WEST VIRGINIA CODE CHAPTER 5b ARTICLE 2E

WV Legislature

§5B-2E-1. West Virginia Tourism Development Act.

This article shall be referred to as the "West Virginia Tourism Development Act."

WV Legislature

§5B-2E-2. Legislative findings.

The Legislature finds and declares that the general welfare and material well-being of the citizens of the state depend, in large measure, upon the development of tourism development projects in the state and that it is in the best interest of the state to induce the creation of new, or the expansion of existing, tourism development projects within the state in order to advance the public purposes of relieving unemployment by preserving and creating jobs and by preserving and creating new and greater sources of revenues for the support of public services provided by the state; and that the inducement for the creation or expansion of tourism development projects should be in the form of a tax credit to be applied to consumers sales and service taxes collected on the gross receipts generated directly from the operations of the new or expanded tourism development projects, in lieu of tax credits on income that are largely deferred for a number of years after start up of a major tourism development project; and all of which new or expanded tourism developments are of paramount importance to the state and its economy and for the state's contribution to the national economy.

WV Legislature

§5B-2E-3. Definitions.

As used in this article, unless the context clearly indicates otherwise:

(1) "Agreement" means a tourism development agreement entered into, pursuant to section six of this article, between the department and an approved company with respect to a project.

(2) "Approved company" means any eligible company approved by the department pursuant to section five of this article seeking to undertake a project.

(3) "Approved costs" means:

(a) Included costs:

(i) Obligations incurred for labor and to vendors, contractors, subcontractors, builders, suppliers, delivery persons and material persons in connection with the acquisition, construction, equipping or installation of a project;

(ii) The costs of acquiring real property or rights in real property and any costs incidental thereto;

(iii) The cost of contract bonds and of insurance of all kinds that may be required or necessary during the course of the acquisition, construction, equipping, or installation of a project which is not paid by the vendor, supplier, delivery person, contractor or otherwise provided;

(iv) All costs of architectural and engineering services, including, but not limited to: Estimates, plans and specifications, preliminary investigations and supervision of acquisition, construction, e quipping and installation of a project, as well as for the performance of all the duties required by or consequent to the acquisition, construction, equipping or installation of a project;

(v) All costs required to be paid under the terms of any contract for the acquisition, construction, equipping or installation of a project;

(vi) All costs required for the installation of utilities, including, but not limited to: Water, sewer, sewer treatment, gas, electricity, communications and off-site construction of utility extensions to the boundaries of the real estate on which the facilities are located, all of which are to be used to improve the economic situation of the approved company in a manner that allows the approved company to attract persons; and

(vii) All other costs comparable with those described in this subdivision;

(b) Excluded costs. — The term "approved costs" does not include any portion of the cost required to be paid for the acquisition, construction, equipping or installation of a portion of

WV Legislature

a project that is financed with state grants or for which the eligible taxpayer elects to qualify for other state tax credits, including, but not limited to, those provided by article thirteen-q, chapter eleven of this code. The exclusion of certain costs of a project under this paragraph (b) does not disqualify the remainder of the costs of the project.

(4) "Base tax revenue amount" means the average monthly amount of consumer sales and service tax collected by an approved company, based on the twelve-month period ending immediately prior to the opening of a new tourism development project for business or a tourism development expansion project, as certified by the State Tax Commissioner.

(5) “Department” means the West Virginia Department of Economic Development as provided in article two of this chapter.

(6) "Crafts and products center" means a facility primarily devoted to the display, promotion and sale of West Virginia products and at which a minimum of eighty percent of the sales occurring at the facility are of West Virginia arts, crafts or agricultural products.

(7) "Eligible company" means any corporation, limited liability company, partnership, limited liability partnership, sole proprietorship, business trust, joint venture or any other entity operating or intending to operate a project, whether owned or leased, within the state that meets the standards required by the department. An eligible company may operate or intend to operate directly or indirectly through a lessee or management company.

(8) "Ineligible company" means any West Virginia pari-mutuel racing facility licensed to operate multiple video lottery machines as authorized by article twenty-two-a, chapter twenty-nine of this code or any limited lottery retailer holding a valid license issued under article seven, chapter sixty of this code.

(9) "Entertainment destination center" means a facility containing a minimum of two hundred thousand square feet of building space adjacent or complementary to an existing tourism attraction, an approved project, or a major convention facility and which provides a variety of entertainment and leisure options that contain at least one major theme restaurant and at least three additional entertainment venues, including, but not limited to, live entertainment, multiplex theaters, large-format theaters, motion simulators, family entertainment centers, concert halls, virtual reality or other interactive games, museums, exhibitions or other cultural and leisure time activities. Entertainment and food and drink options shall occupy a minimum of sixty percent of total gross area, as defined in the application, available for lease and other retail stores shall occupy no more than forty percent of the total gross area available for lease.

(10) "Final approval" means the action taken by the Secretary of the department qualifying the eligible company to receive the tax credits provided in this article.

(11) "Project" means a tourism development project and/or a tourism development expansion project administered in accordance with the provisions of this article.

WV Legislature

(12) "Qualified professional services destination facility" means a facility with a minimum qualified investment, as defined in this article, of not less than $80 million physically located in this state and adjacent or complementary to a historic resort hotel, which primarily furnishes and provides personal or professional services, or both types of services, to individuals who primarily are residents of another state or foreign county.

(13) "State agency" means any state administrative body, agency, department, division, board, commission or institution exercising any function of the state that is not a municipal corporation or political subdivision.

(14) "Tourism attraction" means a cultural or historical site, a recreation or entertainment facility, an area of natural phenomenon or scenic beauty, a West Virginia crafts and products center, or an entertainment destination center or a qualified professional services destination facility. A project or tourism attraction does not include any of the following:

(A) Lodging facility, unless:

(i) The facility constitutes a portion of a project and represents less than fifty percent of the total approved cost of the project, or the facility is to be located on recreational property owned or leased by the state or federal government and the facility has received prior approval from the appropriate state or federal agency;

(ii) The facility involves the substantial reconstruction, restoration, or rehabilitation of a structure that is listed individually in the national register of historic places or is located in a national register historic district and certified by the state historic preservation officer as contributing to the historic significance of the district and the substantial reconstruction, rehabilitation, or restoration project has been approved in advance by the state historic preservation officer; or

(iii) The facility involves the construction, reconstruction, restoration, rehabilitation or upgrade of a full-service lodging facility or the reconstruction, restoration, rehabilitation or upgrade of an existing structure into a full-service lodging facility having not less than five hundred guest rooms, with construction, reconstruction, restoration, rehabilitation or upgrade costs exceeding ten million dollars;

(B) A facility that is primarily devoted to the retail sale of goods, other than an entertainment destination center, a West Virginia crafts and products center or a project where the sale of goods is a secondary and subordinate component of the project; and

(C) A recreational facility that does not serve as a likely destination where individuals who are not residents of the state would remain overnight in commercial lodging at or near the project or existing attraction.

(15) "Tourism development project" means the acquisition, including the acquisition of real estate by a leasehold interest with a minimum term of ten years; the design, construction,

WV Legislature

and equipping of a tourism attraction; the construction and installation of improvements to facilities necessary or desirable for the acquisition, construction, installation of a tourism attraction, including, but not limited to, surveys, installation of utilities, which may include water, sewer, sewage treatment, gas, electricity, communications and similar facilities; and off-site construction of utility extensions to the boundaries of the real estate on which the facilities are located, all of which are to be used to improve the economic situation of the approved company in a manner that allows the approved company to attract persons.

(16) "Tourism development expansion project" means the acquisition, including the acquisition of real estate by a leasehold interest with a minimum term of ten years; the design, construction, equipping, and installation of additions, betterments, and improvements to facilities necessary or desirable for the expansion of an existing tourism attraction including, but not limited to, surveys, installation of utilities, which may include water, sewer, sewage treatment, gas, electricity, communications, and similar facilities; and off-site construction of utility extension to the boundaries of real estate on which the facilities are located, all of which are to be used to improve the economic situation of the approved company in a manner that allows the approved company to attract persons.

(17) "Tourism development project tax credit" means the tourism development project tax credit allowed by section seven of this article.

(18) "Tourism development expansion project tax credit" means the tourism development expansion project tax credit allowed by section seven-a of this article.

WV Legislature

§5B-2E-4. Additional powers and duties of the development office.

The development office has the following powers and duties, in addition to those set forth in this case, necessary to carry out the purposes of this article including, but not limited to:

(1) Make approval of all applications for projects and enter into agreements pertaining to projects with approved companies;

(2) Employ fiscal consultants, attorneys, appraisers and other agents as the executive director of the development office finds necessary or convenient for the preparation and administration of agreements and documents necessary or incidental to any project; and

(3) Impose and collect fees and charges in connection with any transaction.

(4) Impose and collect from the applicant a non-refundable application fee in the amount of $10,000 to be paid to the Development Office when the application is filed.

WV Legislature

§5B-2E-5. Project application; evaluation standards; approval of projects.

(a) Each eligible company that seeks to qualify a project for the tourism development project tax credit provided by section seven of this article, or for the tourism development expansion project tax credit provided by section seven-a of this article, as applicable, must file a written application for approval of the project with the department.

(b) With respect to each eligible company making an application to the department for a tourism development project tax credit or a tourism development expansion project tax credit, the department shall make inquiries and request documentation, including a completed application, from the applicant that shall include: A description and location of the project; capital and other anticipated expenditures for the project and the sources of funding therefor; the anticipated employment and wages to be paid at the project; business plans that indicate the average number of days in a year in which the project will be in operation and open to the public; and the anticipated revenues and expenses generated by the project.

(c) On and after the effective date of this section as amended in 2023, the Secretary of the Department, within sixty days following receipt of an application or receipt of any additional information requested by the Department respecting the application, whichever is later, shall act to grant or not to grant approval of the application, based on the following criteria, all subjective criteria is subject to the sole discretion of the Department:

(1) The project will attract at least twenty-five percent of its visitors from outside of this state;

(2) The project will have approved costs in excess of $1,000,000;

(3) The project will have a significant and positive economic impact on the state considering, among other factors, the extent to which the project will compete directly with or complement existing tourism attractions in the state and the amount by which increased tax revenues from the project will exceed the credit given to the approved company;

(4) The project is expected to produce sufficient revenues and public demand to be operating and open to the public for a minimum of one hundred days per year, not accounting for any unforeseen weather or other force majeure events;

(5) The project will provide additional employment opportunities in the state;

(6) The quality of the proposed project and how it addresses economic problems in the area in which the project will be located;

(7) Whether there is substantial and credible evidence that the project is likely to be started and completed in a timely fashion;

(8) Whether the project will, directly or indirectly, improve the opportunities in the area

WV Legislature

where the project will be located for the successful establishment or expansion of other industrial or commercial businesses;

(9) Whether the project will, directly or indirectly, assist in the creation of additional employment opportunities in the area where the project will be located;

(10) Whether the project helps to diversify the local economy;

(11) Whether the project is consistent with the goals of this article;

(12) Whether the project is economically and fiscally sound using recognized business standards of finance and accounting; and

(13) The ability of the eligible company to carry out the project.

(d) The department may establish other criteria for consideration when approving the applications.

(e) The decision by the Secretary of the Department is final.

WV Legislature

§5B-2E-6. Agreement between department and approved company.

The department, upon final approval of an application by the Secretary, may enter into an agreement with any approved company with respect to its project. The terms and provisions of each agreement shall include, but not be limited to:

(1) The estimated amount of approved costs of the project that qualify for a sales tax credit, as provided in section seven or section seven-a of this article, as applicable. Within six months of the actual completion date, which, for purposes of this section, means the date on which the project is completed and opened to the public, the approved company shall document the actual cost of the project through a certification of the costs to the department by an independent certified public accountant acceptable to the department; and

(2) A date certain by which the approved company reasonably expects the project to be completed and to be opened to the public: *Provided*, That such date may be updated and amended as necessary, with the written approval of the department upon a submission by the approved company outlining the reason for amendment, and, if approved, the completion and opening of the project either prior to or after the initial proposed date shall not impact the qualification of the approved company for the tax credit as provided in §5B-2E-7 or §5B-2E-7a of this code.

WV Legislature

§5B-2E-7. Amount of credit allowed for tourism development project; approved projects.

(a) Approved companies are allowed a credit against the West Virginia consumers sales and service tax imposed by §11-15-1 *et seq*., of this code and collected by the approved company on sales generated by or arising from the operations of the tourism development project: *Provided*, That if the consumers sales and service tax collected by the approved company is not solely attributable to sales resulting from the operation of the new tourism development project, the credit shall only be applied against that portion of the consumers sales and service tax collected in excess of the base tax revenue amount. The amount of this credit is determined and applied as provided in this article.

(b) The maximum amount of credit allowable in this article is equal to twenty-five percent of the approved company's approved costs as provided in the agreement: *Provided*, That, if the tourism development project site is located within the permit area or an adjacent area of a surface mining operation, as these terms are defined in §22-3-3 of this code, from which all coal has been or will be extracted prior to the commencement of the tourism development project; or the tourism development project site is a structure that is listed individually in the national register of historic places or is located in a national register historic district and certified by the state historic preservation officer as contributing to the historic significance of the district; or the tourism development project site is located on or within five miles of recreational property owned or leased by the state or federal government and when the project is located on property owned or leased by the state or federal government, the project has received prior approval from the appropriate state or federal agency, the maximum amount of credit allowable is equal to thirty-five percent of the approved company's approved costs as provided in the agreement.

(c) The amount of credit allowable may be taken over a 10-year period, at the rate of one 10th of the amount thereof per taxable year, beginning with the taxable year in which the project is opened to the public, unless the approved company elects to delay the beginning of the 10-year period until the next succeeding taxable year. This election may be made in the first consumers sales and service tax return filed by the approved company following the date the project is opened to the public. Once made, the election cannot be revoked. If any credit remains after application of this initial ten-year period, the approved company may request an additional 15 year credit application period from the department. If any unused credit remains after the 25th year, the amount thereof is forfeited. No carryback to a prior taxable year is allowed for the amount of any unused portion of any annual credit allowance.

(d) The amount determined under subsection (b) of this section is allowed as a credit against the consumers sales and service tax collected by the approved company on sales from the operation of the tourism development project. The amount determined under said subsection may be used as a credit against taxes required to be remitted on the approved company's monthly consumers sales and service tax returns that are filed pursuant to section sixteen, article fifteen, chapter eleven of this code. The approved company shall claim the credit by reducing the amount of consumers sales and service tax required to be remitted with its

WV Legislature

monthly consumers sales and service tax returns by the amount of its aggregate annual credit allowance until such time as the full current year annual credit allowance has been claimed. Once the total credit claimed for the tax year equals the approved company's aggregate annual credit allowance no further reductions to its monthly consumers sales and service tax returns will be permitted.

(e) Notwithstanding any other provision of this code, an approved company may elect not to utilize the tax credit awarded in this article for any reason whatsoever, including, but not limited to, utilizing other tax credits permitted in this code, after the project is completed and placed in use but prior to making an election pursuant to subsection (c) of this section. Any decision not to utilize the tax credit for an approved company in this article may not impact the approved company's eligibility under this article or affect its designation as a Tourism Development District.

WV Legislature

§5B-2E-7a. Amount of credit allowed for tourism development expansion project; approved projects.

(a) Approved companies are allowed a credit against the West Virginia consumers sales and service tax imposed by article fifteen, chapter eleven of this code and collected by the approved company on sales generated by or arising from the operations of the tourism development expansion project: *Provided*, That the tourism development expansion project tax credit allowed under this section is separate and distinct from any credit allowed for a tourism development project in accordance with the provisions of section seven of this article: *Provided*, however, That if the consumers sales and service tax collected by the approved company is not solely attributable to sales resulting from the operation of the tourism development expansion project, the credit shall only be applied against that portion of the consumers sales and service tax collected in excess of the base tax revenue amount. The amount of this credit is determined and applied as provided in this article.

(b) The maximum amount of credit allowable in this article is equal to twenty-five percent of the approved company's approved costs as provided in the agreement: *Provided*, That, if the tourism development expansion project site is located within the permit area or an adjacent area of a surface mining operation, as these terms are defined in section three, article three, chapter twenty-two of this code, from which all coal has been or will be extracted prior to the commencement of the tourism development project; or the tourism development expansion project site is a structure that is listed individually in the national register of historic places or is located in a national register historic district and certified by the state historic preservation officer as contributing to the historic significance of the district; or the tourism development project site is located on or with 5 miles of a recreational property owned or leased by the state or federal government and when the project is located on property owned or leased by the state or federal government, the project has received prior approval from the appropriate state or federal agency, the maximum amount of credit allowable is equal to thirty-five percent of the approved company's approved costs as provided in the agreement.

(c) The amount of credit allowable may be taken over a 10-year period, at the rate of one 10th of the amount thereof per taxable year, beginning with the taxable year in which the project is opened to the public, unless the approved company elects to delay the beginning of the 10-year period until the next succeeding taxable year. This election may be made in the first consumers sales and service tax return filed by the approved company following the date the project is opened to the public. Once made, the election cannot be revoked. If any credit remains after application of this initial 10-year period, the approved company may request an additional 15 year credit application period from the Department. If any unused credit remains after the 25th year, the amount thereof is forfeited. No carryback to a prior taxable year is allowed for the amount of any unused portion of any annual credit allowance.

(d) The amount determined under subsection (b) of this section is allowed as a credit against the consumers sales and service tax collected by the approved company on sales from the operation of the tourism development expansion project. The amount determined under said

subsection may be used as a credit against taxes required to be remitted on the approved company's monthly consumers sales and service tax returns that are filed pursuant to section sixteen, article fifteen, chapter eleven of this code. The approved company shall claim the credit by reducing the amount of consumers sales and service tax required to be remitted with its monthly consumers sales and service tax returns by the amount of its aggregate annual credit allowance until such time as the full current year annual credit allowance has been claimed. Once the total credit claimed for the tax year equals the approved company's aggregate annual credit allowance no further reductions to its monthly consumers sales and service tax returns will be permitted.

(e) Notwithstanding any other provision of this code, an approved company may elect not to utilize the tax credit awarded in this article for any reason whatsoever, including, but not limited to, utilizing other tax credits permitted in this code, after the project is completed and placed in use but prior to making an election pursuant to subsection (c) of this section. Any decision not to utilize the tax credit for an approved company in this article may not impact the approved company's eligibility under this article or affect its designation as a Tourism Development District.

WV Legislature

§5B-2E-7b. Credit against taxes.

(a) General. – When a qualified professional services destination facility is located at or adjacent to an existing historic resort hotel with at least five hundred rooms and the qualified professional services destination facility eligible for credit under this section is primarily engaged in furnishing services that are not subject to the tax imposed by article fifteen, chapter eleven of this code, then in lieu of the credits that otherwise would be allowable under section seven or seven-a of this article, the eligible company that complies with the requirements of this section may claim the credit provided in this section: Provided, That the maximum amount of credit allowable under this section is equal to twenty-five percent of the eligible company's qualified investment, as defined in this section.

(b) Definitions. – The following words and phrases when used in this section have the meanings given to them in this subsection unless the context in which used clearly indicates that a different meaning was intended by the Legislature.

(1) “Agreement” means an agreement entered into under subsection (g) of this section.

(2) “Compensation” means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(3) “Cost-of-living adjustment” for any calendar year is the percentage, if any, by which the consumer price index for the preceding calendar year exceeds the consumer price index for the calendar year 2015.

(4) “Consumer price index” for any calendar year means the average of the federal consumer price index as of the close of the twelve-month period ending on August 31 of that calendar year.

(5) “Eligible company” for purposes of this section means any corporation, limited liability company, partnership, limited liability partnership, sole proprietorship, business trust, joint venture or any other entity operating a qualified professional services destination facility, whether owned or leased, within the state that: (A) creates at least one hundred twenty-five new jobs in this state within thirty-six months after the date the qualified investment is placed into service or use, and maintains those jobs for the entire ten year life of the tax credit specified in this section, (B) makes available to its full-time employees health insurance coverage and pays at least fifty percent of the premium for the health insurance, (C) generates, within thirty-six months after the date the qualified investment is placed into service or use, not less than $10 million of gross receipts upon which the taxes imposed under article twenty-seven, chapter eleven of this code are paid, and (D) meets the standards, limitations and requirements of this section and of the development office. An eligible company may operate or intend to operate directly or indirectly through a lessee or a contract operator.

(6) “Federal consumer price index” means the most recent consumer price index as of

WV Legislature

August 31 each year for all urban consumers published by the United States Department of Labor.

(7) “Health insurance benefits” means employer-provided coverage for medical expenses of the employee or the employee and his or her family under a group accident or health plan, or employer contributions to an Archer medical savings account, as defined in Section 220 of the Internal Revenue Code of 1986, as amended, or to a health savings account, as defined in Section 223 of the Internal Revenue Code, of the employee when the employer's contribution to any such account is not less than fifty percent of the maximum amount permitted for the year as employer-provided coverage under Section 220 or 223 of the Internal Revenue Code, whichever section is applicable.

(8) “Historic resort hotel” means a resort hotel registered with the United States Department of the Interior on the effective date of this amendment as a national historic landmark in its National Registry of Historic Places having not fewer than five hundred guest rooms.

(9) “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 the taxpayer's business enterprise in this state prior to the date the application was filed under subsection (c) of this section. In no event may the number of new employees exceed the total net increase in the employer's employment in this state: Provided, That 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 as defined in article twenty-four of this chapter. In addition, a person is a “new employee” only if the person's duties are on a regular, full-time and permanent basis:

(A) “Full-time employment” means employment for at least eighty hours per month at a wage not less than the amount specified in subdivision (1), subsection (d) of this section; and

(B) “Permanent employment” does not include employment that is temporary or seasonal and therefore the wages, salaries and other compensation paid to the temporary or seasonal employees will not be considered for purposes of this section even if the compensation paid to the temporary or seasonal employee equals or exceeds the amount specified in paragraph (A) of this subdivision.

(10) “New job” means a job which did not exist in the business of the taxpayer in this state prior to filing the application for benefits under this section, and which is filled by a new employee.

(11) “Professional services” means only those services provided directly by: a physician licensed to practice in this State, a surgeon licensed to practice in this State, a dentist licensed to practice in this State, a podiatrist licensed to practice in this State, an osteopathic physician licensed to practice in this State, a psychologist licensed to practice in this State, an optometrist licensed to practice in this State, a registered nurse licensed to

WV Legislature

practice in this State, a physician assistant licensed to practice in this State, a licensed practical nurse licensed to practice in this State, a dental hygienist licensed to practice in this State, a social worker licensed to practice in this State, or any other health care professional licensed to practice in this State;

(12) "Qualified investment" means one-hundred percent of the cost of property purchased or leased for the construction and equipping of a qualified professional services destination facility which is placed in service or use in this State by an eligible company.

(A) The cost of property purchased for a qualified professional services destination facility is determined under the following rules:

(i) Cost does not include the value of property given in trade or exchange for the property purchased for business expansion.

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

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

(iv) The cost of tangible personal property acquired by written lease for a primary term of not less than four years.

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

(vi) The cost of property used by the taxpayer out-of-state and then brought into this State, is 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 is the original cost of the property to the taxpayer less straight line depreciation allowable for the tax years or portions thereof the taxpayer used the property outside this State. In the case of leased tangible personal property, cost is 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 is the rent reserved for the remaining period of the primary term of the lease, not to exceed ten years, or the remaining useful life of the property, determined as aforesaid, whichever is less.

(c) Credit against taxes. – The credit allowed by this section shall be equal to twenty-five percent of the eligible company's qualified investment in the qualified professional services destination facility and shall be taken and applied as provided in this subsection (c). Notwithstanding any other provision of this article to the contrary, no taxpayer or group of taxpayers may gain entitlement to more than $37.5 million total aggregate tax credit under this section and no taxpayer, or group of taxpayers, in the aggregate may apply more than

WV Legislature

$2.5 million of annual credit in any tax year under this section, either in the form of a refund or directly against a tax liability or in any combination thereof. This limitation applies to initial tax credit attributable to qualified investment in a qualified professional services destination facility, and to qualified investment in a follow-up project expansion, so that credit attributable additively and in the aggregate to both may not be applied to exceed $2.5 million annual credit in any tax year.

(1) Application of credit. – The amount of credit allowable under this subsection shall 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 eligible company places the qualified professional services destination facility, or part thereof, in service or use in this state, unless the eligible company 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 under chapter eleven of this code for the taxable year in which the qualified professional services destination facility is first placed into service or use by the taxpayer. Once made, the election may not be revoked. The annual credit allowance is taken in the manner prescribed in subdivision (3) of this subsection (c): Provided, That if any credit remains after the initial ten year credit application period, the amount of remaining credit is carried forward to each ensuing tax year until used or until the expiration of the fifth taxable year subsequent to the end of the initial ten year credit application period. If any unused credit remains after expiration of the fifth taxable year subsequent to the end of the initial ten year credit application period, the amount thereof is forfeited. No carryback to a prior taxable year is allowed for the amount of any unused portion of any annual credit allowance.

(2) Placed in service or use. – For purposes of the credit allowed by this subsection (c), qualified investment or qualified investment property is considered placed in service or use in the earlier of the following taxable years:

(A) The taxable year in which, under the eligible company's depreciation practice, the period for depreciation with respect to the property begins; or

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

(3) Application of annual credit allowance.

(A) In general.- The aggregate annual credit allowance for the current taxable year is an amount equal to the one-tenth part allowed under subdivision (1) of this subsection for qualified investment placed into service or use.

(B) Application of current year annual credit allowance. – The amount determined under this subsection (c) is allowed as a credit against one hundred percent of the eligible company's state tax liabilities applied as provided in paragraphs (C) and (D) of this subdivision (3), and in that order:

WV Legislature

(C) Corporation net income taxes. - The amount of allowable tax credit for the year determined under paragraph (A) of this subdivision (3) shall first be applied to reduce the taxes imposed by article twenty-four, chapter eleven of this code, for the taxable year determined before application of allowable credits against tax.

(D) Personal income taxes. –

(i) If the eligible company is an electing small business corporation, as defined in section 1361 of the United States Internal Revenue Code of 1986, as amended, a partnership, a limited liability company that is treated as a partnership for federal income tax purposes or a sole proprietorship, then any unused credit after application of paragraph (C) of this subdivision (3) is allowed as a credit against the taxes imposed by article twenty-one, chapter eleven of this code on the members, owners, partners or interest holders in the eligible company.

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

(E) No credit is allowed under this subdivision (3) against any employer withholding taxes imposed by article twenty-one, chapter eleven of this code.

(F) The tax credits allowed under articles thirteen-j, thirteen-q, thirteen-s, thirteen-r, thirteen-w, and thirteen-aa of this code may not be applied to offset any tax against which the tax credit allowed under this article is allowed or authorized. No person, entity, company, or eligible company authorized or entitled to any tax credit allowed under this section or any member of the unitary group or any member of the controlled group of which the taxpayer is a member, may gain entitlement to any other economic development tax credit or economic development tax incentive which relates to the investment or activity upon which the credit authorized under this section is based.

(G) (i) In order to effectuate the purposes of this subdivision (3), the Tax Commissioner may propose for promulgation rules, including emergency rules, in accordance with article three, chapter twenty-nine-a of this code.

(ii) The Tax Commissioner may apply any amount of the tax credit otherwise available to a Taxpayer under this article, to pay any delinquent West Virginia state tax liability of the taxpayer, and interest and penalties as applicable.

(iii) Any amount of the tax credit otherwise available to a taxpayer under this article may be applied by the applicable administering agency to pay any outstanding obligation to a Workers' Compensation Fund, as defined in article two-c of chapter twenty-three of this code, or any outstanding obligation under the West Virginia Unemployment Compensation Act.

WV Legislature

(iv) Any amount of the tax credit otherwise available to a taxpayer under this article, may be applied by the applicable administering agency to pay any delinquent or unpaid assessment, fee, fine, civil penalty or monetary imposition imposed by the West Virginia Division of Environmental Protection or the United States Environmental Protection Agency, or any agency charged with enforcing federal, state or local environmental or hazardous waste regulations.

(H) Unused credit, refundable credit. – If any annual credit remains after application of preceding paragraphs of this subdivision (3), the amount thereof shall be refunded annually to the eligible company, and distributed in accordance with the credit distribution specified in this subdivision (3): Provided, That the amount thereof may not exceed the limitation on annual tax credit or the limitation on total aggregate tax credit specified in this section.

(I) Forfeiture of credit. - If any credit remains after expiration of the fifth taxable year subsequent to the end of the initial ten year credit application period, such credit is forfeited, and may not be used to offset any West Virginia tax liability.

(d) Compensation of employees filling new jobs.

(1) The new jobs and new employee criteria which count toward qualification of a taxpayer as an eligible company for purposes of the tax credit allowed by this section shall be subject to the following limitations and requirements. A job counts toward qualification of a taxpayer as an eligible company if the job is a new job, as defined in this section, held by a new employee, as defined in this section, and the new job:

(A) Pays a median wage of at least $37,000 annually. Beginning January 1, 2015, and on January 1 of each year thereafter, the Tax Commissioner shall prescribe an amount that shall apply in lieu of the $37,000 amount for new jobs filled during that calendar year. This amount is prescribed by increasing the $37,000 figure by the cost-of-living adjustment for that calendar year. If any increase under this subdivision is not a multiple of $50, the increase shall be rounded to the next lowest multiple of $50;

(B) Provides health insurance. The employer may, in addition, offer benefits including child care, retirement and other benefits; and

(C) Is a full-time, permanent position, as those terms are defined in this section.

(D) Jobs that pay less than the statewide average nonfarm payroll wage, as determined annually by the West Virginia Bureau of Employment Programs, or that pay that salary, but do not also provide health benefits in addition to the salary, do not count toward qualification of a taxpayer as an eligible company under this section. Jobs that are less than full-time, permanent positions do not count toward qualification of a taxpayer as an eligible company under this section.

(E) The employer having obtained qualification as an eligible company under this section for

WV Legislature

the year in which the new job is filled is not required to raise wages of the employees currently employed in the new jobs upon which the initial qualification as an eligible company under this section was based by reason of the cost-of-living adjustment for new jobs filled in subsequent years provided the employer continues to provide healthcare.

(e) Application and review.

(1) Application. - An eligible company that meets the requirements of this section may apply to the Development Office for entitlement to the tax credit authorized under this section. The application shall be on a form prescribed by the Development Office and shall include all of the following:

(A) The name and address of the applicant;

(B) Documentation that the applicant is a eligible company;

(C) Documentation that the applicant meets the requirements of this section;

(D) Documentation that the applicant does not owe any delinquent taxes or any other amounts to the federal government, this state or any political subdivision of this state;

(E) An affidavit that the applicant has not filed for or publicly announced its intention to file for bankruptcy protection and that the company will not seek bankruptcy protection within the next six calendar months following the date of the application;

(F) A waiver of confidentiality under section five-d, article ten, chapter eleven of this code for information provided in the application; and

(G) Any other information required by the Development Office.

(f) Credit allowable.

(1) Certified multiple year projects.

(A) In general. - A multiple year qualified professional services destination facility project certified by the West Virginia Development Office is eligible for the credit allowable by this article. A project eligible for certification under this section is one where the qualified investment under this article creates at least the required minimum number of new jobs but the qualified investment is placed in service or use over a period of up to three successive tax years: Provided, That the 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 West Virginia Development Office, 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.

WV Legislature

(B) Application for certification. - The application for certification of a project under this section shall be filed with and approved by the West Virginia Development Office 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 and contain the information as the West Virginia Development Office may require to determine whether the project should be certified as eligible for credit under this article.

(C) Review. - Within thirty days of receipt of a complete application, the Development Office, in conjunction with the Tax Division of the Department of Revenue, shall review the application and determine if the applicant is an eligible company and that the requirements of this section have been met. Applications not approved within the thirty days specified in this subdivision are hereby deemed denied.

(D) Approval. - The Development Office may approve or deny the application. Upon approval of an application, the Development Office shall notify the applicant in writing and enter into an agreement with the eligible company for benefits under this section.

(2) Certified follow-up project expansions.

(A) An eligible company that intends to undertake a follow-up project expansion, may apply to the West Virginia Development Office for certification of a single, one-time, follow-up project expansion, and entitlement to an additional tax credit under this section in an amount which is the lesser of twenty-five percent of qualified investment in the follow-up project expansion or $12.5 million. No taxpayer, or group of taxpayers, in the aggregate may apply more than $2.5 million of annual credit in any tax year under this section, either in the form of a refund or directly against a tax liability or in any combination thereof. This limitation applies to initial tax credit attributable to qualified investment in a qualified professional services destination facility, and to qualified investment in a follow-up project expansion, so that credit attributable additively and in the aggregate to both may not be applied to exceed $2.5 million annual credit in any tax year.

(B) The requirements, limitations and qualifications applicable to qualified professional services destination facility projects under this section apply to follow-up project expansions, except for those requirements, limitations and qualifications expressly specified in this subdivision (2).

(C) Requirements for certification of a follow-up project expansion are as follows:

(i) The eligible company, pursuant to certification and authorization for entitlement to tax credit under subsection (1) of this section (f), has placed qualified investment of not less than $80 million into service in a qualified professional services destination facility within an initial period of not more than three tax years;

(ii) The eligible company intends to place additional qualified investment in service or use in the previously certified qualified professional services destination facility project, or an

WV Legislature

expansion or extension thereof. In no case shall a follow-up project expansion be certified if the follow-up project expansion property is not contiguous to, or within not more than one mile of, the initial qualified professional services destination facility;

(iii) The eligible company proposes to place the qualified investment in the follow-up project expansion in service or use in the fourth tax year subsequent to the tax year in which qualified investment was first placed into service or use in the initial qualified professional services destination facility project, or under a multiple year project certification, in the fourth, fifth and sixth tax year subsequent to the tax year in which qualified investment was first placed into service or use in the initial qualified professional services destination facility project;

(iv) The follow-up project expansion must create and maintain at least twenty-five net new jobs held by new employees, in addition to the new jobs created by the initial qualified professional services destination facility project. The loss of any West Virginia job at the eligible company will be subtracted from the count of new jobs attributable to the follow-up project expansion;

(v) The West Virginia Development Office shall not issue more than one certification for any follow-up project expansion; and

(vi) The West Virginia Development Office shall not issue certification of a follow-up project expansion unless the applicant provides convincing evidence to show that the follow-up project expansion will result in jobs creation specified in this subdivision, that such jobs will remain and be maintained in West Virginia for at least ten years subsequent to the placement of qualified investment into service or use in the follow-up project expansion, that the follow-up project expansion will not operate to the detriment of other West Virginia businesses or to the detriment of the economy, public welfare or moral character of West Virginia or its people.

(g) Agreement.

(1) The agreement between the eligible company and the Development Office shall be entered into before any benefits may be provided under this section.

(2) The agreement shall do all of the following:

(A) Specify the terms and conditions the eligible company must comply with in order to receive benefits under this section, other than those terms, limitations and conditions specified and mandated by statute or regulation; and

(B) Require the Development Office to certify all of the following to the Tax Division of the Department of Revenue each taxable year an agreement under this section is in effect:

(i) That the eligible company is eligible to receive benefits under this section;

WV Legislature

(ii) The number of new jobs created by the company during each taxable year;

(iii) The amount of gross wages, as determined for purposes of Form W2, as filed with the Internal Revenue Service, being paid to each individual employed in a new job;

(iv) The amount of an eligible company's qualified investment;

(v) The maximum amount of credit allowable to the eligible company under this section; and

(vi) Any other information deemed necessary by the Development Office.

(h) Filing and contents.

(1) Filing. – On or before the due date of the income tax return for each tax year in which the agreement is in effect, an eligible company shall file with the Tax Division of the Department of Revenue a form prescribed by the Tax Commissioner.

(2) Contents. - The form specified under subdivision (1) of this subsection (h) shall request the following information:

(A) The name and Employer Identification Number of the eligible company;

(B) The effective date of the agreement;

(C) The reporting period end date;

(D) Information relating to each individual employed in a new job as required by the Tax Commissioner;

(E) Aggregate gross receipts for the tax period and gross receipts on which tax has been paid under article twenty-seven, chapter eleven of this code for the tax period; and

(F) Any other information required by the Tax Commissioner.

(3) Taking of credit. - The taxpayer, participant or participants claiming the credit for qualified investments in a certified project shall annually file with their income tax returns filed under chapter eleven of this code:

(A) Certification that the taxpayer's or 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) Any other information the Tax Commissioner requires to determine continuing eligibility to claim the annual credit allowance for the project's qualified investment.

WV Legislature

(4) Confidentiality.- The contents of the completed form shall be subject to the confidentiality rules set forth in section five-d, article ten, chapter eleven of this code: Provided, That notwithstanding the provisions of section five-d, article ten, chapter eleven of this code, or any other provision of this code, tax returns, tax return information and such other information as may be necessary to administer the tax credits and programs authorized and specified by this article and in this section may be exchanged between the Tax Commissioner and the West Virginia Development Office without restriction.

WV Legislature

§5B-2E-8. Forfeiture of unused tax credits; credit recapture; recapture tax imposed; information required to be submitted annually to development office; transfer of tax credits to successors.

(a) The approved company or eligible company shall forfeit the tourism development project tax credit allowed by section seven of this article, or the tourism development expansion tax credit allowed by section seven-a of this article, or the tax credit allowed by section seven-b of this article, as applicable, with respect to any calendar year and shall pay the recapture tax imposed by subsection (b) of this section, if:

(1) In any year following the first calendar year the project is open to the public, the project fails to attract at least twenty-five percent of its visitors from among persons who are not residents of the state;

(2) In any year following the first year the project is open to the public, the project is not operating and open to the public for at least one hundred days; or

(3) The approved company or eligible company, as of the beginning of each calendar year, has an outstanding obligation under the West Virginia state tax and revenue laws; or

(4) Any company, approved company or eligible company, to which entitlement to the tax credit authorized under section seven-b of this article has been previously established, fails to meet the requirements specified in section seven-b for an eligible company and for a qualified professional services destination facility, including, but not limited to, jobs maintenance, employee wage and employee health benefits, aggregate gross receipts, and gross receipts subject to the tax imposed under article twenty-seven, chapter eleven of this code.

(5) Any company, approved company or eligible company, to which entitlement to the tax credit authorized under section seven-b of this article has been previously established:

(A) Is delinquent in payment of any assessment, fee, fine, civil penalty or monetary imposition imposed by the West Virginia Division of Environmental Protection or the United States Environmental Protection Agency, or any agency charged with enforcing federal, state or local environmental or hazardous waste regulations.

(B) Is delinquent in compliance with any order, injunction, compliance agreement, agreed order, court order, mandamus or other enforcement or compliance instrumentality of the West Virginia Division of Environmental Protection or United States Environmental Protection Agency or any agency charged with enforcing federal, state or local environmental or hazardous waste regulations.

(C) Is out of compliance or not compliant with any citation or order issued by the West Virginia Division of Environmental Protection or the United States Environmental Protection Agency, or any agency charged with enforcing federal, state or local environmental or

WV Legislature

hazardous waste regulations, requiring that a condition be abated or corrected.

(b) In addition to the loss of credit allowed under this article for the calendar year, a credit recapture tax is hereby imposed on any approved company or successor eligible company that forfeits the tourism development project tax credit or the tourism development expansion project credit or the credit authorized under section seven-b of this article, under the provisions of subsection (a) of this section. The credit recapture tax shall apply and the approved company, and successor eligible companies, and any other person or entity that has received the tax credit allowed under this article shall be liable for an amount of recapture tax equal to all previously claimed tourism development project tax credit or tourism development expansion project credit, or the tax credits authorized under section seven-b of this article, and allowed by this article, as applicable, plus interest and penalties applicable in accordance with the Tax Procedure and Administration Act. The recapture tax shall be calculated and paid pursuant to the filing, with the Tax Commissioner of an amended return, and such other forms, schedules and documents as the Tax Commissioner may require, for the prior calendar year, or calendar years, for which credit recapture is required, along with interest, as provided in section seventeen, article ten, chapter eleven of this code: Provided, That the approved company, eligible company, person or entity who previously claimed the tourism development project tax credit, or the tourism development expansion project credit, or the tax credits allowed by section seven-b of this article, as applicable, under this article and successor eligible companies, persons or entities are jointly and severally liable for payment of any recapture tax subsequently imposed under this section. For purposes of this recapture tax, the statute of limitations otherwise applicable under the Tax Procedure and Administration Act shall not begin to run until the eighteenth year subsequent to the earlier of: the year when qualified investment is first placed into service or use, or the year when the application for the tax credit authorized under this article was filed with the West Virginia Development Office.

(c) Within forty-five days after the end of each calendar year during the term of the agreement, the approved company shall supply the development office with all reports and certifications the development office requires demonstrating to the satisfaction of the development office that the approved company is in compliance with applicable provisions of law. Based upon a review of these materials and other documents that are available, the development office shall then certify to the Tax Commissioner that the approved company is in compliance with this section.

(d) The tax credit allowed in this article is transferable, subject to the written consent of the development office, to an eligible successor company that continues to operate the approved project.

WV Legislature

§5B-2E-9. Promulgation of rules.

The executive director of the Development Office may promulgate rules to implement the project application approval process and to describe the criteria and procedures it has established in connection therewith. These rules are not subject to the provisions of chapter twenty-nine-a of this code but shall be filed with the Secretary of State.

WV Legislature

§5B-2E-10. Legislative review.

The Development Office shall report annually to the Joint Commission on Economic Development by December 1 of each year on the number of applications received from eligible companies as provided in this article, the identity of each eligible company, whether the eligible company is seeking the tourism development project credit or the tourism development expansion project credit, or both, a description of the tourism development projects to which the credit may be applied, the status of each application, the number of projects approved, the status of each project, whether the projects are certified multiple year projects, the amount of credit allowed, and the amount of consumers sales and service tax generated by each project.

WV Legislature

§5B-2E-11. Termination.

The Division of Economic Development may not accept any new project application after December 31, 2030, and all applications submitted prior to January 1, 2031, that have not been previously approved or not approved, shall be deemed not approved and shall be null and void as of January 1, 2031.

WV Legislature