WEST VIRGINIA CODE: §11-24-4B

§11-24-4b. Dividends paid deduction to be added back in determining net income for captive real estate investment trusts and regulated investment companies; deductible intangible expenses and deductible interest paid to be added back in determining net income of certain entities.

(a) The dividend paid deduction otherwise allowed by federal law in computing net income of a real estate investment trust that is subject to federal income tax shall be added back in computing the tax imposed by this article if the real estate investment trust is a captive real estate investment trust.

(b) The dividend paid deduction otherwise allowed by federal law in computing net income of a regulated investment company that is subject to federal income tax shall be added back in computing the tax imposed by this article unless the regulated investment company is a qualified regulated investment company as defined in this article.

(c) Intangible expenses otherwise deductible to be added back for certain taxpayers. --

(1) For purposes of computing its net income under this chapter, a taxpayer shall add back otherwise deductible intangible expense directly or indirectly paid, accrued or incurred in connection with one or more direct or indirect transactions with one or more related members.

(2) If the related member was subject to tax in this state or another state or possession of the United States or a foreign nation or some combination thereof on a tax base that included the intangible expense paid, accrued or incurred by the taxpayer, the taxpayer shall receive a credit against tax due in this state in an amount equal to the higher of the tax paid by the related member with respect to the portion of its income representing the intangible expense paid, accrued or incurred by the taxpayer, or the tax that would have been paid by the related member with respect to that portion of its income if: (A) That portion of its income had not been offset by expenses or losses; or (B) the tax liability had not been offset by a credit or credits. The credit determined shall be multiplied by the apportionment factor of the taxpayer in this state. However, in no case shall the credit exceed the taxpayer's liability in this state attributable to the net income taxed as a result of the adjustment required by subdivision (1) of this subsection.

(3) (A) The adjustment required in subdivision (1) of this subsection and the credit allowed in subdivision (2) of this subsection shall not apply to the portion of the intangible expense that the taxpayer establishes by clear and convincing evidence meets both of the following requirements: (i) The related member during the same taxable year directly or indirectly paid, accrued or incurred a portion to a person that is not a related member; and (ii) the transaction giving rise to the intangible expense between the taxpayer and the related member was undertaken for a valid business purpose.

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(B) The adjustment required in subdivision (1) of this subsection and the credit allowed in subdivision (2) of this subsection shall not apply if the taxpayer establishes by clear and convincing evidence of the type and in the form specified by the Tax Commissioner that: (i) The related member was subject to tax on its net income in this state or another state or possession of the United States or some combination thereof; (ii) the tax base for said tax included the intangible expense paid, accrued or incurred by the taxpayer; and (iii) the aggregate effective rate of tax applied to the related member is no less than the tax rate imposed under this article.

(C) The adjustment required in subdivision (1) of this subsection and the credit allowed in subdivision (2) of this subsection shall not apply if the taxpayer establishes by clear and convincing evidence of the type and in the form specified by the commissioner that: (i) The intangible expense was paid, accrued or incurred to a related member organized under the laws of a country other than the United States; (ii) the related member's income from the transaction was subject to a comprehensive income tax treaty between that country and the United States; (iii) the related member's income from the transaction was taxed in that country at a tax rate at least equal to that imposed by this state; and (iv) the intangible expense was paid, accrued or incurred pursuant to a transaction that was undertaken for a valid business purpose and using terms that reflect an arm's length relationship.

(D) The adjustment required in subdivision (1) of this subsection and the credit allowed in subdivision (2) of this subsection shall not apply if the corporation and the commissioner agree in writing to the application or use of alternative adjustments or computations. The commissioner may, in his or her discretion, agree to the application or use of alternative adjustments or computations when he or she concludes that in the absence of agreement the income of the taxpayer would not be reflected accurately.

(d) Interest expense otherwise deductible to be added back for certain taxpayers. --

(1) For purposes of computing its net income under this chapter, a taxpayer shall add back otherwise deductible interest paid, accrued or incurred to a related member during the taxable year.

(2) If the related member was subject to tax in this state or another state or possession of the United States or a foreign nation or some combination thereof on a tax base that included the interest expense paid, accrued or incurred by the taxpayer, the taxpayer shall receive a credit against tax due in this state equal to the higher of the tax paid by the related member with respect to the portion of its income representing the interest expense paid, accrued or incurred by the taxpayer, or the tax that would have been paid by the related member with respect to that portion of its income if: (A) That portion of its income had not been offset by expenses or losses; or (B) the tax liability had not been offset by a credit or credits. The credit determined shall be multiplied by the apportionment factor of the taxpayer in this state. However, in no case shall the credit exceed the taxpayer's liability in this state attributable to the tax imposed under this article as a result of the adjustment required by subdivision (1) of this subsection.

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(3) (A) The adjustment required in subdivision (1) of this subsection and the credit allowed in subdivision (2) of this subsection shall not apply if the taxpayer establishes by clear and convincing evidence, of the type and in the form determined by the commissioner, that: (i) The transaction giving rise to interest expense between the taxpayer and the related member was undertaken for a valid business purpose; and (ii) the interest expense was paid, accrued or incurred using terms that reflect an arm's length relationship.

(B) The adjustment required in subdivision (1) of this subsection and the credit allowed in subdivision (2) of this subsection shall not apply if the taxpayer establishes by clear and convincing evidence of the type and in the form specified by the commissioner that: (i) The related member was subject to tax on its net income in this state or another state or possession of the United States or some combination thereof; (ii) the tax base for said tax included the interest expense paid, accrued or incurred by the taxpayer; and (iii) the aggregate effective rate of tax applied to the related member is no less than the statutory rate of tax applied to the taxpayer under this chapter.

(C) The adjustment required in subdivision (1) of this subsection and the credit allowed in subdivision (2) of this subsection shall not apply if the taxpayer establishes by clear and convincing evidence of the type and in the form specified by the commissioner that: (i) The interest expense is paid, accrued or incurred to a related member organized under the laws of a country other than the United States; (ii) the related member's income from the transaction is subject to a comprehensive income tax treaty between that country and the United States; (iii) the related member's income from the transaction is taxed in that country at a tax rate at least equal to that imposed by this state; and (iv) the interest expense was paid, accrued or incurred pursuant to a transaction that was undertaken for a valid business purpose and using terms that reflect an arm's length relationship.

(D) The adjustment required in subdivision (1) of this subsection and the credit allowed in subdivision (2) of this subsection shall not apply if the corporation and the commissioner agree in writing to the application or use of alternative adjustments or computations. The commissioner may, in his or her discretion, agree to the application or use of alternative adjustments or computations when he or she concludes that in the absence of agreement the income of the taxpayer would not be properly reflected.

(e) Nothing in this subsection shall be construed to limit or negate the commissioner's authority to otherwise enter into agreements and compromises otherwise allowed by law.

(f) 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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