in effect before March 10, 1990, which is placed in service or use prior to January 1, 1994, may be treated as property

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purchased for business expansion under section six of this article.

(iii) The new or expanded business facility was purchased or leased pursuant to a written contract executed prior to March 10, 1990, as limited to the provisions then binding on the taxpayer as of such date, but only to the extent such new or expanded business facility is placed in service or use prior to January 1, 1992.

(iv) The machinery or equipment or other tangible personal property purchased or leased for business expansion at a new or expanded business facility was purchased or leased by the taxpayer pursuant to a written contract to purchase or lease identifiable tangible personal property executed before March 10, 1990, as limited to the provisions of such written contract then binding on the taxpayer, but only to the extent the tangible personal property purchased or leased under such contract is placed in service or use before January 1, 1992: Provided, That when such tangible personal property is purchased or leased as aforesaid as part of a project described in clause (ii) of this subparagraph (B), such tangible personal property must be placed in service or use prior to January 1, 1994, to be treated as property purchased or leased for business expansion under section six of this article.

(C) To property purchased or leased for business expansion that is placed in service or use on or after March 10, 1990, as part of a project otherwise eligible for the credit under subsection (a), section four-b of this article, if all of the requirements of clauses (i), (ii), (iii) and (iv) of this subparagraph are satisfied:

(i) The taxpayer and other participants in the project, if any, have made investments in property purchased or leased for business expansion as defined in subsection (b)(19), section three of this article prior to March 10, 1990, in excess of $10,000,000.

(ii) The investments described in clause (i) were made pursuant to a plan for an integrated project to be developed over a period of one or more years and with the expectation of making additional investments in the integrated project.

(iii) The portion of the project constructed, purchased or leased after March 10, 1990, meets the definition of new business facility in subsection (e)(3) of this section.

(iv) The new jobs created by the project after March 10, 1990, are filled by new employees as defined in subsection (e) (4) of this section.

(3) Notice of claim under transition rules.

(A) Notice required. -- Any person intending to assert a claim for credit based, in whole or in part, on application of the transition rules in subparagraph (B) or (C), paragraph (2) of this subsection (c), shall file written notice of such intention with the Tax Commissioner on or before July 1, 1990. In the case of a multiparticipant project, this notice may be filed by the managing project participant on behalf of all participants in such project. Such notice shall be in a form prescribed by the Tax Commissioner and all information required by such form

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shall be provided.

(B) Failure to file notice. -- If any person fails to timely file the notice required by this paragraph (3), such person shall be precluded from claiming credit under this article for such investment.

(d) Treatment of successor project participants. -- Whenever a participant in a project certified under paragraph (2) or (3), subsection (a), section four-b of this article, is replaced by another participant in that project on or after March 10, 1990, the tax credits available to such successor participant as a result of the transfer shall not exceed the amount of credits that would have been available to the predecessor participant had the transfer to the successor participant not occurred: Provided, That if the project plan provides for annual recalculation of the division of the credit allowable for each year among the participants in the project in order to maximize the collective use of such credit by the project participants, or for any other purpose, then the credit available to the successor participant as a result of the transfer shall be limited each year to the amount of credit actually used by the predecessor participant to offset taxes for the taxable year immediately preceding the taxable year in which such participant's obligations or interest in the project, as described in the project plan certified by the Tax Commissioner, passed to the successor participant in the project.

(e) Certain terms redefined. -- Notwithstanding the provisions of subsection (b), section three of this article, or any other provision of this article, to the contrary, the following terms have the meanings assigned to them by this section.

(1) Construction contract. -- The term "construction contract" means any contract for the building, construction, reconstruction or rehabilitation of, or the installation of any integral components to, or improvements of, a new or existing business facility.

(2) Excluded property. -- The term "property purchased or leased for business expansion" shall not include:

(A) Property owned or leased by the taxpayer and for which the taxpayer was previously allowed tax credit for industrial expansion, tax credit for industrial revitalization, tax credit for coal loading facilities or the tax credits allowed by this article.

(B) Property owned or leased by the taxpayer and for which the seller, lessor, or other transferor, was previously allowed tax credit for industrial expansion, tax credit for industrial revitalization, tax credit for coal loading facilities, or the tax credits allowed by this article.

(C) Repair costs, including materials used in the repair, unless for federal income tax purposes the cost of the repair must be capitalized and not expensed.

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(E) Property which is primarily used outside this state, with use being determined based upon the amount of time the property is actually used both within and without this state.

(F) Property which is acquired incident to the purchase of the stock or assets of the seller, unless for good cause shown, the Tax Commissioner consents to waiving this requirement.

(G) Natural resources in place purchased or leased prior to March 1, 1985, or purchased or leased after such date pursuant to an option to purchase or lease such natural resources in place acquired prior to such date but exercised, in whole or in part, on or after March 10, 1990; and natural resources in place purchased or leased on or after March 10, 1990, unless pursuant to a written contract to purchase or lease executed prior to the passage of this section.

(H) Property purchased or leased on or after March 10, 1990, unless pursuant to a written contract to purchase or lease executed prior to the passage of this section, the cost or consideration for which cannot be quantified with any reasonable degree of accuracy at the time such property is placed in service or use: Provided, That when the contract of purchase or lease specifies a minimum purchase price or minimum annual rent the amount thereof shall be used to determine the qualified investment in such property under section six of this article if the property otherwise qualifies as property purchased or leased for business expansion.

(3) New business facility. -- The term "new business facility" means a business facility which satisfies all the requirements of subparagraphs (A), (B), (C) and (D) of this paragraph.

(A) The facility is employed by the taxpayer in the conduct of a business the net income of which is or would be taxable under article twenty-one or twenty-four of this chapter. Such facility shall not be considered a new business facility in the hands of the taxpayer if the taxpayer's only activity with respect to such facility is to lease it to another person or persons.

(B) Such facility is purchased by, or leased to, the taxpayer after March 1, 1985.

(C) The facility was not purchased or leased by the taxpayer from a related person or a project participant, or related person of a project participant, in any certified project in which the taxpayer is a participant. The Tax Commissioner may waive this requirement if the facility was acquired from a related party for its fair market value and the acquisition was not tax motivated.

(D) Such facility was not in service or use during the ninety days immediately prior to transfer of the title to such facility, or prior to the commencement of the term of the lease of such facility: Provided, That this ninety-day period may be waived by the Tax Commissioner if the commissioner determines that persons employed at the facility may be treated as "new employees" as that term is defined under paragraph (4) of this subsection.

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(4) New employee.

(A) The term "new employee" means a person residing and domiciled in this state, hired by the taxpayer to fill a position or a job in this state which previously did not exist in taxpayer's business enterprise in this state prior to the date on which the taxpayer's qualified investment is placed in service or use in this state. In no case shall the number of new employees directly attributable to such investment for purposes of this credit exceed the total net increase in the taxpayer's employment in this state: Provided, That with respect to taxpayers who file application for certification after March 10, 1990, the Tax Commissioner may require that the net increase in the taxpayer's employment in this state be determined and certified for the taxpayer's controlled group; and in the case of a project involving more than one person for the controlled groups of all participants, taken as a whole: Provided, however, That persons filling jobs saved as a direct result of taxpayer's qualified investment in property purchased or leased for business expansion on or after March 10, 1990, may be treated as new employees filling new jobs if the taxpayer certifies the material facts to the Tax Commissioner and the Tax Commissioner expressly finds that:

(i) But for the new employer purchasing the assets of a business in bankruptcy under chapter seven or eleven of the United States bankruptcy code and such new employer making qualified investment in property purchased or leased for business expansion, the assets would have been sold by the United States bankruptcy court in a liquidation sale and the jobs so saved would have been lost; or

(ii) But for taxpayer's qualified investment in property purchased or leased for business expansion in this state, taxpayer would have closed its business facility in this state and the employees of the taxpayer located at such facility would have lost their jobs: Provided, That the Tax Commissioner shall not make this certification unless the Tax Commissioner finds that the taxpayer is insolvent as defined in 11 U.S.C. §101 (31) or that the taxpayer's business facility was destroyed, in whole or in significant part, by fire, flood or other act of God.

(B) A person shall be deemed to be a "new employee" only if such person's duties in connection with the operation of the business facility are on:

(i) A regular, full-time and permanent basis.

(I) "Full-time employment" means employment for at least one hundred forty hours per month at a wage not less than the prevailing state or federal minimum wage, depending on which minimum wage provision is applicable to the business;

(II) "Permanent employment" does not include employment that is temporary or seasonal and therefore the wages, salaries and other compensation paid to such temporary or seasonal employees will not be considered for purposes of sections five and seven of this article; or

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(ii) A regular, part-time and permanent basis: Provided, That such person is customarily performing such duties at least twenty hours per week for at least six months during the taxable year.

(5) Leased property. -- The term "leased property" does not include property which the taxpayer is required to show on its books and records as an asset under generally accepted principles of financial accounting. If the taxpayer is prohibited from expensing the lease payments for federal income tax purposes, the property shall be treated as purchased property under this section if the property was purchased on or after March 10, 1990.

(6) Small business. -- The term "small business" means a small business which has an annual payroll of $1,700,000 or less, and annual gross receipts of not more than $5,500,000: Provided, That on or before January 15, 1991, and on or before each January 15 thereafter, the Tax Commissioner shall prescribe amounts which shall apply in lieu of the above amounts for taxable years beginning on or after January 1, of the calendar year in which determination is made. The prescribed amounts shall be determined in accordance with section seven-a of this article and notice thereof shall be filed in the state register. The requirements for annual payroll and annual gross receipts, once met by a given taxpayer in that taxable year when qualified investment is first placed in service or use shall not again be applied to that same taxpayer in subsequent years to defeat the small business credit to which the taxpayer gained entitlement in that year. However, the median compensation requirements applicable to any small business, except a small business entitled to a certified project credit, shall be determined when qualified investment is first placed in service or use; and subsequently redetermined inflation adjusted amounts for median compensation for each year shall be the requirements applicable to that small business for each year throughout the ten-year credit period and any further carryover or other extended credit period for the original credit to which the requirements relate. For purposes of this definition:

(A) Annual payroll. -- The annual payroll of a business shall include the employees of its domestic and foreign affiliates, whether employed on a full-time, part-time, temporary, or other basis, during the preceding twelve months. If a business has not been in existence for twelve months, the payroll of the business shall be divided by the number of weeks, including fractions of a week, that it has been in business, and the result multiplied by fifty-two. That amount shall then be added to the twelve month payrolls of its domestic and foreign affiliates to determine the annual payroll of the business for purposes of this section.

(B) Annual gross receipts. -- The annual gross receipts of a business shall include the annual gross receipts of its foreign and domestic affiliates.

(i) The "annual gross receipts" of a business which has been in business for three or more complete fiscal years means the annual gross revenues of the business for the last three fiscal years. For purposes of this definition, the gross revenues of the business includes revenues from sales of tangible personal property and services, interest, rents, royalties, fees, commissions and receipts from any other source, but less returns and allowances, sales

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of fixed assets, interaffiliated transactions between a business and its domestic and foreign affiliates, and taxes collected for remittance to a third party, as shown on its books for federal income tax purposes.

(ii) The annual receipts of a business that has been in business for less than three complete fiscal years means its total receipts for the period it has been in business, divided by the number of weeks including fractions of a week that it has been in business, and multiplied by fifty-two.

(C) Affiliates. -- The term "affiliates" includes all concerns which are affiliates of each other when either directly or indirectly: (i) One concern controls or has the power to control the other; or (ii) a third party or parties controls or has the power to control both. In determining whether concerns are independently owned and operated and whether or not affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management and contractual relationships.

(D) Concern. -- The term "concern" means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity), having a place of business located in this state, and which makes a contribution to the economy of this state through payment of taxes, or the sale or use in this state of tangible personal property, or the procurement or providing of services in this state, or the hiring of employees who work in this state. "Concern" includes, but is not limited to, any person as defined in paragraph (18), subsection (b), section three of this article.

(f) Application for credit required.

(1) Application required. -- Notwithstanding any provision of this article to the contrary, no credit shall be allowed or applied under this article for any qualified investment property placed in service or use on or after January 1, 1990, until the person asserting a claim for the allowance of credit under this article makes written application to the Tax Commissioner for allowance of credit as provided in this subsection and receives written acknowledgment of its receipt from Tax Commissioner: Provided, That in the case of a multiparticipant project this notice may be filed by the managing project participant on behalf of all participants in that project. An application for credit shall be filed no later than the last day of the due date, without extensions, for filing the tax returns required under article twenty-one or twenty-four of this chapter for the taxable year in which the property to which the credit relates is placed in service or use and all information required by such form shall be provided.

(2) Failure to file. -- The failure to timely apply for the credit shall result in the forfeiture of fifty percent of the annual credit allowance otherwise allowable under this article. This penalty shall apply annually until such application is filed.

(g) Effective date.

(1) Except as otherwise expressly provided in this section, the provisions of this section shall

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apply to property placed in service or use on or after March 10, 1990, notwithstanding any provision of prior law which may be in conflict with this section. In the case of any such ambiguity, the provisions of this section shall control resolution of such ambiguity.

(2) The amendments to this section enacted in the year, 1998, shall be retroactive, and shall be effective for tax years beginning on or after January 1, 1995.

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§11-13C-15. Continuing suspension of new credit entitlements, exceptions, effective date.

(a) Notwithstanding any other provision of this article to the contrary, no entitlement to the business investment and jobs expansion tax credit under this article shall result from, and no credit shall be available to any taxpayer for, investment placed in service or use after April 10, one thousand nine hundred ninety-three.

(b) The suspension of new entitlements to credits set forth in subsection (a) of this section shall not apply to companies, entities or taxpayers engaged in the following industries or business activities:

(1) Manufacturing, including, but not limited to, chemical processing and chemical manufacturing, manufacture of wood products and forestry products, manufacture of aluminum, manufacture of paper, paper processing, recyclable paper processing, food processing, manufacture of aircraft or aircraft parts, manufacture of automobiles or automobile parts, and all other manufacturing activities, but not timbering or timber severance or timber hauling, or mineral severance, hauling, processing or preparation, or coal severance, hauling, processing or preparation;

(2) Information processing, including, but not limited to, telemarketing, information processing, systems engineering, backoffice operations and software development;

(3) The activity of warehousing, including, but not limited to, commercial warehousing and the operation of regional distribution centers by manufacturers, wholesalers or retailers;

(4) The activity of goods distribution;

(5) Destination-oriented recreation and tourism.

(c) Notwithstanding the fact that a company, entity or taxpayer is engaged in an industry or business activity enumerated in subsection (b) of this section, such company, entity or taxpayer must qualify for the business investment and jobs expansion tax credit by fulfilling the qualified investment, jobs creation and other credit entitlement requirements of the business investment and jobs expansion tax credit act in order to obtain entitlement to any credit under this article. Failure to fulfill the statutory requirements of the business investment and jobs expansion tax credit act will result in a partial or complete loss of the tax credit.

(d) Transition rule. -- Notwithstanding any provision herein contained to the contrary, this section shall not apply to investments for which applications for credit or applications for projected certification were filed prior to April 10, one thousand nine hundred ninety-three.

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§11-13C-16. Termination of credit; effective date.

(a) Notwithstanding any other provision of this article to the contrary, no entitlement to any tax credit under this article may result from, and no credit is available to any taxpayer for, investment placed in service or use after December 31, 2002.

(b) Notwithstanding the provisions of subsection (a) of this section, the provisions of sections one through fifteen, of this article continue to apply to taxpayers that have gained entitlement to the credit pursuant to the placement of qualified investment into service or use prior to January 1, 2003.

(c) Transition rules. -– The general rule stated in subsection (a) of this section does not apply:

(1) To qualified investment property placed in service or use prior to January 1, 2003.

(2) To property purchased or leased for business expansion that is placed in service or use on or after January 1, 2003, if at least one of the following clauses applies to the property:

(A) The new or expanded business facility was constructed, reconstructed or erected, pursuant to a written construction contract executed prior to January 1, 2003, as limited to the provisions of the contract as of that date then binding on the taxpayer, but only to the extent the new or expanded business facility is placed in service or use prior to January 1, 2004;

(B) The new or expanded business facility is part of a project described in subdivision (1), subsection (a), section four-b of this article, for which the multiple year project investment period had commenced, but had not yet closed on or before January 1, 2003, and the new or expanded business facility constitutes or includes property placed in service or use prior to closure of the multiple year project investment period allowed for the project that is:

(i) Property constructed for a multiple year project certified before January 1, 2003, in accordance with section four-b of this article: Provided, That only that portion of the contract price attributable to that percentage of the construction contract completed prior to the last day of the multiple year project investment period (determined under principles set forth in Section 460(b) of the Internal Revenue Code of 1986, as in effect before January 1, 2003), which is placed in service or use prior to the last day of the multiple year project investment period allowed pursuant to subdivision (1), subsection (a), section four-b of this article, may be treated as property purchased for business expansion under section six of this article;

(ii) A new or expanded business facility purchased or leased for a multiple year project certified before January 1, 2003, in accordance with section four-b of this article; or

(iii) Machinery or equipment or other tangible personal property purchased or leased for a multiple year project certified before January 1, 2003, in accordance with section four-b of this article.

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For purposes of this paragraph, the multiple year project investment period will be treated as having commenced if the taxpayer has placed the qualified investment into service or use in accordance with section four of this article. A multiple year project period will not be treated as having commenced merely as a result of the issuance of certification of a project under section four-b of this article. No entitlement to any tax credit under this paragraph may result from, and no credit is available to any taxpayer for, investment placed in service or use after closure of the multiple year project investment period for which certification has been issued.

(C) The new or expanded business facility was purchased or leased pursuant to a written contract executed prior to January 1, 2003, as limited to the provisions then binding on the taxpayer as of that date, but only to the extent the new or expanded business facility is placed in service or use prior to January 1, 2004; or

(D) The machinery or equipment or other tangible personal property purchased or leased for business expansion at a new or expanded business facility was purchased or leased by the taxpayer pursuant to a written contract to purchase or lease identifiable tangible personal property executed before January 1, 2003, as limited to the provisions of the written contract then binding on the taxpayer, but only to the extent the tangible personal property purchased or leased under the contract is placed in service or use before January 1, 2004.

(d) Notice of election required. -- Any person intending to claim credit under one or more of the transition rules provided in subsection (c) of this section shall file written notice of his or her intention with the Tax Commissioner on or before December 31, 2002. In the case of a multiparticipant project, this notice may be filed by the managing project participant on behalf of all participants in the project. Notice is to be in a form prescribed by the Tax Commissioner and all information required by the form is to be provided.

(e) Failure to file notice. -- If any person fails to timely file the notice required by subsection (d) of this section, that person is precluded from claiming credit under this article for investment property placed in service or use after December 31, 2002, and may claim credit under article thirteen-q of this chapter to the extent credit is allowable under that article. For purposes of this section, notice, in proper and complete form, timely filed under section twenty-one, article thirteen-q of this chapter, fulfills the filing requirement of this section if that filing addresses the same qualified investment for which notice would be required under this section.

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