WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990

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ENROLLED

HOUSE BILL No. 4794

(By Delegates Harley & Kris)

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Passed March 8, 1990

In Effect Passage
ENROLLED

H. B. 4794

(By Delegates Farley and Kiss)

[Passed March 8, 1990; in effect from passage.]

AN ACT to amend sections three-a and five, article twenty-three, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections three, thirteen and thirteen-a, article twenty-four of said chapter eleven, all relating generally to business franchise and corporation net income taxes; updating meaning of certain terms used in such tax laws to bring them into conformity with their meanings for federal income tax purposes for taxable years beginning after the thirty-first day of December, one thousand nine hundred eighty-eight; making the business franchise tax rules for allocation of other sales conform with the corporation net income tax rules for apportionment of such other sales; authorizing use of combined business franchise tax and corporation net income tax returns and combined forms for declaring estimated tax and making installment payments of estimated tax; providing rule for when amount remitted with combined return is less than the taxes show due on such combined return; requiring the method of filing for business franchise tax to be the same as the method of filing for corporation net income tax and specifying effective date.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 23. BUSINESS FRANCHISE TAX.

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

1 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 ninety, 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-nine, and thereafter, but no amendment to laws of the United States made on or after the first day of January, one thousand nine hundred ninety, shall be given effect.

§11-23-5. Apportionment of tax base.

1 (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, reduced by the number of factors, if any, having no denominator, with the sales factor counting as two factors.

12 (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 improve-
ments shall, for the purposes of the property factor, be
treated as property owned by the lessee regardless of
whether the lessee is entitled to remove the improve-
ments 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 communications 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 allow-
ances. The denominator of the fraction shall be the total
gross receipts derived by the taxpayer from transactions
and activity in the regular course of its trade or business
during the taxable year (business income), and reflected
in its gross income reported and as appearing on the
taxpayer's Federal Form 1120 or 1065, and consisting
of those certain pertinent portions of the (gross income)
elements set forth: Provided, That if either the numer-
ator 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) Income producing activity.—The term “income-
producing activity” applies to each separate item of
income and means the transactions and activity directly
engaged in by the taxpayer in the regular course of its
trade or business for the ultimate purpose of obtaining
gain or profit. Such activity does not include transac-
tions and activities performed on behalf of the taxpayer,
such as those conducted on its behalf by an independent
contractor. “Income-producing activity” includes, but is
not limited to, the following:

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

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

(3) The sale, rental, leasing, licensing or other use of
tangible personal property; or
(4) The sale, licensing or other use of intangible personal property. The mere holding of intangible personal property is not, in itself, an income-producing activity.

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

(p) 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.

(q) Effective date.—The amendments to this section made by this act shall apply to all taxable years ending after the effective date of this act.

ARTICLE 24. CORPORATION NET INCOME TAX.

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

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

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

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

§11-24-13. Returns; time for filing.

(a) On or before the fifteenth day of the third month following the close of a taxable year, an income tax return under this article shall be made and filed by or for every corporation subject to the tax imposed by this article.

(b) The tax commissioner may combine into one form the annual return due under this article and the annual return due under article twenty-three of this chapter. When a combined business franchise tax and corporation net income tax annual return filed by a taxpayer, the amount of tax remitted shall be applied first against any business franchise tax that may be due for the taxable year under article twenty-three of this chapter and then against any corporation net income tax that may be due for the taxable year. The tax commissioner may also combine the forms for filing declarations of estimated tax and the forms for making installment payments of estimated tax.

(c) Effective date.—The amendments to this section made by this act shall apply to all taxable years ending after the effective date of this act.


(a) Privilege to file.—An “affiliated group” of corporations (as defined for purposes of filing a consolidated federal income tax return), shall subject to the provisions of this section and in accordance with any regulations prescribed by the tax commissioner, have the privilege of filing a consolidated return with respect to the tax imposed by this article for the taxable year in lieu of separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time during the taxable year have been members of the affiliated group and which are included
in such return consent to the filing of such return. The filing of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group.

(b) Election binding.—If an affiliated group of corporations elects to file a consolidated return under this article for any taxable year ending after June thirtieth, one thousand nine hundred eighty-seven, such elections once made, shall not be revoked for any subsequent taxable year without the written approval of the tax commissioner consenting to the revocation.

(c) Method of filing under this article deemed controlling for filing under other business taxes articles.—The taxpayer shall file on the same basis under article twenty-three of this chapter as such taxpayer has filed pursuant to this article. Such filing method may not be changed in respect of this article or article twenty-three of this chapter without the written consent of the tax commissioner.

(d) Regulations.—The tax commissioner shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected and adjusted, in such manner as the tax commissioner deems necessary to clearly reflect the income tax liability and the income factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability.

(e) Computation and payment of tax.—In any case in which a consolidated return is filed, or is required to be filed, the tax due under this article from the affiliated group, shall be determined, computed, assessed, collected and adjusted in accordance with regulations prescribed by the tax commissioner, in effect on the last day prescribed by law for the filing of such return, and
such affiliated group shall be treated as the taxpayer.

(f) Consolidated return required.—If any affiliated group of corporations has not elected to file a consolidated return, the tax commissioner may require such corporations to make a consolidated return in order to clearly reflect the taxable income of such corporations.

(g) Effective date.—The amendments to this section made by this act shall apply to all taxable years ending after the effective date of this act.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Signature]
Chairman Senate Committee

[Signature]
Chairman House Committee

Originating in the House.

Takes effect from passage.

[Signature]
Clerk of the Senate

[Signature]
Clerk of the House of Delegates

[Signature]
President of the Senate

[Signature]
Speaker of the House of Delegates

The within is approved this the 26th day of March, 1990.

[Signature]
Governor