

NO. 2712

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SECRETARY OF STATE

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1989



# ENROLLED

HOUSE BILL No. *2712*

(By Mr. *Speake, Mr. Chambers, and Del R. Barks*  
[By Request of the Executive])



Passed *April 4,* 1989

In Effect *From* Passage

**ENROLLED**  
**H. B. 2712**

(By MR. SPEAKER, MR. CHAMBERS, AND DELEGATE R. BURK)  
[By Request of the Executive]

[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.**

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

7       (b) *Terms defined.*

8       (1) *Business income.*—The term “business income”

9 means income arising from transactions and activity in  
10 the regular course of the taxpayer's trade or business  
11 and includes income from tangible and intangible  
12 property if the acquisition, management and disposition  
13 of the property constitute integral parts of the taxpay-  
14 er's regular trade or business operations.

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

17 (A) *Corporations*.—In the case of a corporation,  
18 except an electing small business corporation, the  
19 average of the beginning and ending year balances of  
20 the sum of the following entries from Schedule L of  
21 Federal Form 1120, prepared following generally  
22 accepted accounting principles and as filed by the  
23 taxpayer with the Internal Revenue Service for the  
24 taxable year:

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

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

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

30 (iv) Less the cost of treasury stock.

31 (B) *S Corporations*.—In the case of an electing small  
32 business corporation, the average of the beginning and  
33 ending year balances of the sum of the following entries  
34 from Schedule L of Federal Form 1120S, prepared  
35 following generally accepted accounting principles and  
36 as filed by the taxpayer with the Internal Revenue  
37 Service for the taxable year:

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

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

41 (iii) Retained earnings, appropriated and  
42 unappropriated;

43 (iv) The amount of shareholders' undistributed tax-  
44 able income;

45 (v) The amount of the accumulated adjustments  
46 account;

47 (vi) The amount of the other adjustments account;

48 (vii) Less the cost of treasury stock.

49 (C) *Partnerships*.—In the case of a partnership, the  
50 average of the beginning and ending year balances of  
51 the value of partner's capital accounts from Schedule L  
52 of Federal Form 1065, prepared following accepted  
53 accounting principles and as filed by the taxpayer with  
54 the Internal Revenue Service for the taxable year.

55 (D) *Additional items in capital*.—The term "capital"  
56 for purposes of this article shall include such adjust-  
57 ments thereto as the tax commissioner deems necessary  
58 to properly reflect capital and such additional items  
59 from the accounts of the taxpayer as the tax commis-  
60 sioner may by regulation prescribe, which fairly  
61 represent the net equity of the taxpayer as defined in  
62 accordance with generally accepted accounting  
63 principles.

64 (E) *Allowance for certain government obligations and*  
65 *obligations secured by residential property*.—As to both  
66 corporations and partnerships, capital shall be multi-  
67 plied by a fraction equal to one minus a fraction:

68 (i) The numerator of which is the average of the  
69 monthly beginning and ending account balances during  
70 the taxable year (account balances to be determined at  
71 cost in the same manner that such obligations, invest-  
72 ments and loans are reported on Schedule L of the  
73 Federal Form 1120 or Federal Form 1065) of the  
74 following:

75 (I) Obligations and securities of the United States, or  
76 of any agency, authority, commission or instrumentality  
77 of the United States and any other corporation or entity  
78 created under the authority of the United States  
79 Congress for the purpose of implementing or furthering  
80 an objective of national policy;

81 (II) Obligations of this state and any political subdi-  
82 vision of this state;

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

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

90 (ii) The denominator of which is the average of the  
91 monthly beginning and ending account balances of the  
92 total assets of the taxpayer as shown on Schedule L of  
93 Federal Form 1120, as filed by the taxpayer with the  
94 Internal Revenue Service or, in the case of partnerships,  
95 Schedule L of Federal Form 1065, as filed by the  
96 taxpayer with the Internal Revenue Service.

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

101 (4) *Commissioner or tax commissioner*.—The terms  
102 “commissioner” or “tax commissioner” are used inter-  
103 changeably herein and mean the tax commissioner of  
104 the state of West Virginia, or his delegate.

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

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

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

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

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

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

149 (10) *Federal Form 1120*.—The term “Federal Form  
150 1120” means the annual federal income tax return of  
151 any corporation made pursuant to the United States  
152 Internal Revenue Code of 1986, as amended, or in  
153 successor provisions of the laws of the United States, in  
154 respect to the taxable income of a corporation, and filed  
155 with the federal Internal Revenue Service. In the case  
156 of a corporation that elects to file a federal income tax  
157 return as part of an affiliated group, but files as a  
158 separate corporation under this article, then as to such  
159 corporation Federal Form 1120 means its pro forma  
160 Federal Form 1120.

161 (11) *Federal Form 1065*.—The term “Federal Form  
162 1065” means the annual federal income tax return of a  
163 partnership made pursuant to Section 6031 of the  
164 United States Internal Revenue Code of 1986, as  
165 amended or renumbered, or in successor provisions of  
166 the laws of the United States, in respect to the taxable  
167 income of a partnership, and filed with the federal  
168 Internal Revenue Service.

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

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

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

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

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

199 (17) *Partnership and partner*.—The term “partner-

200 ship” includes a syndicate, group, pool, joint venture or  
201 other unincorporated organization through or by means  
202 of which any business, financial operation or venture is  
203 carried on, and which is not a trust or estate, a  
204 corporation or a sole proprietorship or an unincorpo-  
205 rated organization which under Section 761 of the  
206 Internal Revenue Code of 1986, as amended, and is not  
207 treated as a partnership for the taxable year for federal  
208 income tax purposes. The term “partner” includes a  
209 member in such a syndicate, group, pool, joint venture  
210 or other unincorporated organization which is a  
211 partnership.

212 (18) *Person*.—The term “person” includes any corpo-  
213 ration or partnership.

214 (19) *Pro forma return*.—The term “pro forma return”  
215 when used in this article means the return which the  
216 taxpayer would have filed with the Internal Revenue  
217 Service had it not elected to file federally as part of a  
218 consolidated group.

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

222 (21) *State*.—The term “state” means a state of the  
223 United States, the District of Columbia, the Common-  
224 wealth of Puerto Rico, or any territory or possession of  
225 the United States, and any foreign country or political  
226 subdivision thereof.

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

234 (23) *Taxable year*.—The term “taxable year” means  
235 the calendar year, or the fiscal year ending during such  
236 calendar year, upon the basis of which tax liability is  
237 computed under this article. “Taxable year” means, in  
238 case of a return made for a fractional part of a year



239 (short taxable year) under the provisions of this article,  
240 or under regulations promulgated by the tax commis-  
241 sioner, the period for which such return is made.

242 (24) *Taxable in another state.*—The term “taxable in  
243 another state” for purposes of apportionment under this  
244 article, means a taxpayer who:

245 (A) Is subject to a net income tax, a franchise tax  
246 measured by net income, a franchise tax for the  
247 privilege of doing business or a corporate stock tax; or

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

250 (25) *Taxpayer.*—The term “taxpayer” means any  
251 person (as defined in this section) subject to the tax  
252 imposed by this article.

253 (26) *This code.*—The term “this code” means the code  
254 of West Virginia, one thousand nine hundred thirty-one,  
255 as amended.

256 (27) *This state.*—The term “this state” means the state  
257 of West Virginia.

258 (28) *Treasury stock.*—The term “treasury stock”  
259 means shares of a corporation which have been issued  
260 and have been subsequently acquired by and belong to  
261 such corporation, and have not been canceled or restored  
262 to the status of authorized but unissued shares. Treasury  
263 stock is deemed to be issued shares, but not outstanding  
264 shares.

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

1 Any term used in this article shall have the meaning  
2 as when used in a comparable context in the laws of the  
3 United States relating to federal income taxes, unless a  
4 different meaning is clearly required by the context or  
5 by definition of this article. Any reference in this article  
6 to the laws of the United States, or to the Internal  
7 Revenue Code, or to the federal income tax law shall  
8 mean the provisions of the laws of the United States as  
9 related to the determination of income for federal  
10 income tax purposes. All amendments made to the laws  
11 of the United States prior to the first day of January,

12 one thousand nine hundred eighty-nine, shall be given  
13 effect in determining the taxes imposed by this article  
14 for the tax period beginning the first day of January,  
15 one thousand nine hundred eighty-eight, and thereafter,  
16 but no amendment to laws of the United States made  
17 on or after the first day of January, one thousand nine  
18 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.

*Joseph C. Mathis*  
Clerk of the Senate

*Donald L. Hays*  
Clerk of the House of Delegates

*Samuel J. Finney*  
President of the Senate

*Robert Chiles*  
Speaker of the House of Delegates

The within *is approved* this the *24<sup>th</sup>*  
day of *April*, 1989

*Yoston Caperton*  
Governor

PRESENTED TO THE

GOVERNOR

Date 4/11/89

Time 11:48