WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1988

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ENROLLED

HOUSE BILL No. 1511

(By Mr. Speaker, Mr. Chambers, and)
Delegate Scowen)
(At request of the Executive)

Passed March 12, 1988

In Effect from Passage
AN ACT to amend and reenact sections three, five, six, seven and seventeen, article twenty-three, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said article twenty-three by adding thereto two new sections, designated sections three-a and twenty-six, all relating generally to the business franchise tax; defining terms; updating references to federal internal revenue code; apportioning tax base; imposing tax; exempting certain businesses from tax; allowing certain credits against tax; and specifying effective dates.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 23. BUSINESS FRANCHISE TAX.

§11-23-3. Meaning of terms; specific terms defined.

1 (a) General. — When used in this article, or in the administration of this article, terms defined in this section shall have the meanings ascribed to them herein unless a different meaning is clearly required by either
the context in which the term is used, or by specific
definition in this article.

(b) Terms defined.

(1) Business income. — The term “business income”
means income arising from transactions and activity in
the regular course of the taxpayer’s trade or business
and includes income from tangible and intangible
property if the acquisition, management and disposition
of the property constitute integral parts of the taxpay-
er’s regular trade or business operations.

(2) Capital. — The term “capital” of a taxpayer shall
mean:

(A) Corporations. — In the case of a corporation,
except an electing small business corporation, the
average of the beginning and ending year balances of
the sum of the following entries from Schedule L of
Federal Form 1120, as filed by the taxpayer with the
internal revenue service for the taxable year:

(i) The value of all common stock and preferred stock
of the taxpayer;

(ii) The amount of paid-in or capital surplus;

(iii) The amount of retained earnings, appropriated
and unappropriated;

(iv) Less the cost of treasury stock.

(B) S Corporations. — In the case of an electing small
business corporation, the average of the beginning and
ending year balances of the sum of the following entries
from Schedule L of Federal Form 1120S, as filed by the
taxpayer with the internal revenue service for the
taxable year:

(i) The value of all common stock and preferred stock
of the taxpayer;

(ii) The amount of paid-in or capital surplus;

(iii) Retained earnings, appropriated and
unappropriated;

(iv) The amount of shareholders’ undistributed taxa-
ble income;

(v) The amount of the accumulated adjustments account;

(vi) The amount of the other adjustments account;

(vii) Less the cost of treasury stock.

(C) Partnerships. — In the case of a partnership, the average of the beginning and ending year balances of the value of partner's capital accounts from Schedule L of Federal Form 1065, as filed by the taxpayer with the internal revenue service for the taxable year.

(D) Additional items in capital. — The term "capital" for purposes of this article shall include such additional items from the accounts of the taxpayer as the tax commissioner may by regulation prescribe, which fairly represent the net equity of the taxpayer as defined in accordance with generally accepted accounting principles.

(E) Allowance for certain government obligations and obligations secured by residential property. — As to both corporations and partnerships, capital shall be multiplied by a fraction equal to one minus a fraction:

(i) The numerator of which is the sum of the average of the beginning and ending account balances for the taxable year (account balances to be determined at cost in the same manner that such obligations, investments and loans are reported on Schedule L of the Federal Form 1120 or Federal Form 1065) of the following:

(II) Obligations of this state and any political subdivision of this state;

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

(IV) 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.

(ii) The denominator of which is the average of the beginning and ending year balances of the total assets of the taxpayer as shown on Schedule L of the Federal Form 1120, as filed by the taxpayer with the internal revenue service or, in the case of partnerships, Schedule L of Federal Form 1065, as filed by the taxpayer with the internal revenue service.

(3) Commercial domicile. — The term “commercial domicile” means the principal place from which the trade or business of the taxpayer is directed or managed.

(4) Commissioner or tax commissioner. — The terms “commissioner” or “tax commissioner” are used interchangeably herein and mean the tax commissioner of the state of West Virginia, or his delegate.

(5) Compensation. — The term “compensation” means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(6) Corporation. — The term “corporation” includes any corporation, S corporation, joint-stock company and any association or other organization which is taxable as a corporation under federal income tax laws or the income tax laws of this state.

(7) Delegate. — The term “delegate” in the phrase “or his delegate,” when used in reference to the tax commissioner, means any officer or employee of the state tax department duly authorized by the tax commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this article or regulations promulgated thereunder.

(8) Doing business. — The term “doing business” means any activity of a corporation or partnership
which enjoys the benefits and protection of the government and laws of this state, except the activity of agriculture and farming, which shall mean the production of food, fiber and woodland products (but not timbering activity) by means of cultivation, tillage of the soil and by the conduct of animal, livestock, dairy, apiary, equine or poultry husbandry, horticulture, or any other plant or animal production and all farm practices related, usual or incidental thereto, including the storage, packing, shipping and marketing, but not including any manufacturing, milling or processing of such products by persons other than the producer thereof.

The activity of agriculture and farming shall mean such activity, as above defined, occurring on not less than five acres of land and the improvements thereon, used in the production of the aforementioned activities, and shall mean the production of at least one thousand dollars of products per annum through the conduct of such principal business activities as set forth in section ten, article one-a, chapter eleven of this code.

(9) Domestic corporation. — The term “domestic corporation” means a corporation organized under the laws of this state, and certain corporations organized under the laws of the state of Virginia before the twentieth day of June, one thousand eight hundred sixty-three. Every other corporation is a foreign corporation.

(10) Federal Form 1120. — The “Federal Form 1120” means the annual federal income tax return of any corporation made pursuant to the United States Internal Revenue Code of 1986, as amended, or in successor provisions of the laws of the United States, in respect to the taxable income of a corporation, and filed with the federal internal revenue service. In the case of a corporation that elects to file a federal income tax return as part of an affiliated group, but files as a separate corporation under this article, then as to such corporation Federal Form 1120 means its pro forma Federal Form 1120.
(11) **Federal Form 1065.** — The term “Federal Form 1065” means the annual federal income tax return of a partnership made pursuant to Section 6031 of the United States Internal Revenue Code of 1986, as amended, or renumbered, or in successor provisions of the laws of the United States, in respect to the taxable income of a partnership, and filed with the federal internal revenue service.

(12) **Fiduciary.** — The term “fiduciary” means, and includes, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person.

(13) **Financial organization.** — The term “financial organization” includes any bank, banking association, trust company, industrial loan company, small loan company or licensee, building and loan association, savings and loan association, finance company, investment company, investment broker or dealer, and any other similar business organization at least ninety percent of the assets of which consist of intangible personal property and at least ninety percent of the gross receipts of which consist of dividends, interest and other charges derived from the use of money or credit.

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

(15) **Includes and including.** — The term “includes” and “including” when used in a definition contained in this article shall not be deemed to exclude other things otherwise within the meaning of the term being defined.

(16) **Parent and subsidiary corporations.** — A corporation which owns on average during the taxable year more than fifty percent of the stock of all classes of another corporation is defined to be the “parent corporation” and the corporation which is so owned by the parent is defined to be a “subsidiary corporation.”

(17) **Partnership and partner.** — The term “partner-
ship” includes a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business, financial operation or venture is carried on, and which is not a trust or estate, a corporation, a sole proprietorship, or an unincorporated organization which under Section 761 of the internal revenue code and is not treated as a partnership for the taxable year for federal income tax purposes. The term “partner” includes a member in such a syndicate, group, pool, joint venture or other unincorporated organization which is a “partnership.”

(18) **Person.** — The term “person” includes any corporation or partnership.

(19) **Pro forma return.** — The term “pro forma return” when used in this article means the return which the taxpayer would have filed with the internal revenue service had it not elected to file federally as part of a consolidated group.

(20) **Sales.** — The term “sales” means all gross receipts of the taxpayer that are “business income,” as defined in this section.

(21) **State.** — The term “state” means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(22) **Stock.** — The term “stock” includes shares in a corporation, association or joint-stock company. It shall not include nonvoting stock which is limited and preferred as to dividends, or treasury stock. “Stock owned by a corporation” shall include stock owned directly by such corporation and stock which is subject to an option to acquire stock.

(23) **Taxable year.** — The term “taxable year” means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which tax liability is computed under this article. “Taxable year” means, in case of a return made for a fractional part of a year (short taxable year) under the provisions of this article, or under regulations promulgated by the tax commis-
Enr. H. B. 4511]

§11-23-3a. Specific terms defined.

Any term used in this article shall have the 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 of this article. Any reference in this article to the laws of the United States, or to the internal revenue code, or to the federal income tax law shall mean the provisions of the laws of the United States as related 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 the tax period beginning the first day of January, one thousand nine hundred eighty-eight, and thereafter, but no amendment to laws of the United States made on or after the first day of January, one thousand nine hundred eighty-eight, shall be given effect.

§11-23-5. Apportionment of tax base.

(a) A taxpayer subject to the tax imposed by this article and also taxable in another state shall, for the purposes of this tax, apportion its tax base to this state by multiplying its tax base by a fraction, the numerator of which is the sum of the property factor, plus the payroll factor, plus two times the sales factor, all of which shall be determined as hereinafter provided in this section, and the denominator of which is four.

(b) 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 real and tangible personal property owned or rented by the taxpayer and used by it during the taxable year, which is reported on Schedule L of Federal Form 1120 (or 1065 for partnerships), plus the average value of all real and tangible personal property leased and used by the taxpayer during the taxable year.

(c) 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 net annual rental rate. 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 the property and includes:
(1) 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.

(2) 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.

(d) 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.

(e) Leasehold improvements. — Leasehold improvements shall, for the purposes of the property factor, be treated as property owned by the lesser regardless of whether the lessee 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.

(f) 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.

(g) 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, 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.

(h) 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 the amounts paid directly to employees shall be included in the payroll factor. Amounts considered 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.

(i) Employee. — The term "employee" means:

(1) Any officer of a corporation; or

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

(j) Compensation paid in this state. — Compensation is paid in this state if:

(1) The employee's service is performed entirely within the state;

(2) The employee's service is performed both within and without the state, but the service performed without
the state is incidental to the individual's service within
the 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

(3) Some of the service is performed in the state and:

(A) 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

(B) 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.

(k) 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 allo-
wances. 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 or
1065, 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 obligations 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.

(l) Allocation of sales of tangible personal property. —

(1) Sales of tangible personal property are in this state if:

(A) 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

(B) 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.

(2) 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), section seven, article twenty-four of this chapter shall be excluded from the denominator of the sales factor.

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

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

(2) 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.

(n) Other methods of allocation.
(1) General. — If the allocation and apportionment provisions of subsection (a) 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 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 tax base. 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) 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 subdivision (1) of this subsection is sought, on the ground that the allocation and apportionment provisions of subsection (a) 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.

§11-23-6. Imposition of tax.

(a) General. — An annual business franchise tax is hereby imposed on the privilege of doing business in this state and in respect of the benefits and protections
Such tax shall be collected from every corporation having its commercial domicile in this state, every foreign or domestic corporation owning or leasing real or tangible personal property located in this state or doing business in this state and from every partnership owning or leasing property located in this state or doing business in this state, effective on and after the first day of July, one thousand nine hundred eighty-seven.

(b) Amount of tax and rate; effective date. — On and after the first day of July, one thousand nine hundred eighty-seven, the amount of tax shall be the greater of fifty dollars or fifty-five one hundredths of one percent of the value of the tax base, as determined under this article: Provided, That when the taxpayer's first taxable year under this article is a short taxable year, the taxpayer's liability shall be prorated based upon the ratio which the number of months in which such short taxable year bears to twelve.

§11-23-7. Persons and organizations exempt from tax.

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

(a) Natural person doing business in this state that are not doing business in the form of a partnership (as defined in section three of this article) or in the form of a corporation (as defined in section three of this article). Such person include persons doing business as sole proprietors, sole practitioners and other self-employed person.

(b) Corporations and organizations which by reason of their purposes or activities are exempt from federal income tax: Provided, That this exemption shall not apply to that portion of their capital (as defined in section three of this article) which is used, directly or indirectly, in the generation of unrelated business income (as defined in the Internal Revenue Code) of any such corporation or organization if the unrelated business income is subject to federal income tax.
(c) Insurance companies which pay this state a tax upon premiums.

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

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

(f) Any credit union organized under the provisions of chapter thirty-one, or any other chapter of this code: Provided, That this exemption shall not apply to corporations or cooperative associations organized under the provisions of article four, chapter nineteen of this code.

(g) Any corporation organized under this code which is a political subdivision of the state of West Virginia, or is an instrumentality of a political subdivision of this state, and was created pursuant to this code.

(h) Any corporation or partnership engaged in the activity of agriculture and farming, as defined in paragraph (8), subsection (b), section three of this article: Provided, That if a corporation or partnership is not exclusively engaged in such activity, its tax base under this article shall be apportioned, in accordance with regulations promulgated by the tax commissioner, among its several activities and only that portion attributable to the activity of agriculture and farming shall be exempt from tax under this article.

(i) Any corporation or partnership licensed under article twenty-three, chapter nineteen of this code, to conduct horse or dog racing meetings or a pari-mutuel system of wagering: Provided, That if such corporation or partnership is not exclusively engaged in such
activity, its tax base under this article shall be appor-
tioned, in accordance with regulations promulgated by
the tax commissioner, among its several activities and
only that portion attributable to the activity of conduct-
ing a horse or dog racing meeting or a pari-mutuel
system of wagering shall be exempt from tax under this
article.

§11-23-17. Credits against tax.

(a) A credit shall be allowed against the tax imposed
by this article equal to the amount of franchise tax
liability due under this article, for the taxable year
(determined before application of other allowable
credits) multiplied by a fraction, the numerator of which
is the gross income of the business subject to tax under
article thirteen-a of this chapter and the denominator of
which is the total amount of gross receipts derived from
or attributable to all of taxpayer's activity in West
Virginia: Provided, That on or after the first day of July,
one thousand nine hundred eighty-eight,

(b) For taxable years ending after the thirtieth day
of June, one thousand nine hundred eighty-eight, a
credit shall be allowed against the tax imposed by this
article equal to the amount of franchise tax liability due
under this article, for the taxable year (determined
before application of other allowable credits) multiplied
by a fraction, the numerator of which is the gross
income of the business subject to tax under article
thirteen of this chapter and the denominator of which
is the total amount of gross receipts derived from or
attributable to all of taxpayer's activity in West
Virginia: Provided, That such credit shall be prorated
and only that amount attributable to months of the
taxable year beginning after June thirtieth, one thou-
sand nine hundred eighty-eight, shall be allowed as a
credit.

(c) A parent taxpayer who files a separate return
under this article shall be allowed a credit against such
taxpayer's liability for the tax under this article for the
amount of net taxes that would have been paid without
regard to the adjustment required by subparagraph (D),
paragraph (2), subsection (b), section three of this article for the taxable year by a subsidiary corporation or partnership: Provided, That the amount of credit allowed shall not exceed the amount of tax that would have been paid, without regard to such adjustment, under this article by the subsidiary or partnership, multiplied by the percentage of the parent's ownership of the subsidiary corporation or partnership. In the case of corporations, this percentage shall be equal to the percentage of stock of all classes owned by the parent. In no case shall any credit allowable by this section, which is not used on an annual return, be carried forward or back, but instead the same shall be forfeited.

(d) A credit shall be allowed against the tax imposed by this article for the taxable year equal to the amount of liability of the taxpayer for the taxable year for the full amount of any tax imposed pursuant to article eight of this chapter on the capital of the business, as determined under sections fourteen and fourteen-a, article three of this chapter.

§11-23-26. 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 approval this the 29th day of March, 1988.

Governor