WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1988

ENROLLED

Com. Sub. for
HOUSEx BILL No. H.75

(Pby Mr. Speaker, Mr. Chamber
and Delegate Swamm
By Regist red of the Executive

Passed March 12, 1988

In Effect Arm Passage
AN ACT to amend and reenact section seven-a, article thirteen-c, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections three, four, five, six and seven, article twenty-four of said chapter eleven; and to further amend said article twenty-four by adding thereto a new section, designated section forty-two, all relating generally to business tax credits and the corporation net income tax; making technical correction in definition of small business; updating the meaning of certain terms to bring them into conformity with their meaning for federal income tax purposes and making such update retroactive for taxable years beginning after the thirty-first day of December, one thousand nine hundred eighty-six; deleting certain obsolete language and clarifying certain language for improved administration; requiring certain increasing and decreasing modifications to be made to federal taxable income; providing a West Virginia net operating loss deduction; providing rules for allocation and apportionment of adjusted federal taxable income in the case of corporations subject to a tax on net income imposed by more than one state; and providing effective dates.
Be it enacted by the Legislature of West Virginia:

That section seven-a, article thirteen-c, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that sections three, four, five, six and seven, article twenty-four of said chapter eleven, be amended and reenacted; and that said article twenty-four be further amended by adding thereto a new section, designated section forty-two, all to read as follows:

ARTICLE 13C. BUSINESS INVESTMENT AND JOBS EXPANSION CREDIT.

§11-13C-7a. Small business credit.

(a) "Small business" defined. — For purposes of this section, the term "small business" means a business which has an annual payroll of one million five hundred thousand dollars or less, or annual gross sales of not more than five million dollars: Provided, That beginning the first day of January, one thousand nine hundred eighty-nine and each first day of January thereafter, the tax commissioner shall prescribe amounts which shall apply in lieu of the above amounts during that calendar year. These amounts shall be prescribed by increasing the amount of each by the cost-of-living adjustment for such calendar year.

(1) Cost-of-living adjustment. — For purposes of subsection (a), the cost-of-living adjustment for any calendar year is the percentage (if any) by which:

(A) The consumer price index for the preceding calendar year exceeds

(B) The consumer price index for the calendar year one thousand nine hundred eighty-seven.

(2) Consumer price index for any calendar year. — For purposes of subdivision (1), the consumer price index for any calendar year is the average of the Federal Consumer Price Index as of the close of the twelve-month period ending on the thirty-first day of August of such calendar year.

(3) Consumer price index. — For purposes of subdivision (2), the term "Federal Consumer Price Index"
means the last consumer price index for all urban consumers published by the United States department of labor.

(4) **Rounding.** — If any increase under subdivision (1) is not a multiple of fifty dollars, such increase shall be rounded to the next lowest multiple of fifty dollars.

(b) **Amount of credit allowed.**

(1) **Credit allowed.** — An eligible small business taxpayer shall be allowed a credit against the portion of taxes imposed by this state that are attributable to and the direct consequence of the eligible small business taxpayer's qualified investment in a new or expanded business in this state which results in the creation of at least ten new jobs. The amount of this credit shall be determined as provided in this section.

(2) **Amount of credit.** — The amount of credit allowable under this section is determined by dividing the amount of the eligible small business taxpayer's "qualified investment" (determined under section six) in "property purchased for business expansion" (as defined in section three) by ten. The amount of qualified investment so apportioned to each year of the ten-year credit period shall be the annual measure against which taxpayer's annual new jobs percentage (determined under subsection (d)) is applied. The product of this calculation establishes the maximum amount of credit allowable each year for ten consecutive years under this section due to the qualified investment.

(3) **Application of credit.** — The annual credit allowance must be taken beginning with the taxable year in which the taxpayer places the qualified investment into service or use in this state, unless the taxpayer elects to delay the beginning of the ten-year credit period until the next succeeding taxable year. This election shall be made in the annual income tax return filed under this chapter by the taxpayer for the taxable year in which the qualified investment is placed in service or use. Once made, this election cannot be revoked. The annual credit allowance shall be taken and applied in the manner prescribed in section five.
(c) New jobs. — The term “new jobs” has the meaning ascribed to it in subdivision (14), subsection (b), section three of this article: Provided, That the median compensation of such new jobs shall not be less than eleven thousand dollars per year and that beginning the first day of January, one thousand nine hundred eighty-nine, and each first day of January thereafter, the tax commissioner shall adjust the median annual compensation specified in this subsection by increasing the amount thereof by the annual cost-of-living adjustment determined under subsection (a).

(1) The term “new employee” shall have the meaning ascribed to it in subdivision (13), subsection (b), section three of this article: Provided, That such term shall not include employees filling new jobs who:

(A) Are related individuals, as defined in subsection (i), section 51 of the Internal Revenue Code of 1986, or a person who owns ten percent or more of the business with such ownership interest to be determined under rules set forth in subsection (b), section 267 of said Internal Revenue Code; or

(B) Worked for the taxpayer during the six-month period ending on the date taxpayer's qualified investment is placed in service or use and is rehired by the taxpayer during the six-month period beginning on the date taxpayer's qualified investment is placed in service or use.

(2) When a job is attributable. — An employee's position is directly attributable to the qualified investment if:

(A) The employee's service is performed or his base of operations is at the new or expanded business facility;

(B) The position did not exist prior to the construction, renovation, expansion or acquisition of the business facility and the making of the qualified investment; and

(C) But for the qualified investment, the position would not have existed.

(d) New jobs percentage. — The annual new jobs
percentage is based on the number of new jobs created in this state by the taxpayer that is directly attributable to taxpayer's qualified investment.

(1) If at least ten new jobs are created and filled during the taxable year in which the qualified investment is placed in service or use, the applicable new jobs percentage shall be thirty percent: Provided, That for each new job over ten, up to forty such additional new jobs, the applicable new jobs percentage shall be increased by adding thereto one half of one percent, with the maximum new jobs percentage not to exceed fifty percent.

(2) During each of the remaining nine years of the ten-year credit period, the annual new jobs percentage shall be based on the average number of new jobs that were filled during that taxable year: Provided, That for purposes of estimating the new jobs percentage that will be applicable for each subsequent credit year, the taxpayer shall use the new jobs percentage allowable for the taxable year immediately prior thereto, and in the annual income tax return filed under this chapter for the then current tax year, taxpayer shall redetermine his allowable new jobs percentage for that year based on the average number of new employees employed in new jobs during that year (determined on a monthly basis) created as the direct result of taxpayer's qualified investment.

(e) Certification of new jobs. — With the annual income tax return filed under this chapter for each taxable year during the ten-year credit period, the taxpayer shall certify:

(1) The new jobs percentage for that taxable year;

(2) The amount of the credit allowance for that year;

(3) If the business is a partnership or electing small business corporation, the amount of credit allocated to the partners or shareholders, as the case may be;

(4) That qualified investment property continue to be used in the business, or if any of it was disposed of during the year the date of disposition and that such
property was not disposed of prior to expiration of its
useful life, as determined under section six;

(5) That the new jobs created by the qualified
investment continue to exist and are filled by persons
who meet the definition of new employee (as defined in
subdivision (1), subsection (c) of this section) and are
paid an average annual compensation equal to or
greater than the minimum average annual compensa-
tion required by this section.

(f) Small business project. — A small business may
apply to the tax commissioner under section four-b for
certification of subdivision (1), subsection (a), section
four-b project if that project will create at least ten new
jobs.

(g) Regulations. — The tax commissioner shall pres-
cribe such regulations as he may deem necessary in
order to determine the amount of credit allowed under
this section to a taxpayer; to verify taxpayer's continued
entitlement to claim such credit; and to verify proper
application of the credit allowed. The tax commissioner
may, by regulation, require a taxpayer intending to
claim credit under this section to file with the tax
commissioner a notice of intent to claim this credit,
before the taxpayer begins reducing his monthly or
quarterly installment payments of estimated tax for the
credit provided in this section.

(h) Effective date. — The credit provided in this
section shall be allowed for qualified investment
property purchased or leased after the thirtieth day of
June, one thousand nine hundred eighty-seven.

ARTICLE 24. CORPORATION NET INCOME TAX.

§11-24-3. Meaning of terms; general rule.

(a) Any term used in this article shall have the same
meaning as when used in a comparable context in the
laws of the United States relating to federal income
taxes, unless a different meaning is clearly required by
the context or by definition in this article. Any reference
in this article to the laws of the United States shall mean
the provisions of the Internal Revenue Code of 1986, as
amended, and such other provisions of the laws of the United States as relate to the determination of income for federal income tax purposes. All amendments made to the laws of the United States prior to the first day of January, one thousand nine hundred eighty-eight, shall be given effect in determining the taxes imposed by this article for any taxable year beginning the first day of January, one thousand nine hundred eighty-seven, and thereafter, but no amendment to the laws of the United States effective on or after the first day of January, one thousand nine hundred eighty-eight, shall be given any effect.

(b) The term “Internal Revenue Code of 1986” means the Internal Revenue Code of the United States enacted by the “Federal Tax Reform Act of 1986” and includes the provisions of law formerly known as the Internal Revenue Code of 1954, as amended, and in effect when the “Federal Tax Reform Act of 1986” was enacted, that were not amended or repealed by the “Federal Tax Reform Act of 1986.” Except when inappropriate, any references in any law, executive order, or other document:

(1) To the Internal Revenue Code of 1954 shall include reference to the Internal Revenue Code of 1986, and

(2) To the Internal Revenue Code of 1986 shall include a reference to the provisions of law formerly known as the Internal Revenue Code of 1954.

§11-24-4. Imposition of primary tax and rate thereof; effective and termination dates.

Primary tax.

(1) In the case of taxable periods beginning after the thirtieth day of June, one thousand nine hundred sixty-seven, and ending prior to the first day of January, one thousand nine hundred eighty-three, a tax is hereby imposed for each taxable year at the rate of six percent per annum on the West Virginia taxable income of every domestic or foreign corporation engaging in business in this state or deriving income from property, activity or other sources in this state, except corporations exempt
(2) In the case of taxable periods beginning on or after the first day of January, one thousand nine hundred eighty-three, and ending prior to the first day of July, one thousand nine hundred eighty-seven, a tax is hereby imposed for each taxable year on the West Virginia taxable income of every domestic or foreign corporation engaging in business in this state or deriving income from property, activity or other sources in this state, except corporations exempt under section five of this article, and any banks, banking associations or corporations, trust companies, building and loan associations, and savings and loan associations, at the rates which follow:

(A) On taxable income not in excess of fifty thousand dollars, the rate of six percent; and

(B) On taxable income in excess of fifty thousand dollars, the rate of seven percent.

(3) In the case of taxable periods beginning on or after the first day of July, one thousand nine hundred eighty-seven, a tax is hereby imposed for each taxable year on the West Virginia taxable income of every domestic or foreign corporation engaging in business in this state or deriving income from property, activity or other sources in this state, except corporations exempt under section five of this article, at the rate of nine and three quarters percent. Beginning the first day of July, one thousand nine hundred eighty-eight, and on each first day of July thereafter for four successive calendar years, the rate shall be reduced by fifteen one hundredths of one percent per year, with such rate to be nine percent on and after the first day of July, one thousand nine hundred ninety-two.

§11-24-5. Corporations exempt from tax.

The following corporations shall be exempt from the tax imposed by this article to the extent provided in this section:

(a) Corporations which by reason of their purposes or activities are exempt from federal income tax: Provided,
That this exemption shall not apply to the unrelated business income, as defined in the Internal Revenue Code, of any such corporation if such income is subject to federal income tax.

(b) Insurance companies which pay this state a tax upon premiums.

(c) Production credit associations organized under the provisions of the federal "Farm Credit Act of 1933": Provided, That the exemption shall not apply to corporations or associations organized under the provisions of article four, chapter nineteen of this code.

(d) Corporations electing to be taxed under subchapter S of the Internal Revenue Code of one thousand ninety-eight, as amended: Provided, That said corporations shall file the information return required by section thirteen-b of this article.

(e) Trusts established pursuant to section one hundred eighty-six, chapter seven, title twenty-nine of the code of the laws of the United States (enacted as section three hundred two (c) of the labor management relations act, one thousand ninety-four, as amended prior to the first day of January, one thousand sixty-seven.

§11-24-6. Adjustments in determining West Virginia taxable income.

(a) General. — In determining West Virginia taxable income of a corporation, its taxable income as defined for federal income tax purposes shall be adjusted and determined before the apportionment provided by section seven of this article, by the items specified in this section.

(b) Adjustments increasing federal taxable income. — There shall be added to federal taxable income, unless already included in the computation of federal taxable income, the following items:

(1) Interest or dividends on obligations or securities of any state or of a political subdivision or authority thereof;
(2) Interest or dividends (less related expenses to the extent not deducted in determining federal taxable income) on obligations or securities of any authority, commission or instrumentality of the United States which the laws of the United States exempt from federal income tax but not from state income taxes;

(3) Income taxes and other taxes, including franchise and excise taxes, which are based on, measured by, or computed with reference to net income, imposed by this state or any other taxing jurisdiction, to the extent deducted in determining federal taxable income;

(4) Taxes imposed by this state for which credit against the taxes imposed by section four of this article, is allowed by section nine or nine-a of this article and taken by the taxpayer, to the extent deducted in determining federal taxable income; and

(5) The deferral value of certain income that is not recognized for federal tax purposes, which value shall be an amount equal to a percentage of the amount allowed as a deduction in determining federal taxable income pursuant to the accelerated cost recovery system under section 168 of the Internal Revenue Code for the federal taxable year, with the percentage of the federal deduction to be added as follows with respect to the following recovery property: Three-year property — no modifications; five-year property — ten percent; ten-year property — fifteen percent; fifteen-year public utility property — twenty-five percent; and fifteen-year or eighteen-year real property — thirty-five percent:

Provided, That this modification shall not apply to any person whose federal deduction is determined by the use of the straight line method, or to any taxable year beginning after the thirtieth day of June, one thousand nine hundred eighty-seven;

(6) The amount of unrelated business taxable income as defined by section 512 of the Internal Revenue Code of 1986, as amended, of a corporation which by reason of its purposes is generally exempt from federal income taxes; and

(7) The amount of any net operating loss deduction
taken for federal income tax purposes under section 172 of the Internal Revenue Code of 1986, as amended.

(c) Adjustments decreasing federal taxable income. — There shall be subtracted from federal taxable income to the extent included therein:

(1) Any gain from the sale or other disposition of property having a higher fair market value on the first day of July, one thousand nine hundred sixty-seven, than the adjusted basis at said date for federal income tax purposes: Provided, That the amount of this adjustment is limited to that portion of any such gain which does not exceed the difference between such fair market value and such adjusted basis;

(2) The amount of any refund or credit for overpayment of income taxes and other taxes, including franchise and excise taxes, which are based on, measured by, or computed with reference to net income, imposed by this state or any other taxing jurisdiction, to the extent properly included in gross income for federal income tax purposes;

(3) The amount of dividends received, to the extent included in federal taxable income: Provided, That this modification shall not be made for taxable years beginning after the thirtieth day of June, one thousand nine hundred eighty-seven;

(4) Thirty-seven and one-half percent of the excess of net long-term capital gain over net short-term capital loss as defined in the laws of the United States: Provided, That this modification shall not be made for taxable years beginning after the thirtieth day of June, one thousand nine hundred eighty-seven;

(5) The amount added to federal taxable income due to the elimination of the reserve method for computation of the bad debt deduction;

(6) The full amount of interest expense actually disallowed in determining federal taxable income which was incurred or continued to purchase or carry obligations or securities of any state or of any political subdivision thereof;
(7) The amount required to be added to federal taxable income as a dividend received from a foreign (non-United States) corporation under section 78 of the Internal Revenue Code of 1986, as amended, by a corporation electing to take the foreign tax credit for federal income tax purposes;

(8) The amount of salary expenses disallowed as a deduction for federal income tax purposes due to claiming the federal jobs credit under section 51 of the Internal Revenue Code of 1986, as amended;

(9) The amount included in federal adjusted gross income by the operation of section 951 of the Internal Revenue Code of 1986, as amended; and

(10) Any amount included in federal adjusted gross income which is foreign source income. Foreign source income includes:

(A) Interest and dividends, other than those derived from sources within the United States;

(B) Rents, royalties, license, and technical fees from property located or services performed without the United States or from any interest in such property, including rents, royalties, or fees for the use of or the privilege of using without the United States any patents, copyrights, secret process and formulas, good will, trademarks, trade brands, franchises and other like properties; and

(C) Gains, profits, or other income from the sale of intangible or real property located without the United States.

In determining the source of "foreign source income," the provisions of sections 861, 862 and 863 of the Internal Revenue Code of 1986, as amended, shall be applied.

(d) Net operating loss deduction. — Except as otherwise provided in this subsection, there shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the West Virginia net operating loss carryovers to such year plus (2) the net operating loss...
carrybacks to such year. For purposes of this subsection, the term "West Virginia net operating loss deduction" means the deduction allowed by this subsection, determined in accordance with section 172 of the Internal Revenue Code of 1986, as amended.

(1) **Special rules:**

(A) When the corporation further adjusts its adjusted federal taxable income under section seven of this article, the West Virginia net operating loss deduction allowed by this subsection (d) shall be deducted after the section seven adjustments are made;

(B) The tax commissioner shall prescribe such transition regulations as he deems necessary for fair and equitable administration of this subsection as amended by this act.

(2) **Effective date.** — The provisions of this subsection (d), as amended by this act, shall apply to all taxable years ending after the thirtieth of June, one thousand nine hundred eighty-eight; and to all loss carryovers from taxable years ending on or before said thirtieth day of June.

(e) **Special adjustments for expenditures for water and air pollution control facilities.**

(1) If the taxpayer so elects under subdivision (2) of this subsection, there shall be:

(A) Subtracted from federal taxable income the total of the amounts paid or incurred during the taxable year for the acquisition, construction or development within this state of water pollution control facilities or air pollution control facilities as defined in section 169 of the Internal Revenue Code, and

(B) Added to federal taxable income the total of the amounts of any allowances for depreciation and amortization of such water pollution control facilities or air pollution control facilities, as so defined, to the extent deductible in determining federal taxable income.

(2) The election referred to in subdivision (1) of this subsection shall be made in the return filed within the
time prescribed by law (including extensions there-
of) for the taxable year in which such amounts were
paid or incurred. Such election shall be made in such
manner, and the scope of application of such election
shall be defined, as the tax commissioner may by
regulations prescribe, and shall be irrevocable when
made as to all amounts paid or incurred for any
particular water pollution control facility or air
pollution control facility.

(3) Notwithstanding any other provisions of this
subsection or of section seven to the contrary, if the
taxpayer's federal taxable income is subject to allocation
and apportionment under section seven, the adjustments
prescribed in paragraphs (A) and (B), subdivision (1) of
this subsection shall (instead of being made to the
taxpayer's federal taxable income before allocation and
apportionment thereof as provided in section seven) be
made to the portion of the taxpayer's net income,
computed without regard to such adjustments, allocated
and apportioned to this state in accordance with section
seven.

(f) Allowance for certain government obligations and
obligations secured by residential property. — The West
Virginia taxable income of a taxpayer subject to this
article as adjusted in accordance with parts (b), (c),
(d) and (e) of this section shall be further adjusted by
multiplying such taxable income after such adjustment
by parts (b), (c), (d) and (e) by a fraction equal to one
minus a fraction:

(1) The numerator of which is the sum of the average
of the monthly beginning and ending account balances
during the taxable year (account balances to be deter-
mined at cost in the same manner that such obligations,
investments and loans are reported on Schedule L of the
Federal Form 1120) of the following:

(A) Obligations or securities of the United States, or
of any agency, authority, commission or instrumentality
of the United States and any other corporation or entity
created under the authority of the United States
Congress for the purpose of implementing or furthering
an objective of national policy;

(B) Obligations or securities of this state and any political subdivision or authority thereof;

(C) Investments or loans primarily secured by mortgages, or deeds of trust, on residential property located in this state and occupied by nontransients; and

(D) Loans primarily secured by a lien or security agreement on residential property in the form of a mobile home, modular home or double-wide, located in this state and occupied by nontransients.

(2) The denominator of which is the average of the monthly beginning and ending account balances of the total assets of the taxpayer which are shown on Schedule L of Federal Form 1120, which are filed by the taxpayer with the Internal Revenue Service.


(a) General. — Any taxpayer having income from business activity which is taxable both in this state and in another state shall allocate and apportion its net income as provided in this section. For purposes of this section, the term “net income” means the taxpayer’s federal taxable income adjusted as provided in section six.

(b) “Taxable in another state” defined. — For purposes of allocation and apportionment of net income under this section, a taxpayer is taxable in another state if:

(1) In that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporation stock tax, or

(2) That state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether, in fact, that state does or does not subject the taxpayer to such tax.

(c) Business activities entirely within West Virginia. — If the business activities of a taxpayer take place entirely within this state, the entire net income of such taxpayer is subject to the tax imposed by this article.
The business activities of a taxpayer shall be deemed to have taken place in their entirety within this state if such taxpayer is not "taxable in another state."

(d) Business activities partially within and partially without West Virginia; allocation of nonbusiness income. — If the business activities of a taxpayer take place partially within and partially without this state and such taxpayer is also taxable in another state, rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income of the taxpayer, shall be allocated as provided in subdivisions (1) through (4).

(1) Net rents and royalties.

(A) Net rents and royalties from real property located in this state are allocable to this state.

(B) Net rents and royalties from tangible personal property are allocable to this state:

(i) If and to the extent that the property is utilized in this state, or

(ii) In their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(C) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.
(2) Capital gains.

(A) Capital gains and losses from sales of real property located in this state are allocable to this state.

(B) Capital gains and losses from sales of tangible personal property are allocable to this state if:

(i) The property had a situs in this state at the time of the sale, or

(ii) The taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(C) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

(D) Gains pursuant to section 631 (a) and (b) of the Internal Revenue Code of 1986, as amended, from sales of natural resources severed in this state shall be allocated to this state if they are nonbusiness income.

(3) Interest and dividends are allocable to this state if

(A) Patent and copyright royalties are allocable to this state:

(i) If and to the extent that the patent or copyright is utilized by the payer in this state, or

(ii) If and to the extent that the patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(B) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile
(C) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer’s commercial domicile is located.

(5) Corporate partner’s distributive share.

(A) Persons carrying on business as partners in a partnership, as defined in section 761 of the Internal Revenue Code of 1986, as amended, are liable for income tax only in their separate or individual capacities.

(B) A corporate partner’s distributive share of income, gain, loss, deduction or credit of a partnership shall be modified as provided in section six of this article for each partnership. Such distributive share shall then be allocated and apportioned as provided in section seven of this article, using the corporation’s proportionate share of the partnership’s property, payroll and sales factors. The sum of that portion of the distributive share allocated and apportioned to this state shall then be treated as distributive share allocated to this state; and that portion of distributive share allocated or apportioned outside this state shall be treated as distributive share allocated outside this state, unless the taxpayer requests or the tax commissioner, under subsection (h) of this section requires that such distributive share be treated differently.

(e) Business activities partially within and partially without this state; apportionment of business income. — All net income, after deducting those items specifically allocated under subsection (d), shall be apportioned to this state by multiplying such net income by a fraction, the numerator of which is the property factor plus the payroll factor plus two times the sales factor, and the denominator of which is four, reduced by the number of factors, if any, having no denominator.

(1) Property factor. — The property factor is a
fraction, the numerator of which is the average value of the taxpayer’s real and tangible personal property owned or rented and used by it in this state during the taxable year and the denominator of which is the average value of all the taxpayer’s real and tangible personal property owned or rented and used by the taxpayer during the taxable year, which is reported on Schedule L Federal Form 1120, plus the average value of all real and tangible personal property leased and used by the taxpayer during the taxable year.

(2) Value of property. — Property owned by the taxpayer shall be valued at its original cost, adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc. Provided, That where records of original cost are unavailable or cannot be obtained without unreasonable expense, property shall be valued at original cost as determined under regulations of the tax commissioner. Property rented by the taxpayer from others shall be valued at eight times the annual rental rate. The term “net annual rental rate” is the annual rental paid, directly or indirectly, by the taxpayer, or for its benefit, in money or other consideration for the use of property and includes:

(A) Any amount payable for the use of real or tangible personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise.

(B) Any amount payable as additional rent or in lieu of rents, such as interest, taxes, insurance, repairs or any other items which are required to be paid by the terms of the lease or other arrangement, not including amounts paid as service charges, such as utilities, janitor services, etc. If a payment includes rent and other charges unsegregated, the amount of rent shall be determined by consideration of the relative values of the rent and the other items.

(3) Movable property. — The value of movable tangible personal property used both within and without this state shall be included in the numerator to the extent
of its utilization in this state. The extent of such utilization shall be determined by multiplying the original cost of such property by a fraction, the numerator of which is the number of days of physical location of the property in this state during the taxable period, and the denominator of which is the number of days of physical location of the property everywhere during the taxable year. The number of days of physical location of the property may be determined on a statistical basis or by such other reasonable method acceptable to the tax commissioner.

(4) Leasehold improvements. — Leasehold improvements shall, for purposes of the property factor, be treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Leasehold improvements shall be included in the property factor at their original cost.

(5) Average value of property. — The average value of property shall be determined by averaging the values at the beginning and ending of the taxable year; Provided, That the tax commissioner may require the averaging of monthly values during the taxable year if substantial fluctuations in the values of the property exist during the taxable year, or where property is acquired after the beginning of the taxable year, or is disposed of, or whose rental contract ceases, before the end of the taxable year.

(6) Payroll factor. — The payroll factor is a fraction, the numerator of which is the total compensation paid in this state during the taxable year by the taxpayer for compensation, and the denominator of which is the total compensation paid by the taxpayer during the taxable year, as shown on the taxpayer's federal income tax return as filed with the Internal Revenue Service, as reflected in the schedule of wages and salaries and that portion of cost of goods sold which reflects compensation, or as shown on a pro forma return.

(7) Compensation. — The term "compensation" means
wages, salaries, commissions and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or to any other person not properly classifiable as an employee shall be excluded. Only amounts paid directly to employees are included in the payroll factor. Amounts considered as paid directly to employees include the value of board, rent, housing, lodging and other benefits or services furnished to employees by the taxpayer in return for personal services, provided such amounts constitute income to the recipient for federal income tax purposes.

(8) Employee. — The term “employee” means:

(A) Any officer of a corporation; or

(B) Any individual who, under the usual common-law rule applicable in determining the employer-employee relationship, has the status of an employee.

(9) Compensation. — Compensation is paid or accrued in this state if:

(A) The employee’s service is performed entirely within this state; or

(B) The employee’s service is performed both within and without this state, but the service performed without the state is incidental to the individual’s service within this state. The word “incidental” means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction; or

(C) Some of the service is performed in this state and

(i) The employee’s base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state; or

(ii) The base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the employee’s residence is in this state.

The term “base of operations” is the place of more or
less permanent nature from which the employee starts
his work and to which he customarily returns in order
to receive instructions from the taxpayer or communi-
cations from his customers or other persons or to
replenish stock or other materials, repair equipment, or
perform any other functions necessary to the exercise of
his trade or profession at some other point or points. The
term "place from which the service is directed or
controlled" refers to the place from which the power to
direct or control is exercised by the taxpayer.

(10) Sales factor. — The sales factor is a fraction, the
numerator of which is the gross receipts of the taxpayer
derived from transactions and activity in the regular
course of its trade or business in this state during the
taxable year (business income), less returns and allow-
ances. The denominator of the fraction shall be the total
gross receipts derived by the taxpayer from transactions
and activity in the regular course of its trade or business
during the taxable year (business income), and reflected
in its gross income reported and as appearing on the
taxpayer's Federal Form 1120, and consisting of those
certain pertinent portions of the (gross income) elements
set forth: Provided, That if either the numerator or the
denominator includes interest or dividends from obliga-
tions of the United States government which are exempt
from taxation by this state, the amount of such interest
and dividends, if any, shall be subtracted from the
numerator or denominator in which it is included.

(11) Allocation of sales of tangible personal prop-
erty. — (A) Sales of tangible personal property are in
this state if:

(i) The property is received in this state by the
purchaser, other than the United States government,
regardless of the f.o.b. point or other conditions of the
sale. In the case of delivery by common carrier or other
means of transportation, the place at which such
property is ultimately received after all transportation
has been completed shall be considered as the place at
which such property is received by the purchaser.
Direct delivery in this state, other than for purposes of
transportation, to a person or firm designated by the
purchaser, constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by the purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale; or

(ii) The property is shipped from an office, store, warehouse, factory or other place of storage in this state and the purchaser is the United States government.

(B) All other sales of tangible personal property delivered or shipped to a purchaser within a state in which the taxpayer is not taxed (as defined in subsection (b) of this section) shall be excluded from the denominator of the sales factor.

(12) Allocation of other sales. — Sales, other than sales of tangible personal property are in this state if:

(A) The income-producing activity is performed in this state; or

(B) The income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

(f) Income-producing activity. — The term “income-producing activity” applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gain or profit. Such activity does not include transactions and activities performed on behalf of the taxpayer, such as those conducted on its behalf by an independent contractor. “Income-producing activity” includes, but is not limited to, the following:

(1) The rendering of personal services by employees with utilization of tangible and intangible property by the taxpayer in performing a service;

(2) The sale, rental, leasing, licensing or other use of real property;

(3) The sale, rental, leasing, licensing or other use of tangible personal property; or
The sale, licensing or other use of intangible personal property.

The mere holding of intangible personal property is not, in itself, an income-producing activity.

(g) Cost of performance. — The term "cost of performance" means direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer.

(h) Other methods of allocation and apportionment.

(1) General. — If the allocation and apportionment provisions of subsections (d) and (e) of this section do not fairly represent the extent of the taxpayer's business activities in this state, the taxpayer may petition for or the tax commissioner may require, in respect to all or any part of the taxpayer's business activities, if reasonable:

(A) Separate accounting;

(B) The exclusion of one or more of the factors;

(C) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(D) The employment of any other method to effectuate an equitable allocation or apportionment of the taxpayer's income. Such petition shall be filed no later than the due date of the annual return for the taxable year for which the alternative method is requested, determined without regard to any extension of time for filing such return, and the petition shall include a statement of the petitioner's objections and of such alternative method of allocation or apportionment as it believes to be proper under the circumstances with such detail and proof as the tax commissioner may require.

(2) Alternative method for public utilities. — If the taxpayer is a public utility and if the allocation and apportionment provisions of subsections (d) and (e) do not fairly represent the taxpayer's business activities in this state, the taxpayer may petition for, or the tax
commissioner may require, as an alternative to the other
methods provided for in paragraph (1) of this subsection,
the allocation and apportionment of the taxpayer's net
income in accordance with any system of accounts
prescribed by the public service commission of this state
pursuant to the provisions of section eight, article two,
chapter twenty-four of this code, provided the allocation
and apportionment provisions of such system of accounts
fairly represent the extent of the taxpayer's business
activities in this state for the purposes of the tax
imposed by this article.

(3) **Burden of proof.** — In any proceeding before the
tax commissioner or in any court in which employment
of one of the methods of allocation or apportionment
provided for in paragraph (1) or (2) of this subsection
is sought, on the ground that the allocation and
apportionment provisions of subsections (d) and (e) do
not fairly represent the extent of the taxpayer's business
activities in this state, the burden of proof shall:

(A) If the tax commissioner seeks employment of one
of such methods, be on the tax commissioner, or

(B) If the taxpayer seeks employment of one of such
other methods, be on the taxpayer.

§11-24-9a. **Credits against primary tax; election of**
taxpayer.

**Credit for primary taxes imposed under article**
**thirteen-a, chapter eleven of this code.** — A credit shall
be allowed against the primary tax imposed by this
article equal to the amount of the liability of the
taxpayer for the taxable year for the severance tax
imposed under article thirteen-a, chapter eleven of this
code: **Provided,** That the amount of such severance tax
credit shall not exceed fifty percent of the primary tax
liability of the taxpayer under this article, which is
attributable to the West Virginia taxable income
derived by the taxpayer for the taxable year from the
activities with respect to which said tax under article
thirteen-a was imposed, and shall not in any event
exceed fifty percent of the primary tax liability of the
taxpayer under this article for such taxable year:
Provided, however, That the entire amount of the severance tax liability of the taxpayer, which was taken as a deduction in determining its federal taxable income for the taxable year, shall be an adjustment increasing federal taxable income under section six of this article: Provided further, That the taxpayer may at its option elect, in lieu of claiming the credit allowable by this subsection, to not increase its federal taxable income under section six of this article and thereby take as a full deduction under this article for the taxable year the amount of its severance tax liability for the taxable year, which was taken as a deduction on its federal return for such taxable year.

For purposes of this section, the tax imposed under article thirteen-a, chapter eleven of this code shall be the amount of the liability of the taxpayer for such tax under said article thirteen-a computed without reduction for the tax credit for coal loading facilities or for industrial expansion or revitalization allowed for such year.

§11-24-42. Effective date.

The provisions of this article as amended or added by this act shall take effect on the first day of July, one thousand nine hundred eighty-eight, and apply to all taxable years ending after that date: Provided, That if an effective date is expressly provided in such provision, that specific effective date shall control in lieu of this general effective date provision.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within ........................................ this the ................
day of ........................................, 1988.

Governor