WEST VIRGINIA CODE: §11-21-3A

§11-21-3a. Imposition of tax; persons subject to tax.

(a) Definitions. — As used in this section, or §11-21-3 of this code, or both, the following terms have the following meanings. Any term used in this section that is not defined in this section has the same meaning as when used elsewhere in this article. Any term undefined in this article has the same meaning as when used in a comparable context in the laws of the United States relating to income taxes, in accordance with §11-21-9 of this code, unless a different meaning is clearly required.

(b) "Electing pass-through entity" means a qualifying pass-through entity that elects to be subject to the tax levied under this article for a taxable year.

(c) "Owner" means a person that is a partner, member, shareholder, or investor in an electing pass-through entity for any portion of the taxable year.

(d) "Income" means the sum of:

(1) The owners' distributive shares of the income, gain, expense, or loss of an electing pass-through entity for the taxable year, as reported for federal income tax purposes; and

(2) The resident owner's distributive share of the electing pass-through entity's income or loss not attributable to West Virginia.

(e) "Tax Commissioner" means the Tax Commissioner of the State of West Virginia or his or her delegate, as provided in §11-1-1 *et seq*. of this code.

(f) "Pass-through entity" means any partnership or other business entity that is not subject to tax under §11-24-1 *et seq*. of this code.

(g) "Entity" means any person that is not an individual.

(h) A pass-through entity that is not a disregarded entity for federal income tax purposes may elect to be subject to the tax levied under this section by filing with the Tax Commissioner a form prescribed by the commissioner making such election on or before the deadline to file the return, as specified in §11-21-51 of this code. Such election applies only to the taxable year for which the election is made and, once made, is irrevocable for that year.

(i) For taxable years beginning on and after January 1, 2022, an electing pass-through entity may make an election, in a format and according to such requirements and procedures established by the Tax Commissioner, to pay the tax levied by this article at the entity level for the taxable year.

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(j) An electing pass-through entity required to file a return under this article shall make an election for the taxable period covered by such return. The election must be made on or before the due date for filing the applicable return, including any extensions that have been granted. Such election applies only to the taxable year for which the election is made and, once made, is irrevocable for that year.

(k) A tax equal to the top marginal rate on individuals under this article on the West Virginia taxable income of an electing pass-through entity that makes the election provided under this section, is hereby annually imposed.

(l) The tax levied under this section shall be calculated without regard to any deductions or credits otherwise permitted to be claimed by an owner or member of the electing pass-through entity in computing the owner's aggregate tax liability under this article and not utilized by the pass-through entity in determining its taxable income.

(m) An electing pass-through entity that elects to pay the tax under this section may be eligible for credits, deductions, or other adjustments to taxable income provided by any applicable sections of this code including the credit provided in §11-21-20 of this code: *Provided*, That a qualifying pass-through entity's taxable income shall be adjusted to eliminate any federal deduction for state and local income taxes.

(n) The full amount of the tax payable as shown on the return of the electing pass-through entity must be paid to the state within the time allowed for filing the return. In the case of any overpayment of the tax imposed under this section, only the electing pass-through entity may request a refund of the overpayment. In the case of any underpayment of tax imposed under this section, the Tax Commissioner may collect the tax from the electing pass-through entity pursuant to §11-10-1 *et seq*. of this code: *Provided*, That shareholders, owners, and partners shall be jointly and severally liable for any underpayment of tax not paid by, or collected from, the pass-through entity.

(o) With respect to an electing pass-through entity that pays the tax imposed under this section, the tax shall be treated as a tax imposed on the pass-through entity itself. The tax levied under this section is intended to comply with the provisions of Internal Revenue Service Notice 2020-75 in which such tax paid by an electing pass-through entity is deductible to the entity for federal income tax purposes.

(p) The Tax Commissioner shall propose rules for legislative approval in accordance with the provisions of §29A-3-1 *et seq*. of this code to administer the tax levied pursuant to the provisions of this section. These rules must include a description of how the adjustments to income and the credit authorized by this section apply to direct or indirect owners of an electing pass-through entity based upon various ownership structures.

(q) There is hereby allowed a credit against a taxpayer's aggregate tax liability under this article for a taxpayer who is an owner of an electing pass-through entity. The credit shall equal the owner's proportionate share of the tax levied under this article remitted by the

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owner's electing pass-through entity for the taxable year. The credit shall be claimed for the taxpayer's taxable year that includes the last day of the electing pass-through entity's taxable year for which the tax levied under this section was paid. If the credit exceeds the aggregate amount of tax otherwise due, the excess may be carried forward by the taxpayer for up to five taxable years. The Tax Commissioner may request that a taxpayer claiming a credit under this section furnish information as is necessary to support the claim for the credit under this section, and no credit shall be allowed unless information requested from the taxpayer is provided to the Tax Commissioner.

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