WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1989

ENROLLED

HOUSE BILL No. 2712...

(By Mr. Speaker, Mr. Chambers, and Del. Rush)

Passed April 4, 1989

In Effect From Passage
AN ACT to amend and reenact sections three and three-a, article twenty-three, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the business franchise tax; updating the meaning of certain terms; expanding and clarifying certain definitions; and providing the tax commissioner authority to determine additional items in capital so that income is properly reflected.

Be it enacted by the Legislature of West Virginia:

That sections three and three-a, article twenty-three, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 23. BUSINESS FRANCHISE TAX.

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

(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, prepared following generally
accepted accounting principles and 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, prepared
following generally accepted accounting principles and
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 taxable 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, prepared following accepted accounting principles and 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 adjustments thereto as the tax commissioner deems necessary to properly reflect capital and 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 average of the monthly beginning and ending account balances during 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:

(I) Obligations and 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;

(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 monthly beginning and ending account balances of the total assets of the taxpayer as shown on Schedule L of 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 corporations, 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 term "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 or a sole proprietorship or an unincorpo-
rated organization which under Section 761 of the
Internal Revenue Code of 1986, as amended, 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 corpo-
ration 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 Common-
wealth of Puerto Rico, or any territory or possession of
the United States, and any foreign country or political
subdivision thereof.

(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
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(24) Taxable in another state.—The term "taxable in another state" for purposes of apportionment under this article, means a taxpayer who:

(A) 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 corporate stock tax; or

(B) Would be subject to a net income tax if such other state imposed such a tax.

(25) Taxpayer.—The term "taxpayer" means any person (as defined in this section) subject to the tax imposed by this article.

(26) This code.—The term "this code" means the code of West Virginia, one thousand nine hundred thirty-one, as amended.

(27) This state.—The term "this state" means the state of West Virginia.

(28) Treasury stock.—The term "treasury stock" means shares of a corporation which have been issued and have been subsequently acquired by and belong to such corporation, and have not been canceled or restored to the status of authorized but unissued shares. Treasury stock is deemed to be issued shares, but not outstanding shares.

§11-23-3a. Meaning of terms; general rule.

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-nine, 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-nine, shall be given effect.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Frederick L. Parker
Chairman Senate Committee

Bernard V. Kelly
Chairman House Committee

Originating in the House.

Takes effect from passage.

Saul L. Mirkin
Clerk of the Senate

Donald L. Yeager
Clerk of the House of Delegates

Joe A. Timbee
President of the Senate

Bob Ehrler
Speaker of the House of Delegates

The within is approved this the 24th day of April, 1989.

Johnston Carpenter
Governor