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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1988



ENROLLED

Com. Sub. for
HOUSE BILL No. 4475

(By Mr. Speaku, Mr. Chambers)
and Delegate Swann
[By Request of the Executive]



Passed March 12, 1988

In Effect From Passage

ENROLLED

COMMITTEE SUBSTITUTE

FOR

H. B. 4475

(By MR. SPEAKER, MR. CHAMBERS, and DELEGATE SWANN)

[By request of the Executive]

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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.

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

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

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

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

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

26 (3) *Consumer price index*. — For purposes of subdivi-
27 sion (2), the term "Federal Consumer Price Index"

28 means the last consumer price index for all urban
29 consumers published by the United States department
30 of labor.

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

34 (b) *Amount of credit allowed.*

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

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

56 (3) *Application of credit.* — The annual credit allow-
57 ance must be taken beginning with the taxable year in
58 which the taxpayer places the qualified investment into
59 service or use in this state, unless the taxpayer elects
60 to delay the beginning of the ten-year credit period until
61 the next succeeding taxable year. This election shall be
62 made in the annual income tax return filed under this
63 chapter by the taxpayer for the taxable year in which
64 the qualified investment is placed in service or use. Once
65 made, this election cannot be revoked. The annual credit
66 allowance shall be taken and applied in the manner
67 prescribed in section five.

68 (c) *New jobs.* — The term “new jobs” has the meaning
69 ascribed to it in subdivision (14), subsection (b), section
70 three of this article: *Provided*, That the median compen-
71 sation of such new jobs shall not be less than eleven
72 thousand dollars per year and that beginning the first
73 day of January, one thousand nine hundred eighty-nine,
74 and each first day of January thereafter, the tax
75 commissioner shall adjust the median annual compen-
76 sation specified in this subsection by increasing the
77 amount thereof by the annual cost-of-living adjustment
78 determined under subsection (a).

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

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

89 (B) Worked for the taxpayer during the six-month
90 period ending on the date taxpayer’s qualified invest-
91 ment is placed in service or use and is rehired by the
92 taxpayer during the six-month period beginning on the
93 date taxpayer’s qualified investment is placed in service
94 or use.

95 (2) *When a job is attributable.* — An employee’s
96 position is directly attributable to the qualified invest-
97 ment if:

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

100 (B) The position did not exist prior to the construc-
101 tion, renovation, expansion or acquisition of the business
102 facility and the making of the qualified investment; and

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

105 (d) *New jobs percentage.* — The annual new jobs

106 percentage is based on the number of new jobs created
107 in this state by the taxpayer that is directly attributable
108 to taxpayer's qualified investment.

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

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

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

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

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

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

142 (4) That qualified investment property continue to be
143 used in the business, or if any of it was disposed of
144 during the year the date of disposition and that such

145 property was not disposed of prior to expiration of its
146 useful life, as determined under section six;

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

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

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

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

ARTICLE 24. CORPORATION NET INCOME TAX.

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

1 (a) Any term used in this article shall have the same
2 meaning as when used in a comparable context in the
3 laws of the United States relating to federal income
4 taxes, unless a different meaning is clearly required by
5 the context or by definition in this article. Any reference
6 in this article to the laws of the United States shall mean
7 the provisions of the Internal Revenue Code of 1986, as

8 amended, and such other provisions of the laws of the
9 United States as relate to the determination of income
10 for federal income tax purposes. All amendments made
11 to the laws of the United States prior to the first day
12 of January, one thousand nine hundred eighty-eight,
13 shall be given effect in determining the taxes imposed
14 by this article for any taxable year beginning the first
15 day of January, one thousand nine hundred eighty-
16 seven, and thereafter, but no amendment to the laws of
17 the United States effective on or after the first day of
18 January, one thousand nine hundred eighty-eight, shall
19 be given any effect.

20 (b) The term "Internal Revenue Code of 1986" means
21 the Internal Revenue Code of the United States enacted
22 by the "Federal Tax Reform Act of 1986" and includes
23 the provisions of law formerly known as the Internal
24 Revenue Code of 1954, as amended, and in effect when
25 the "Federal Tax Reform Act of 1986" was enacted, that
26 were not amended or repealed by the "Federal Tax
27 Reform Act of 1986." Except when inappropriate, any
28 references in any law, executive order, or other
29 document:

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

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

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

1 *Primary tax.*

2 (1) In the case of taxable periods beginning after the
3 thirtieth day of June, one thousand nine hundred sixty-
4 seven, and ending prior to the first day of January, one
5 thousand nine hundred eighty-three, a tax is hereby
6 imposed for each taxable year at the rate of six percent
7 per annum on the West Virginia taxable income of every
8 domestic or foreign corporation engaging in business in
9 this state or deriving income from property, activity or
10 other sources in this state, except corporations exempt

11 under section five.

12 (2) In the case of taxable periods beginning on or after
13 the first day of January, one thousand nine hundred
14 eighty-three, and ending prior to the first day of July,
15 one thousand nine hundred eighty-seven, a tax is hereby
16 imposed for each taxable year on the West Virginia
17 taxable income of every domestic or foreign corporation
18 engaging in business in this state or deriving income
19 from property, activity or other sources in this state,
20 except corporations exempt under section five of this
21 article, and any banks, banking associations or corpora-
22 tions, trust companies, building and loan associations,
23 and savings and loan associations, at the rates which
24 follow:

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

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

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

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

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

4 (a) Corporations which by reason of their purposes or
5 activities are exempt from federal income tax: *Provided,*

6 That this exemption shall not apply to the unrelated
7 business income, as defined in the Internal Revenue
8 Code, of any such corporation if such income is subject
9 to federal income tax.

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

12 (c) Production credit associations organized under the
13 provisions of the federal "Farm Credit Act of 1933":
14 *Provided*, That the exemption shall not apply to
15 corporations or associations organized under the provi-
16 sions of article four, chapter nineteen of this code.

17 (d) Corporations electing to be taxed under subchap-
18 ter S of the Internal Revenue Code of one thousand nine
19 hundred eighty-six, as amended: *Provided*, That said
20 corporations shall file the information return required
21 by section thirteen-b of this article.

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

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

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

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

11 (1) Interest or dividends on obligations or securities of
12 any state or of a political subdivision or authority
13 thereof;

14 (2) Interest or dividends (less related expenses to the
15 extent not deducted in determining federal taxable
16 income) on obligations or securities of any authority,
17 commission or instrumentality of the United States
18 which the laws of the United States exempt from federal
19 income tax but not from state income taxes;

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

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

30 (5) The deferral value of certain income that is not
31 recognized for federal tax purposes, which value shall
32 be an amount equal to a percentage of the amount
33 allowed as a deduction in determining federal taxable
34 income pursuant to the accelerated cost recovery system
35 under section 168 of the Internal Revenue Code for the
36 federal taxable year, with the percentage of the federal
37 deduction to be added as follows with respect to the
38 following recovery property: Three-year property — no
39 modifications; five-year property — ten percent; ten-
40 year property — fifteen percent; fifteen-year public
41 utility property — twenty-five percent; and fifteen-year
42 or eighteen-year real property — thirty-five percent:
43 *Provided*, That this modification shall not apply to any
44 person whose federal deduction is determined by the use
45 of the straight line method, or to any taxable year
46 beginning after the thirtieth day of June, one thousand
47 nine hundred eighty-seven;

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

53 (7) The amount of any net operating loss deduction

54 taken for federal income tax purposes under section 172
55 of the Internal Revenue Code of 1986, as amended.

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

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

67 (2) The amount of any refund or credit for overpay-
68 ment of income taxes and other taxes, including
69 franchise and excise taxes, which are based on, mea-
70 sured by, or computed with reference to net income,
71 imposed by this state or any other taxing jurisdiction,
72 to the extent properly included in gross income for
73 federal income tax purposes;

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

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

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

88 (6) The full amount of interest expense actually
89 disallowed in determining federal taxable income which
90 was incurred or continued to purchase or carry obliga-
91 tions or securities of any state or of any political
92 subdivision thereof;

93 (7) The amount required to be added to federal
94 taxable income as a dividend received from a foreign
95 (non-United States) corporation under section 78 of the
96 Internal Revenue Code of 1986, as amended, by a
97 corporation electing to take the foreign tax credit for
98 federal income tax purposes;

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

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

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

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

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

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

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

126 (d) *Net operating loss deduction.* — Except as other-
127 wise provided in this subsection, there shall be allowed
128 as a deduction for the taxable year an amount equal to
129 the aggregate of (1) the West Virginia net operating loss
130 carryovers to such year plus (2) the net operating loss

131 carrybacks to such year. For purposes of this subsection,
132 the term "West Virginia net operating loss deduction"
133 means the deduction allowed by this subsection, deter-
134 mined in accordance with section 172 of the Internal
135 Revenue Code of 1986, as amended.

136 (1) *Special rules:*

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

142 (B) The tax commissioner shall prescribe such tran-
143 sition regulations as he deems necessary for fair and
144 equitable administration of this subsection as amended
145 by this act.

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

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

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

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

162 (B) Added to federal taxable income the total of the
163 amounts of any allowances for depreciation and amor-
164 tization of such water pollution control facilities or air
165 pollution control facilities, as so defined, to the extent
166 deductible in determining federal taxable income.

167 (2) The election referred to in subdivision (1) of this
168 subsection shall be made in the return filed within the

169 time prescribed by law (including extensions the-
170 reof) for the taxable year in which such amounts were
171 paid or incurred. Such election shall be made in such
172 manner, and the scope of application of such election
173 shall be defined, as the tax commissioner may by
174 regulations prescribe, and shall be irrevocable when
175 made as to all amounts paid or incurred for any
176 particular water pollution control facility or air
177 pollution control facility.

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

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

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

204 (A) Obligations or securities of the United States, or
205 of any agency, authority, commission or instrumentality
206 of the United States and any other corporation or entity
207 created under the authority of the United States
208 Congress for the purpose of implementing or furthering

209 an objective of national policy;

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

212 (C) Investments or loans primarily secured by mort-
213 gages, or deeds of trust, on residential property located
214 in this state and occupied by nontransients; and

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

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

§11-24-7. Allocation and apportionment.

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

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

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

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

18 (c) *Business activities entirely within West Virginia.*
19 — If the business activities of a taxpayer take place
20 entirely within this state, the entire net income of such
21 taxpayer is subject to the tax imposed by this article.

22 The business activities of a taxpayer shall be deemed to
23 have taken place in their entirety within this state if
24 such taxpayer is not "taxable in another state."

25 (d) *Business activities partially within and partially*
26 *without West Virginia; allocation of nonbusiness income.*

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

35 (1) *Net rents and royalties.*

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

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

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

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

46 (C) The extent of utilization of tangible personal
47 property in a state is determined by multiplying the
48 rents and royalties by a fraction, the numerator of which
49 is the number of days of physical location of the property
50 in the state during the rental or royalty period in the
51 taxable year and the denominator of which is the
52 number of days of physical location of the property
53 everywhere during all rental or royalty periods in the
54 taxable year. If the physical location of the property
55 during the rental or royalty period is unknown or
56 unascertainable by the taxpayer, tangible personal
57 property is utilized in the state in which the property
58 was located at the time the rental or royalty payer
59 obtained possession.

60 (2) *Capital gains.*

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

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

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

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

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

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

77 (3) *Interest and dividends are allocable to this state if*
78 *the taxpayer's commercial domicile is in this state.*

79 (4) *Patent and copyright royalties.*

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

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

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

88 (B) A patent is utilized in a state to the extent that
89 it is employed in production, fabrication, manufacturing
90 or other processing in the state or to the extent that a
91 patented product is produced in the state. If the basis
92 of receipts from patent royalties does not permit
93 allocation to states or if the accounting procedures do
94 not reflect states of utilization, the patent is utilized in
95 the state in which the taxpayer's commercial domicile

96 is located.

97 (C) A copyright is utilized in a state to the extent that
98 printing or other publication originates in the state. If
99 the basis of receipts from copyright royalties does not
100 permit allocation to states or if the accounting proce-
101 dures do not reflect states of utilization, the copyright
102 is utilized in the state in which the taxpayer's commer-
103 cial domicile is located.

104 (5) *Corporate partner's distributive share.*

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

109 (B) A corporate partner's distributive share of in-
110 come, gain, loss, deduction or credit of a partnership
111 shall be modified as provided in section six of this article
112 for each partnership. Such distributive share shall then
113 be allocated and apportioned as provided in section
114 seven of this article, using the corporation's proportion-
115 ate share of the partnership's property, payroll and sales
116 factors. The sum of that portion of the distributive share
117 allocated and apportioned to this state shall then be
118 treated as distributive share allocated to this state; and
119 that portion of distributive share allocated or apporti-
120 oned outside this state shall be treated as distributive
121 share allocated outside this state, unless the taxpayer
122 requests or the tax commissioner, under subsection
123 (h) of this section requires that such distributive share
124 be treated differently.

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

134 (1) *Property factor.* — The property factor is a

135 fraction, the numerator of which is the average value
136 of the taxpayer's real and tangible personal property
137 owned or rented and used by it in this state during the
138 taxable year and the denominator of which is the
139 average value of all the taxpayer's real and tangible
140 personal property owned or rented and used by the
141 taxpayer during the taxable year, which is reported on
142 Schedule L Federal Form 1120, plus the average value
143 of all real and tangible personal property leased and
144 used by the taxpayer during the taxable year.

145 (2) *Value of property.* — Property owned by the
146 taxpayer shall be valued at its original cost, adjusted by
147 subsequent capital additions or improvements thereto
148 and partial disposition thereof, by reason of sale,
149 exchange, abandonment, etc.: *Provided*, That where
150 records of original cost are unavailable or cannot be
151 obtained without unreasonable expense, property shall
152 be valued at original cost as determined under regula-
153 tions of the tax commissioner. Property rented by the
154 taxpayer from others shall be valued at eight times the
155 annual rental rate. The term "net annual rental rate"
156 is the annual rental paid, directly or indirectly, by the
157 taxpayer, or for its benefit, in money or other consid-
158 eration for the use of property and includes:

159 (A) Any amount payable for the use of real or tangible
160 personal property, or any part thereof, whether desig-
161 nated as a fixed sum of money or as a percentage of
162 sales, profits or otherwise.

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

172 (3) *Movable property.* — The value of movable tang-
173 ible personal property used both within and without this
174 state shall be included in the numerator to the extent

175 of its utilization in this state. The extent of such
176 utilization shall be determined by multiplying the
177 original cost of such property by a fraction, the
178 numerator of which is the number of days of physical
179 location of the property in this state during the taxable
180 period, and the denominator of which is the number of
181 days of physical location of the property everywhere
182 during the taxable year. The number of days of physical
183 location of the property may be determined on a
184 statistical basis or by such other reasonable method
185 acceptable to the tax commissioner.

186 (4) *Leasehold improvements.* — Leasehold improve-
187 ments shall, for purposes of the property factor, be
188 treated as property owned by the taxpayer regardless
189 of whether the taxpayer is entitled to remove the
190 improvements or the improvements revert to the lessor
191 upon expiration of the lease. Leasehold improvements
192 shall be included in the property factor at their original
193 cost.

194 (5) *Average value of property.* — The average value of
195 property shall be determined by averaging the values
196 at the beginning and ending of the taxable year:
197 *Provided,* That the tax commissioner may require the
198 averaging of monthly values during the taxable year if
199 substantial fluctuations in the values of the property
200 exist during the taxable year, or where property is
201 acquired after the beginning of the taxable year, or is
202 disposed of, or whose rental contract ceases, before the
203 end of the taxable year.

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

214 (7) *Compensation.* — The term "compensation" means

215 wages, salaries, commissions and any other form of
216 remuneration paid to employees for personal services.
217 Payments made to an independent contractor or to any
218 other person not properly classifiable as an employee
219 shall be excluded. Only amounts paid directly to
220 employees are included in the payroll factor. Amounts
221 considered as paid directly to employees include the
222 value of board, rent, housing, lodging and other benefits
223 or services furnished to employees by the taxpayer in
224 return for personal services, provided such amounts
225 constitute income to the recipient for federal income tax
226 purposes.

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

228 (A) Any officer of a corporation; or

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

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

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

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

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

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

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

251 The term “base of operations” is the place of more or

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

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

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

283 (i) The property is received in this state by the
284 purchaser, other than the United States government,
285 regardless of the f.o.b. point or other conditions of the
286 sale. In the case of delivery by common carrier or other
287 means of transportation, the place at which such
288 property is ultimately received after all transportation
289 has been completed shall be considered as the place at
290 which such property is received by the purchaser.
291 Direct delivery in this state, other than for purposes of
292 transportation, to a person or firm designated by the

293 purchaser, constitutes delivery to the purchaser in this
294 state, and direct delivery outside this state to a person
295 or firm designated by the purchaser does not constitute
296 delivery to the purchaser in this state, regardless of
297 where title passes or other conditions of sale; or

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

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

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

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

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

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

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

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

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

331 (4) The sale, licensing or other use of intangible
332 personal property.

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

335 (g) *Cost of performance.* — The term “cost of perfor-
336 mance” means direct costs determined in a manner
337 consistent with generally accepted accounting principles
338 and in accordance with accepted conditions or practices
339 in the trade or business of the taxpayer.

340 (h) *Other methods of allocation and apportionment.*

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

348 (A) Separate accounting;

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

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

353 (D) The employment of any other method to effectuate
354 an equitable allocation or apportionment of the taxpay-
355 er’s income. Such petition shall be filed no later than the
356 due date of the annual return for the taxable year for
357 which the alternative method is requested, determined
358 without regard to any extension of time for filing such
359 return, and the petition shall include a statement of the
360 petitioner’s objections and of such alternative method of
361 allocation or apportionment as it believes to be proper
362 under the circumstances with such detail and proof as
363 the tax commissioner may require.

364 (2) *Alternative method for public utilities.* — If the
365 taxpayer is a public utility and if the allocation and
366 apportionment provisions of subsections (d) and (e) do
367 not fairly represent the taxpayer’s business activities in
368 this state, the taxpayer may petition for, or the tax

369 commissioner may require, as an alternative to the other
 370 methods provided for in paragraph (1) of this subsection,
 371 the allocation and apportionment of the taxpayer's net
 372 income in accordance with any system of accounts
 373 prescribed by the public service commission of this state
 374 pursuant to the provisions of section eight, article two,
 375 chapter twenty-four of this code, provided the allocation
 376 and apportionment provisions of such system of accounts
 377 fairly represent the extent of the taxpayer's business
 378 activities in this state for the purposes of the tax
 379 imposed by this article.

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

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

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

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

1 *Credit for primary taxes imposed under article*
 2 *thirteen-a, chapter eleven of this code.* — A credit shall
 3 be allowed against the primary tax imposed by this
 4 article equal to the amount of the liability of the
 5 taxpayer for the taxable year for the severance tax
 6 imposed under article thirteen-a, chapter eleven of this
 7 code: *Provided,* That the amount of such severance tax
 8 credit shall not exceed fifty percent of the primary tax
 9 liability of the taxpayer under this article, which is
 10 attributable to the West Virginia taxable income
 11 derived by the taxpayer for the taxable year from the
 12 activities with respect to which said tax under article
 13 thirteen-a was imposed, and shall not in any event
 14 exceed fifty percent of the primary tax liability of the
 15 taxpayer under this article for such taxable year:

16 *Provided, however,* That the entire amount of the
17 severance tax liability of the taxpayer, which was taken
18 as a deduction in determining its federal taxable income
19 for the taxable year, shall be an adjustment increasing
20 federal taxable income under section six of this article:
21 *Provided further,* That the taxpayer may at its option
22 elect, in lieu of claiming the credit allowable by this
23 subsection, to not increase its federal taxable income
24 under section six of this article and thereby take as a
25 full deduction under this article for the taxable year the
26 amount of its severance tax liability for the taxable year,
27 which was taken as a deduction on its federal return for
28 such taxable year.

29 For purposes of this section, the tax imposed under
30 article thirteen-a, chapter eleven of this code shall be the
31 amount of the liability of the taxpayer for such tax
32 under said article thirteen-a computed without reduc-
33 tion for the tax credit for coal loading facilities or for
34 industrial expansion or revitalization allowed for such
35 year.

§11-24-42. Effective date.

1 The provisions of this article as amended or added by
2 this act shall take effect on the first day of July, one
3 thousand nine hundred eighty-eight, and apply to all
4 taxable years ending after that date: *Provided,* That if
5 an effective date is expressly provided in such provision,
6 that specific effective date shall control in lieu of this
7 general effective date provision.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Bruce O. Williams

Chairman Senate Committee

Bernard V. Kelly

Chairman House Committee

Originating in the House.

Takes effect from passage.

John C. Sticks

Clerk of the Senate

Donald L. Kopp

Clerk of the House of Delegates

Dan Tomlinson

President of the Senate

[Signature]

Speaker of the House of Delegates

The within *approved* this the *29th*
March
day of _____, 1988.

Andrew J. [Signature]

Governor

PRESENTED TO THE

GOVERNOR

Date 3/23/88

Time 3:53 p.m.

RECEIVED

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SECRETARY OF DEFENSE