WEST VIRGINIA CODE: §11-24-3A

§11-24-3a. Specific terms defined.

(a) For purposes of this article:

(1) Aggregate effective rate of tax. -- The term "aggregate effective rate of tax" shall mean the sum of the effective rates of tax imposed by a state or United States possession or any combination thereof on a related member.

(2) Business income. -– The term "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property or the rendering of services in connection therewith constitute integral parts of the taxpayer's regular trade or business operations and includes all income which is apportionable under the Constitution of the United States.

(3) Captive real estate investment trust. -- The term "captive real estate investment trust" shall mean a real estate investment trust, the shares or beneficial interests of which:

(A) Are not regularly traded on an established securities market and:

(B) Are more than fifty percent of the voting power or value of the beneficial interests or shares of which are owned or controlled, directly or indirectly or constructively, by a single entity that is:

(i) Treated as an association taxable as a corporation under the Internal Revenue Code of 1986, as amended; and

(ii) Not exempt from federal income tax pursuant to the provisions of Section 501(a) of the Internal Revenue Code of 1986, as amended;

(C) For purposes of applying subparagraph (i), paragraph (B) of this subdivision, the following entities are not considered an association taxable as a corporation:

(i) Any real estate investment trust as defined in Section 856 of the Internal Revenue Code of 1986, as amended, other than a "captive real estate investment trust";

(ii) Any qualified real estate investment trust subsidiary under Section 856(i) of the Internal Revenue Code of 1986, as amended, other than a qualified real estate investment trust subsidiary of a "captive real estate investment trust";

(iii) Any listed Australian property trust, meaning an Australian unit trust registered as a "managed investment scheme" under the Australian Corporations Act in which the principal class of units is listed on a recognized stock exchange in Australia and is regularly traded on

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an established securities market, or an entity organized as a trust, provided that a listed Australian property trust owns or controls, directly or indirectly, seventy-five percent or more of the voting power or value of the beneficial interests or shares of the trust; or

(iv) Any qualified foreign entity, meaning a corporation, trust, association or partnership organized outside the laws of the United States and which satisfies the following criteria:

(1) At least seventy-five percent of the entity's total asset value at the close of its taxable year is represented by real estate assets as defined in Section 856(c)(5)(B) of the Internal Revenue Code of 1986, as amended, thereby including shares or certificates of beneficial interest in any real estate investment trust, cash and cash equivalents and United States government securities;

(2) The entity is not subject to tax on amounts distributed to its beneficial owners or is exempt from entity-level taxation;

(3) The entity distributes at least eighty-five percent of its taxable income as computed in the jurisdiction in which it is organized to the holders of its shares or certificates of beneficial interest on an annual basis;

(4) Not more than ten percent of the voting power or value in the entity is held directly or indirectly or constructively by a single entity or individual or the shares or beneficial interests of the entity are regularly traded on an established securities market; and

(5) The entity is organized in a country which has a tax treaty with the United States.

(D) A real estate investment trust that is intended to be regularly traded on an established securities market, and that satisfies the requirements of Section 856(a)(5) and (6) of the U.S. Internal Revenue Code by reason of Section 856(h)(2) of the Internal Revenue Code is not considered a captive real estate investment trust within the meaning of this section.

(E) A real estate investment trust that does not become regularly traded on an established securities market within one year of the date on which it first becomes a real estate investment trust is not considered not to have been regularly traded on an established securities market, retroactive to the date it first became a real estate investment trust, and shall file an amended return reflecting the retroactive designation for any tax year or part year occurring during its initial year of status as a real estate investment trust. For purposes of this section, a real estate investment trust becomes a real estate investment trust on the first day that it has both met the requirements of Section 856 of the Internal Revenue Code and has elected to be treated as a real estate investment trust pursuant to Section 856(c)(1) of the Internal Revenue Code.

(4) Combined group. -- The term "combined group" means the group of all persons whose income and apportionment factors are required to be taken into account pursuant to subsection (j) or (k), section thirteen-a of this article in determining the taxpayer's share of

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the net business income or loss apportionable to this state.

(5) Commercial domicile. -- The term "commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed: Provided, That the commercial domicile of a financial organization, which is subject to regulation as such, shall be at the place designated as its principal office with its regulating authority.

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

(7) Corporation. -- "Corporation" means any corporation as defined by the laws of this state or organization of any kind treated as a corporation for tax purposes under the laws of this state, wherever located, which if it were doing business in this state would be subject to the tax imposed by this article. The business conducted by a partnership which is directly or indirectly held by a corporation shall be considered the business of the corporation to the extent of the corporation's distributive share of the partnership income, inclusive of guaranteed payments to the extent prescribed by regulation. The term "corporation" includes a joint-stock company and any association or other organization which is taxable as a corporation under the federal income tax law.

(8) Delegate. -- The term "delegate" in the phrase "or his or her delegate", when used in reference to the Tax Commissioner, means any officer or employee of the state Tax Division 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 or regulations promulgated thereunder.

(9) Domestic corporation. -- The term "domestic corporation" means any corporation organized under the laws of West Virginia and certain corporations organized under the laws of the state of Virginia before June 20, 1863. Every other corporation is a foreign corporation.

(10) Effective rate of tax. -- The term "effective rate of tax" means, as to any state or United States possession, the maximum statutory rate of tax imposed by the state or possession on a related member's net income multiplied by the apportionment percentage, if any, applicable to the related member under the laws of said jurisdiction. For purposes of this definition, the effective rate of tax as to any state or United States possession is zero where the related member's net income tax liability in said jurisdiction is reported on a combined or consolidated return including both the taxpayer and the related member where the reported transactions between the taxpayer and the related member are eliminated or offset. Also, for purposes of this definition, when computing the effective rate of tax for a jurisdiction in which a related member's net income is eliminated or offset by a credit or similar adjustment that is dependent upon the related member either maintaining or managing intangible property or collecting interest income in that jurisdiction, the maximum statutory rate of tax imposed by said jurisdiction shall be decreased to reflect the statutory rate of tax that applies to the related member as effectively reduced by the credit or similar adjustment.

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(11) Engaging in business. -- The term "engaging in business" or "doing business" means any activity of a corporation which enjoys the benefits and protection of government and laws in this state.

(12) Federal Form 1120. -- The term "Federal Form 1120" means the annual federal income tax return of any corporation made pursuant to the United States Internal Revenue Code of 1986, as amended, or in successor provisions of the laws of the United States, in respect to the federal taxable income of a corporation, and filed with the federal Internal Revenue Service. In the case of a corporation that elects to file a federal income tax return as part of an affiliated group, but files as a separate corporation under this article, then as to such corporation Federal Form 1120 means its pro forma Federal Form 1120.

(13) Fiduciary. -- The term "fiduciary" means, and includes, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person.

(14) Financial organization. -- The term "financial organization" means:

(A) A holding company or a subsidiary thereof. As used in this section "holding company" means a corporation registered under the federal Bank Holding Company Act of 1956 or registered as a savings and loan holding company other than a diversified savings and loan holding company as defined in Section 408(a)(1)(F) of the federal National Housing Act, 12 U.S.C. §1730(a)(1)(F);

(B) A regulated financial corporation or a subsidiary thereof. As used in this section "regulated financial corporation" means:

(i) An institution, the deposits, shares or accounts of which are insured under the Federal Deposit Insurance Act or by the federal Savings and Loan Insurance Corporation;

(ii) An institution that is a member of a federal home loan bank;

(iii) Any other bank or thrift institution incorporated or organized under the laws of a state that is engaged in the business of receiving deposits;

(iv) A credit union incorporated and organized under the laws of this state;

(v) A production credit association organized under 12 U.S.C. §2071;

(vi) A corporation organized under 12 U.S.C. §611 through §631 (an Edge Act corporation); or

(vii) A federal or state agency or branch of a foreign bank as defined in 12 U.S.C. §3101; or

(C) A corporation which derives more than fifty percent of its gross business income from one or more of the following activities:

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(i) Making, acquiring, selling or servicing loans or extensions of credit. Loans and extensions of credit include:

(I) Secured or unsecured consumer loans;

(II) Installment obligations;

(III) Mortgages or other loans secured by real estate or tangible personal property;

(IV) Credit card loans;

(V) Secured and unsecured commercial loans of any type; and

(VI) Loans arising in factoring;

(ii) Leasing or acting as an agent, broker or advisor in connection with leasing real and personal property that is the economic equivalent of an extension of credit as defined by the Federal Reserve Board in 12 CFR 225.25(b)(5);

(iii) Operating a credit card business;

(iv) Rendering estate or trust services;

(v) Receiving, maintaining or otherwise handling deposits;

(vi) Engaging in any other activity with an economic effect comparable to those activities described in subparagraph () (i), (ii), (iii), (iv) or (v) of this paragraph.

(15) Fiscal year. -- The term "fiscal year" means an accounting period of twelve months ending on any day other than the last day of December and on the basis of which the taxpayer is required to report for federal income tax purposes.

(16) Includes and including. -- The terms "includes" and "including", when used in a definition contained in this article, do not exclude other things otherwise within the meaning of the term being defined.

(17) Insurance company. -- The term "insurance company" means any corporation subject to taxation under section twenty-two, article three, chapter twenty-nine of this code or chapter thirty-three of this code or an insurance carrier subject to the surcharge imposed by subdivision (1) or (3), subsection (f), section three, article two-c, chapter twenty-three of this code or any corporation that would be subject to taxation under any of those provisions were its business transacted in this state.

(18) Intangible expense. -- The term "intangible expense" includes: (A) Expenses, losses and costs for, related to or in connection directly or indirectly with the direct or indirect acquisition, use, maintenance or management, ownership, sale, exchange or any other

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disposition of intangible property to the extent those amounts are allowed as deductions or costs in determining taxable income before operating loss deductions and special deductions for the taxable year under the Internal Revenue Code; (B) amounts directly or indirectly allowed as deductions under Section 163 of the Internal Revenue Code for purposes of determining taxable income under the Internal Revenue Code to the extent those expenses and costs are directly or indirectly for, related to or in connection with the expenses, losses and costs referenced in subdivision (A) of this subsection; (C) losses related to, or incurred in connection directly or indirectly with, factoring transactions or discounting transactions; (D) royalty, patent, technical and copyright fees; (E) licensing fees; and (F) other similar expenses and costs.

(19) Intangible property. -- "Intangible property" includes patents, patent applications, trade names, trademarks, service marks, copyrights, mask works, trade secrets and similar types of intangible assets.

(20) Interest expense. -- "Interest expense" means amounts directly or indirectly allowed as deductions under Section 163 of the Internal Revenue Code for purposes of determining taxable income under the Internal Revenue Code.

(21) "Internal Revenue Code" means the Internal Revenue Code as defined in section three of this article, as amended and in effect for the taxable year and without regard to application of federal treaties unless expressly made applicable to states of the United States.

(22) Nonbusiness income. -- The term "nonbusiness income" means all income other than business income.

(23) Ownership. -- In determining the ownership of stock, assets or net profits of any person, the constructive ownership of Section 318(a) of the Internal Revenue Code of 1986, as amended, as modified by Section 856(d)(5) of the Internal Revenue Code of 1986, as amended, shall apply.

(24) "Partnership" means a general or limited partnership or organization of any kind treated as a partnership for tax purposes under the laws of this state.

(25) Person. -- The term "person" is considered interchangeable with the term "corporation" in this section. The term "person" means any individual, firm, partnership, general partner of a partnership, limited liability company, registered limited liability partnership, foreign limited liability partnership, association, corporation whether or not the corporation is, or would be if doing business in this state, subject to the tax imposed by this article, company, syndicate, estate, trust, business trust, trustee, trustee in bankruptcy, receiver, executor, administrator, assignee or organization of any kind.

(26) Pro forma return. -- The term "pro forma return" when used in this article means the return which the taxpayer would have filed with the Internal Revenue Service had it not

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elected to file federally as part of an affiliated group.

(27) Public utility. -- The term "public utility" means any business activity to which the jurisdiction of the Public Service Commission of West Virginia extends under section one, article two, chapter twenty-four of this code.

(28) Qualified regulated investment company. -- The term "qualified regulated investment company" means any regulated investment company other than a regulated investment company where more than fifty percent of the voting power or value of the beneficial interests or share of which are owned or controlled, directly or indirectly, constructively or otherwise, by a single entity that is:

(A) Subject to the provision of subchapter C, chapter 1, subtitle A, Title 26 of the United States Code, as amended;

(B) Not exempt from federal income tax pursuant to the provision of Section 501 of the Internal Revenue Code of 1986, as amended; and

(C) Not a regulated investment company as defined in Section 3 of the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-3: Provided, That a regulated invested company, the shares of which are held in a segregated asset account of a life insurance corporation (as described in Section 817 of the Internal Revenue Code of 1986, as amended), shall be treated as a qualified regulated investment company.

(29) Real estate investment trust. -- The term "real estate investment trust" has the meaning ascribed to such term in Section 856 of the Internal Revenue Code of 1986, as amended.

(30) Regulated investment company. -- The term "regulated investment company" has the same meaning as ascribed to such term in Section 851 of the Internal Revenue Code of 1986, as amended.

(31) Related entity. -- "Related entity" means: (A) A stockholder who is an individual or a member of the stockholder's family set forth in Section 318 of the Internal Revenue Code if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially or constructively, in the aggregate, at least fifty percent of the value of the taxpayer's outstanding stock; (B) a stockholder, or a stockholder's partnership, limited liability company, estate, trust or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts and corporations own directly, indirectly, beneficially or constructively, in the aggregate, at least fifty percent of the value of the taxpayer's outstanding stock; or (C) a corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Internal Revenue Code if the taxpayer owns, directly, indirectly, beneficially or constructively, at least fifty percent of the value of the corporation's outstanding stock. The attribution rules of the Internal Revenue Code shall apply for purposes of determining whether the ownership

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requirements of this definition have been met.

(32) Related member. -- "Related member" means a person that, with respect to the taxpayer during all or any portion of the taxable year, is: (A) A related entity; (B) a component member as defined in subsection (b), Section 1563 of the Internal Revenue Code; (C) a person to or from whom there is attribution of stock ownership in accordance with subsection (e), Section 1563 of the Internal Revenue Code; or (D) a person that, notwithstanding its form or organization, bears the same relationship to the taxpayer as a person described in subdivisions (A) through (C), inclusive, of this subsection.

(33) Sales. -- The term "sales" means all gross receipts of the taxpayer that are "business income" as defined in this section.

(34) State. -- The term "state" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States and any foreign country or political subdivision thereof.

(35) Tax. -- The term "tax" includes, within its meaning, interest and additions to tax, unless the intention to give it a more limited meaning is disclosed by the context.

(36) Taxable year, tax year. -- The term "taxable year" or "tax year" means the taxable year for which the taxable income of the taxpayer is computed under the federal income tax law.

(37) Tax Commissioner. -- The term "Tax Commissioner" means the Tax Commissioner of the State of West Virginia or his or her delegate.

(38) Tax haven. -- The term "tax haven" means a jurisdiction that, for a particular tax year in question: (A) Is identified by the Organization for Economic Cooperation and Development as a tax haven or as having a harmful preferential tax regime; or (B) a jurisdiction that has no, or nominal, effective tax on the relevant income and: (i) That has laws or practices that prevent effective exchange of information for tax purposes with other governments regarding taxpayers subject to, or benefitting from, the tax regime; (ii) that lacks transparency. For purposes of this definition, a tax regime lacks transparency if the details of legislative, legal or administrative provisions are not open to public scrutiny and apparent or are not consistently applied among similarly situated taxpayers; (iii) facilitates the establishment of foreign-owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the local economy; (iv) explicitly or implicitly excludes the jurisdiction's resident taxpayers from taking advantage of the tax regime's benefits or prohibits enterprises that benefit from the regime from operating in the jurisdiction's domestic market; or (v) has created a tax regime which is favorable for tax avoidance, based upon an overall assessment of relevant factors, including whether the jurisdiction has a significant untaxed offshore financial or other services sector relative to its overall economy. For purposes of this definition, the phrase "tax regime" means a set or system of rules, laws, regulations or practices by which taxes are imposed on any person, corporation or entity, or on any income, property, incident, indicia or activity

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pursuant to governmental authority.

(39) Taxpayer. -- The term "taxpayer" means any person subject to the tax imposed by this article.

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

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

(42) "United States" means the United States of America and includes all of the states of the United States, the District of Columbia and United States territories and possessions.

(43) "Unitary business" means a single economic enterprise that is made up either of separate parts of a single business entity or of a commonly controlled group of business entities that are sufficiently interdependent, integrated and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts. For purposes of this article and article twenty-three of this chapter, any business conducted by a partnership shall be treated as conducted by its partners, whether directly held or indirectly held through a series of partnerships, to the extent of the partner's distributive share of the partnership's income, regardless of the percentage of the partner's ownership interest or the percentage of its distributive or any other share of partnership income. A business conducted directly or indirectly by one corporation through its direct or indirect interest in a partnership is unitary with that portion of a business conducted by one or more other corporations through their direct or indirect interest in a partnership if there is a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts and the corporations are members of the same commonly controlled group.

(44) West Virginia taxable income. -- The term "West Virginia taxable income" means the taxable income of a corporation as defined by the laws of the United States for federal income tax purposes, adjusted, as provided in this article: Provided, That in the case of a corporation having income from business activity which is taxable without this state, its "West Virginia taxable income" shall be the portion of its taxable income as defined and adjusted as is allocated or apportioned to this state under the provisions of this article.

(45) Valid business purpose. -- "Valid business purpose" means one or more business purposes, other than the avoidance or reduction of taxation, which alone or in combination constitute the primary motivation for a business activity or transaction, which activity or transaction changes in a meaningful way, apart from tax effects, the economic position of the taxpayer. The economic position of the taxpayer includes an increase in the market share of the taxpayer or the entry by the taxpayer into new business markets.

(b) Effective date. -- The amendments to this section made in the year 2009 are retroactive and are effective for tax years beginning on and after January 1, 2009.

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