WEST VIRGINIA CODE CHAPTER 11 ARTICLE 13LL

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§11-13LL-1. Short title.

This article may be cited as the “West Virginia Industrial Advancement Act.”

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§11-13LL-2. Legislative findings and purpose.

The Legislature finds that the location of new labor and capital intensive heavy industrial facilities in this state, and the expansion, growth and revitalization of labor and capital intensive heavy industrial facilities in this state is in the public interest and promotes the general welfare of the people of this state.

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§11-13LL-3. Definitions.

(a) Any term used in this article has the meaning ascribed by this section unless a different meaning is clearly required by the context of its use or by definition in this article.

(b) For purpose of this article, the term:

(1) "Combined group" means a combined group as defined in §11-24-3a of this code and all members of a combined return in this state.

(2) "Defined benefit" means money payments, emoluments, rights, benefits, asset transfers and any other form of disbursement or outlay derived from a defined benefit plan as defined in 26 USC §414, or 29 USC §1002.

(3) "Eligible certificate holder" means an eligible taxpayer certified as a qualified labor intensive heavy industrial manufacturing project.

(4) "Eligible taxpayer" means an industrial taxpayer who purchases property for the purpose of industrial expansion or for the purpose of industrial revitalization in this state.

(5) "Employee benefits" means payments by a taxpayer for a full-time employee for: health insurance; life insurance; dental insurance; vision insurance; defined benefits; or as contributions to a qualified cash or deferred compensation arrangement within the meaning of Section 401(k) of the Internal Revenue Code or similar qualified plans.

(6) "Flow-through entity," "conduit entity," or "pass through entity" means an S Corporation, partnership, limited partnership, limited liability partnership, or limited liability company. The term "flow-through entity," "conduit entity," or "pass through entity" includes a publicly traded partnership as that term is defined in section 7704 of the Internal Revenue Code that has equity securities registered with the Securities and Exchange Commission under section 12 of Title I of the Securities Exchange Act of 1934, 15 USC §78l: *Provided*, That a publicly traded partnership as defined in section 7704 of the Internal Revenue Code having equity securities registered with the Securities and Exchange Commission under section 12 of Title I of the Securities Exchange Act of 1934, 15 USC §78l, that is treated as a C corporation for federal income tax purposes, shall be treated as a corporation taxable under §11-24-1 *et seq.* of this code.

(7) "Full-time employee" means an employee employed in the state for at least an average of 140 hours per month during employment with an average hourly wage including employee benefits of more than 200 percent of the prevailing federal minimum wage. The prevailing federal minimum wage shall be the federal minimum wage effective as of the date of certification of a taxpayer as a qualified labor intensive heavy industrial manufacturing project.

(8) "Industrial expansion" means capital investment in a new or expanded industrial facility in this state.

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(9) “Industrial facility” means any factory, mill, plant, refinery, warehouse, building, or complex of buildings located within this state, including the land on which foregoing is located, and all machinery, equipment, and other real and tangible personal property located at or associated with the facility used in connection with the operation of the manufacturing business.

(10) “Industrial revitalization” or “revitalization” means capital investment in an industrial facility located in this state to construct, build, commission, install, replace or modernize buildings, equipment, machinery, and other tangible personal property used in connection with the operation of the facility in an industrial business of the taxpayer including the acquisition of any real property necessary to the industrial revitalization.

(11) “Industrial taxpayer” means any taxpayer who is primarily engaged in a manufacturing business.

(12) “Qualified labor intensive heavy industrial manufacturing project” means a project certified as a qualified labor intensive heavy industrial manufacturing project by a duly authorized representative of the West Virginia Department of Economic Development on or after January 1, 2022 in which the taxpayer is expected to:

(A) Invest at least $2 billion in property purchased for manufacturing investment and placed in service or put in use at an industrial facility in this state;

(B) Hire at least 500 full-time employees during the period beginning with the date of the first property purchased for manufacturing investment in this state and ending within 36 months after the taxable year in which at least $2 billion in property purchased for manufacturing investment is placed in service or put in use at an industrial facility in this state; and

(C) Meets the definition of manufacturing under this article.

Upon certification by the West Virginia Department of Economic Development, as a qualified labor intensive heavy industrial manufacturing project, an eligible taxpayer may begin claiming the credits allowable by this article. If an eligible certificate holder fails to meet the requirements of subdivision (12), subsection (b) of this section within 72 months of certification, the taxpayer shall increase its tax liability for the current taxable year by an amount equal to the amount of credit which was used pursuant to this article to reduce any tax liability in earlier years.

(13) “Manufacturing” means any business activity classified as having a sector identifier, consisting of the first two digits of the six-digit North American Industry Classification System code number of 31, 32, or 33. For purposes of this article, manufacturing also includes the processing and separation of gases including into compressed, liquid and solid forms.

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(14) "Person" means includes any natural person, corporation or partnership or flow-through entity.

(15) "Property purchased for manufacturing investment" means real property, and improvements thereto, and tangible personal property but only if the property was constructed or purchased on or after January 1, 2022, for use as a component part of a new, expanded, or revitalized industrial facility. This term includes only that tangible personal property with respect to which depreciation, or amortization in lieu of depreciation, is allowable in determining the federal income tax liability (per United States Federal income tax laws in effect as of December 31, 2021) of the industrial taxpayer, that has a useful life, at the time the property is placed in service or use in this state, of four years or more. Property acquired by written lease for a primary term of 10 years or longer, if used as a component part of a new or expanded industrial facility, is included within this definition.

(A) "Property purchased for manufacturing investment" does not include:

(i) 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;

(ii) Motor vehicles licensed by the Division of Motor Vehicles;

(iii) Airplanes;

(iv) Off-premises transportation equipment;

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

(vi) Property which is acquired incident to the purchase of the stock or assets of an industrial taxpayer which property was or had been used by the seller in his or her industrial business in this state or in which investment was previously the basis of a credit against tax taken under any other article of this chapter.

(B) Purchases or acquisitions of land or depreciable property qualify as purchases of property purchased for manufacturing investment for purposes of this article only if:

(i) 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 1986, as defined in §11-21-1 *et seq*. and §11-24-1 *et seq*. of this code;

(ii) The property is not acquired from a related person or by one component member of a controlled group from another component member of the same controlled group. The Tax Commissioner may waive this requirement if the property was acquired from a related party for its then fair market value; and

(iii) The basis of the property for federal income tax purposes, in the hands of the person

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acquiring it, is not determined, in whole or in part, by reference to the federal adjusted basis of the property in the hands of the person from whom it was acquired or under section 1014(e) of the United States Internal Revenue Code of 1986.

(16) "Qualified manufacturing investment" means that amount determined under §11-13LL-5 of this code as qualified manufacturing investment.

(17) "Taxpayer" means any person subject to any of the taxes imposed by §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code, or any combination of those articles of this chapter. The term "taxpayer" includes owners of a flow-through entity, the owners of which receive conduit income from the flow-through entity, on which income owners are required to pay the taxes imposed by §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code, or any combination of those articles. For purposes of this article, reference to the term "taxpayer" also includes the flow-through entity acting on behalf of, or in the stead of, such owners.

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§11-13LL-4. Amount of qualified labor intensive heavy industrial manufacturing project tax credit allowed for manufacturing investment.

(a) *Credit allowed*. — There is allowed or allowable to eligible taxpayers and to persons described in subdivision (4), subsection (b) of this section a credit against the taxes imposed by §11-21-1 *et seq.* and §11-24-1-1 *et seq.* of this code.

(b) *Amount of credit allowable*. — The amount of allowable credit under this article is equal to 50 percent of the qualified manufacturing investment, as determined in §11-13LL-5 of this code, for any eligible certificate holder at the time of certification and thereafter for subsequent qualified manufacturing investment made in this state in excess of the amount of the certification. This credit shall reduce the personal income tax imposed under §11-21-1 *et seq.* of this code and the corporation net income tax imposed under §11-24-1 *et seq.* of this code and for any eligible certificate holder, subject to the following conditions and limitations:

(1) The amount of credit allowable for any eligible certificate holder is applied as utilized pursuant to subdivisions (2), (3), and (4) of this subsection (b) and any unused credit may be carried forward to subsequent taxable years until the credit is exhausted;

(2) *Corporation net income tax*. —

The credit is applied to reduce the corporation net income tax imposed under §11-24-1 *et seq.* of this code (determined after application of §11-13Y-1 *et seq.* of this code and any other allowable credits against tax) or any similar tax, including, but not limited to, local or foreign income, alternative, minimum, accumulated earnings, personal holding company, franchise, capital stock, profits, windfall profits, or gross receipts tax to zero. The amount of annual credit allowed will not reduce corporation net income tax, imposed under §11-24-1 *et seq.* of this code or any similar tax, including, but not limited to, local or foreign income, alternative, minimum, accumulated earnings, personal holding company, franchise, capital stock, profits, windfall profits, or gross receipts tax below zero. Notwithstanding §11-24-13a(g) and §11-24-13c(b)(2) of this code or any other provisions under this code, credit earned by one member of a combined group, but not fully used by that member, may be used, in whole or in part, by another member of the combined group to reduce the corporation net income tax imposed under §11-24-1 *et seq.* of this code or any similar tax, including, but not limited to, local or foreign income, alternative, minimum, accumulated earnings, personal holding company, franchise, capital stock, profits, windfall profits, or gross receipts tax to zero;

(3) *Flow-through entities*. —

(A) If the eligible taxpayer is a flow-through entity, then any unused credit (after application of subdivision (2) of this subsection) is allowed or allowable as a credit against the taxes imposed by §11-24-1 *et seq.* of this code on owners of the eligible taxpayer on the conduit income directly derived from the eligible taxpayer by its owners. Only those portions of the tax imposed by §11-24-1 *et seq.* of this code that are imposed on income directly derived by

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the owner from the eligible taxpayer are subject to offset by this credit;

(B) For eligible certificate holders the amount of annual credit allowed or allowable may reduce corporation net income tax, imposed under §11-24-1 *et seq.* of this code, to zero percent of the amount which would be imposed on the conduit income directly derived from the eligible taxpayer by each owner for such taxable year in the absence of this credit against the taxes as determined after application of §11-13Y-1 *et seq.* of this code any other allowable credits against tax;

(C) Flow-through entities shall allocate any unused credit after application of subdivisions (2) and, (3) of this subsection among their owners in the same manner as profits and losses are allocated for the taxable year; and

(4) *Personal income tax* – The tax credit authorized by this article may be applied against the tax imposed under §11-21-1 *et seq.* of this code, on a sole proprietor who is eligible certificate holder, or on flow-through income of an individual partner, owner, interest holder or S Corporation shareholder, which is net income from an eligible certificate holder directly and solely derived from the qualified labor intensive heavy industrial manufacturing project. Annual credit allowed will not reduce the tax imposed under §11-21-1 *et seq.* of this code on such flow-through income below zero.

(c) Application for credit required.

(1) *Application required*. — Prior to making written application to the Tax Commissioner, an eligible certificate holder may begin claiming credits pursuant to this article. An eligible certificate holder shall file an application with the Tax Commissioner no later than the last day for filing the annual return, determined by including any authorized extension of time for filing the return, required under §11-21-1 *et seq.* or §11-24-1-1 *et seq.* of this code for the taxable year in which the property to which the credit relates is placed in service or use.

(2) *Failure to file*. — The failure to timely apply the application for credit under this section results in forfeiture of five percent of the annual credit allowance otherwise allowable under this article. This penalty applies annually until the application is filed.

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§11-13LL-5. Qualified manufacturing investment.

(a) *General*. — The qualified manufacturing investment is the applicable percentage of the cost of property purchased for manufacturing investment, which is placed in service or use in this state, by the eligible taxpayer during the taxable year.

(b) Applicable percentage.

(1) For the purposes of subsection (a) of this section, the applicable percentage for any property is determined under the following table:

If useful life is: The applicable percentage is:

Less than 4 years: zero percent

4 years or more: 100 percent

(2) The useful life of any property for purposes of this section may be determined at the election of the taxpayer under any one of the following methods:

(A) Depreciation life or useful life, as determined pursuant to such methods as the Tax Commissioner may require as of the date the property is first placed in service or use in this state by the taxpayer;

(B) Depreciation life or useful life, as determined pursuant to the depreciation methods used by the taxpayer for federal income tax purposes; or

(C) Depreciation life or useful life, as determined pursuant to the modified accelerated cost recovery system, as in effect under the United States Internal Revenue Code as of October 1, 2021.

(3) The election of method under this section shall be made on the application for credit filed with the Tax Commissioner for the project. The election of a method, once made, may not be changed during the life of the tax credit authorized under this article except by written approval of the Tax Commissioner.

(c) *Placed in service or use*. — For purposes of the credit allowed by this article, property is 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 the property begins federal income tax purposes; 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.

Notwithstanding the foregoing, eligible certificate holder may begin claiming credits

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pursuant to this article upon certification.

(d) *Cost*. — For purposes of this section, the cost of property purchased for manufacturing investment, is determined under the following rules:

(1) *Trade-ins*. — Cost will not include the value of property given in trade or exchange for property purchased for manufacturing investment;

(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 will not include any insurance proceeds received in compensation for the loss;

(3) *Rental property*. -– The cost of property acquired by lease for a term of 10 years or longer is 100 percent of the rent reserved for the primary term of the lease, not to exceed 20 years;

(4) *Property purchased for multiple use*. — The cost of property purchased for multiple business use including use as a component part of a new or expanded or revitalized industrial facility, together with some other business or activity not eligible for credit under this article, is apportioned between the businesses and occupations. The amount apportioned to the new or expanded or revitalized industrial facility is considered as a qualified investment, subject to the conditions and limitations of this section; and

(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 purposes of depreciation.

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§11-13LL-6. Forfeiture of unused tax credits; redetermination of credit allowed.

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:

(a) Is disposed of prior to the end of its useful life, as determined under §11-13LL-5 of this code; or

(b) Ceases to be used in an industrial facility of the taxpayer in this state prior to the end of its useful life, as determined under §11-13LL-5 of this code, then the unused portion of the credit allowed for such property is forfeited for the taxable year and all ensuing years. 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 the property allowed under §11-13LL-5 of this code, to correspond with the percentage of cost allowable for the period of time that the property was actually used in manufacturing activity as part of an industrial facility of the taxpayer. The taxpayer must then file a reconciliation statement with its annual return filed under §11-24-1 *et seq*. or §11-21-1 *et seq*. of this code, for the year in which the forfeiture occurs and pay any additional taxes owed due to reduction of the amount of credit allowable for the earlier years, plus interest and any applicable penalties.

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§11-13LL-7. Transfer of property purchased for manufacturing investment to successors.

(a) *Mere change in form of business*. — Property may not be treated as disposed of under section six 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 for use in the activity of manufacturing in an industrial facility in West Virginia, and the taxpayer retains a controlling interest in the successor business. In this event, the successor business is allowed to claim the amount of credit still available with respect to the property or industrial facility transferred, and the taxpayer (transferor) may not be required to redetermine the amount of credit allowed in earlier years.

(b) *Transfer or sale to successor*. — Property will not be treated as disposed of under §11-13LL-6 of this code by reason of any transfer or sale to a successor business which continues to use the property in manufacturing in an industrial facility in West Virginia. 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. Upon transfer or sale, the successor shall acquire the amount of credit that remains available under this article for each taxable year subsequent to the taxable year of the transferor during which the transfer occurred and, for the year of transfer, an amount of annual credit for the year in the same proportion as the number of days remaining in the transferor's taxable year bears to the total number of days in the taxable year.

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§11-13LL-8. Identification of investment credit property.

(a) Every taxpayer who claims credit under this article shall maintain sufficient records to establish the following facts for each item of property purchased for manufacturing investment:

(1) Its identity;

(2) Its actual or reasonably determined cost;

(3) Its 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 property purchased for manufacturing investment.

(b) Every taxpayer who claims credit under this article shall also maintain sufficient records to establish the number and types of new jobs, if any, created, the wages and benefits paid to employees filling the new jobs and the duration of each job.

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§11-13LL-9. Failure to keep records of property purchased for manufacturing investment.

A taxpayer who does not keep the records required for property purchased for manufacturing investment, is subject to the following rules:

(a) A taxpayer is treated as having disposed of, during the taxable year, any property purchased for manufacturing investment which the taxpayer cannot establish was still on hand and used in manufacturing activity in this state at the end of that year; and

(b) If a taxpayer cannot establish when property purchased for manufacturing investment reported for purposes of claiming this credit returned during the taxable year was placed in service, the taxpayer is 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 and used in manufacturing activity at the end of that year. 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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§11-13LL-10. Rule-making.

(a) In order to effectuate the purposes of this article, the Tax Commissioner may promulgate procedural rules, interpretive rules and legislative rules, including emergency rules, or any combination thereof, in accordance with §29A-3-1 *et seq*. of this code.

(b) In order to effectuate the purposes of this article, the Department of Economic Development or any agency, division or subdivision thereof, may promulgate procedural rules, interpretive rules and legislative rules, including emergency rules, or any combination thereof, in accordance with §29A-3-1 *et seq*. of this code.

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§11-13LL-11. Application of the West Virginia Tax Procedure and Administration Act and West Virginia Tax Crimes and Penalties Act.

The provisions of this article are subject to the West Virginia Tax Procedure and Administration Act, set forth in §11-10-1 *et seq*. of this code, and the West Virginia Tax Crimes and Penalties Act, set forth in §11-9-1 *et seq*. of this code, as if the provisions thereof were set forth in extenso in this article.

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§11-13LL-12. Effective date.

This article shall be effective for corporate net income tax years and personal income tax years beginning on and after January 1, 2022, with retrospective effective back to such date.

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§11-13LL-13. Consumers sales and service tax and use tax exemption for certificate holders and for construction contractors.

(a) Notwithstanding the provisions of §11-15-1 *et seq*. and §11-15A-1 *et seq*. of this code and notwithstanding the provisions of §11-15-8d of this code, or any other provision of this code, purchases of building materials, tangible personal property, and services by a construction contractor or construction subcontractor or by an eligible certificate holder, used in the construction of a qualified labor intensive heavy industrial manufacturing project facility and any property, structure or facility located on and within the property boundaries of a qualified labor intensive heavy industrial manufacturing project facility, certified pursuant to the provisions of this article, or outside the property boundaries of a qualified labor intensive heavy industrial manufacturing project facility but owned 50 percent or more by such eligible certificate holder, are exempt from the taxes imposed by §11-15-1 *et seq*. and §11-15A-1 *et seq*. of this code. The exemption authorized under this section applies to purchases of building materials, and tangible personal property incorporated into certified project buildings and structures during construction, and to purchases of services used in construction of certified project buildings and structures. The exemption authorized under this section also applies to those structures and facilities located outside the qualified labor intensive heavy industrial manufacturing project property that are not used in manufacturing, and which may be ancillary, incidental, convenient or remote to the manufacturing activity.

(b) Purchases of services, materials and tangible personal property for repairs, maintenance and refurbishment of project property enumerated in subsection (a) are exempt from the taxes imposed by §11-15-1 *et seq*. and §11-15A-1 *et seq*. of this code.

(c) The exemptions authorized under this section also apply to exempt purchases enumerated herein from the municipal consumers sales and service tax and use tax.

(d) Purchases of gasoline and special fuel or any other fuel or means of power for a motor vehicle or any other machine, apparatus or engine, are not exempt under the provisions of this section.

(e) Purchases subject to the consumers sales and service tax and use tax under the provisions of §11-15-3c of this code related to motor vehicle sales are not exempt under the provisions of this section.

(f) Purchases subject to a special district excise tax under §7-22-1 *et seq*. or §8-38-1 *et seq*. of this code are exempt under the provisions of this section.

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§11-13LL-14. Certain taxes prohibited.

Notwithstanding any other provision of this code, municipalities may not impose any business and occupation tax, excise tax, sales or use tax, license tax, license fee, amusement tax, public utilities tax, consumption tax franchise tax, or any other municipal tax or municipal fee on persons who hold a current certification issued under this article. This exclusion does not apply to ad valorem property tax.

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