

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990



ENROLLED

Committee Substitute for

SENATE BILL NO. 333

(By Senator

Sundette, Mr. President, et al)



PASSED

March 10,

1990

In Effect

from

Passage

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 333

(BY SENATORS BURDETTE, MR. PRESIDENT, AND HARMAN,
BY REQUEST OF THE EXECUTIVE)

[Passed March 10, 1990; in effect from passage.]

AN ACT to amend article thirteen-c, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section fourteen, relating generally to the business investment and jobs expansion tax credits; narrowing, restricting and otherwise limiting the availability and benefits of such credits to taxpayers; making legislative findings; providing rule of construction; prohibiting application of credit against severance taxes, subject to transition rules; requiring persons who will claim credit under transition rules to timely file notice of intent with tax commissioner; limiting credit available to project successors under certain circumstances; defining or redefining certain terms; requiring timely filing of application for credit; providing for forfeiture of credit under specified circumstances; providing other administration provisions; and specifying internal effective dates.

Be it enacted by the Legislature of West Virginia:

That article thirteen-c, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section fourteen, to read as follows:

ARTICLE 13C. BUSINESS INVESTMENT AND JOBS EXPANSION CREDIT.

§11-13C-14. Restrictions and limitations on credits allowed by this article.

1 (a) *Findings*.—The Legislature finds that the tax
2 credits allowed under provisions of this article hereto-
3 fore enacted have not effectively and efficiently
4 increased employment through investment in certain
5 industry segments; that while there has been a signif-
6 icant net decrease in employment in the coal industry
7 in recent years the amount of credit being claimed by
8 producers of coal has significantly increased; that the
9 increasing cost of the credits allowed by this article to
10 coal producers is eroding the state's ability to reason-
11 ably fund essential state services such as public
12 education, public safety and basic human services; and
13 that this erosion will continue unless remedial legisla-
14 tion is enacted.

15 (b) *Construction*.—The rule of statutory construction
16 codified in subsection (b), section twelve of this article,
17 is hereby replaced with a rule of reasonable construc-
18 tion in which the burden of proof is on the taxpayer
19 to establish by clear and convincing evidence that the
20 taxpayer is entitled to the benefits allowed by this
21 article.

22 (c) *Credit not to be applied against severance taxes*.

23 (1) Notwithstanding any provision in this chapter to
24 the contrary, no credit shall be allowed against the
25 taxes imposed by article thirteen-a of this chapter for
26 taxable years ending on or after the date of passage of
27 this section unless one of the transition rules in
28 paragraph (2) of this subsection (c) applies.

29 (2) *Transition rules*.—The general rule stated in
30 paragraph (1) of this subsection (c) shall not apply:

31 (A) To qualified investment property placed in
32 service or use prior to the date of passage of this
33 section.

34 (B) To property purchased or leased for business
35 expansion that is placed in service or use on or after
36 the date of passage of this section, if at least one of the
37 following clauses applies to such property:

38 (i) The new or expanded business facility was
39 constructed, reconstructed or erected, pursuant to a
40 written construction contract executed prior to the
41 date of passage of this section, as limited to the
42 provisions of such contract as of such date then
43 binding on the taxpayer, but only to the extent such
44 new or expanded business facility is placed in service
45 or use prior to the first day of January, one thousand
46 nine hundred ninety-two.

47 (ii) The new or expanded business facility which is
48 part of a project described in paragraph (1), subsection
49 (a), section four-b of this article, was constructed,
50 reconstructed or erected, pursuant to a written con-
51 struction contract executed prior to the date of passage
52 of this section, as limited to the provisions of such
53 contract as of such date then binding on the taxpayer:
54 *Provided*, That only that portion of the contract price
55 attributable to that percentage of the construction
56 contract completed prior to the first day of January,
57 one thousand nine hundred ninety-two (determined
58 under principles set forth in Section 460(b) of the
59 Internal Revenue Code of 1986, as in effect before the
60 date of passage of this section) which is placed in
61 service or use prior to the first day of January, one
62 thousand nine hundred ninety-four may be treated as
63 property purchased for business expansion under
64 section six of this article.

65 (iii) The new or expanded business facility was
66 purchased or leased pursuant to a written contract
67 executed prior to the date of passage of this section, as
68 limited to the provisions then binding on the taxpayer
69 as of such date, but only to the extent such new or
70 expanded business facility is placed in service or use

71 prior to the first day of January, one thousand nine
72 hundred ninety-two.

73 (iv) The machinery or equipment or other tangible
74 personal property purchased or leased for business
75 expansion at a new or expanded business facility was
76 purchased or leased by the taxpayer pursuant to a
77 written contract to purchase or lease identifiable
78 tangible personal property executed before the date of
79 passage of this section, as limited to the provisions of
80 such written contract then binding on the taxpayer,
81 but only to the extent the tangible personal property
82 purchased or leased under such contract is placed in
83 service or use before the first day of January, one
84 thousand nine hundred ninety-two: *Provided, That*
85 when such tangible personal property is purchased or
86 leased as aforesaid as part of a project described in
87 clause (ii) of this subparagraph (B), such tangible
88 personal property must be placed in service or use
89 prior to the first day of January, one thousand nine
90 hundred ninety-four, to be treated as property pur-
91 chased or leased for business expansion under section
92 six of this article.

93 (C) To property purchased or leased for business
94 expansion that is placed in service or use on or after
95 the date of passage of this section as part of a project
96 otherwise eligible for the credit under subsection (a),
97 section four-b of this article, if all of the requirements
98 of clauses (i), (ii), (iii) and (iv) of this subparagraph are
99 satisfied:

100 (i) The taxpayer and other participants in the
101 project, if any, have made investments in property
102 purchased or leased for business expansion as defined
103 in subsection (b)(19), section three of this article prior
104 to the date of passage of this section in excess of ten
105 million dollars.

106 (ii) The investments described in clause (i) were
107 made pursuant to a plan for an integrated project to
108 be developed over a period of one or more years and
109 with the expectation of making additional investments
110 in the integrated project.

111 (iii) The portion of the project constructed, pur-
 112 chased or leased after the date of passage of this
 113 section meets the definition of new business facility in
 114 subsection (e)(3) of this section.

115 (iv) The new jobs created by the project after the
 116 date of passage of this section are filled by new
 117 employees as defined in subsection (e)(4) of this
 118 section.

119 (3) *Notice of claim under transition rules.*

120 (A) *Notice required.*—Any person intending to assert
 121 a claim for credit based in whole or in part on
 122 application of the transition rules in subparagraph (B)
 123 or (C), paragraph (2) of this subsection (c), shall file
 124 written notice of such intention with the tax commis-
 125 sioner on or before the first day of July, one thousand
 126 nine hundred ninety. In the case of a multiparticipant
 127 project, this notice may be filed by the managing
 128 project participant on behalf of all participants in such
 129 project. Such notice shall be in a form prescribed by
 130 the tax commissioner and all information required by
 131 such form shall be provided.

132 (B) *Failure to file notice.*—If any person fails to
 133 timely file the notice required by this paragraph (3),
 134 such person shall be precluded from claiming credit
 135 under this article for such investment.

136 (d) *Treatment of successor project participants.*—
 137 Whenever a participant in a project certified under
 138 paragraph (2) or (3), subsection (a), section four-b of
 139 this article, is replaced by another participant in that
 140 project on or after the date of passage of this section,
 141 the tax credits available to such successor participant
 142 as a result of the transfer shall not exceed the amount
 143 of credits that would have been available to the
 144 predecessor participant had the transfer to the succes-
 145 sor participant not occurred: *Provided*, That if the
 146 project plan provides for annual recalculation of the
 147 division of the credit allowable for each year among
 148 the participants in the project in order to maximize
 149 the collective use of such credit by the project partic-
 150 ipants, or for any other purpose, then the credit

151 available to the successor participant as a result of the
152 transfer shall be limited each year to the amount of
153 credit actually used by the predecessor participant to
154 offset taxes for the taxable year immediately preced-
155 ing the taxable year in which such participant's
156 obligations or interest in the project, as described in
157 the project plan certified by the tax commissioner,
158 passed to the successor participant in the project.

159 (e) *Certain terms redefined.*—Notwithstanding the
160 provisions of subsection (b), section three of this
161 article, or any other provision of this article, to the
162 contrary, the following terms have the meanings
163 assigned to them by this section.

164 (1) *Construction contract.*—The term “construction
165 contract” means any contract for the building, con-
166 struction, reconstruction or rehabilitation of, or the
167 installation of any integral components to, or improve-
168 ments of, a new or existing business facility.

169 (2) *Excluded property.*—The term “property pur-
170 chased or leased for business expansion” shall not
171 include:

172 (A) Property owned or leased by the taxpayer and
173 for which the taxpayer was previously allowed tax
174 credit for industrial expansion, tax credit for industrial
175 revitalization, tax credit for coal loading facilities or
176 the tax credits allowed by this article.

177 (B) Property owned or leased by the taxpayer and
178 for which the seller, lessor, or other transferor, was
179 previously allowed tax credit for industrial expansion,
180 tax credit for industrial revitalization, tax credit for
181 coal loading facilities, or the tax credits allowed by this
182 article.

183 (C) Repair costs, including materials used in the
184 repair, unless for federal income tax purposes the cost
185 of the repair must be capitalized and not expensed.

186 (D) Airplanes.

187 (E) Property which is primarily used outside this
188 state, with use being determined based upon the

189 amount of time the property is actually used both
190 within and without this state.

191 (F) Property which is acquired incident to the
192 purchase of the stock or assets of the seller, unless for
193 good cause shown, the tax commissioner consents to
194 waiving this requirement.

195 (G) Natural resources in place purchased or leased
196 prior to the first day of March, one thousand nine
197 hundred eighty-five, or purchased or leased after such
198 date pursuant to an option to purchase or lease such
199 natural resources in place acquired prior to such date
200 but exercised in whole or in part on or after the date
201 of passage of this section; and natural resources in
202 place purchased or leased on or after the date of
203 passage of this section unless pursuant to a written
204 contract to purchase or lease executed prior to the
205 passage of this section.

206 (H) Property purchased or leased on or after the
207 date of passage of this section, unless pursuant to a
208 written contract to purchase or lease executed prior to
209 the passage of this section, the cost or consideration for
210 which cannot be quantified with any reasonable
211 degree of accuracy at the time such property is placed
212 in service or use: *Provided*, That when the contract of
213 purchase or lease specifies a minimum purchase price
214 or minimum annual rent the amount thereof shall be
215 used to determine the qualified investment in such
216 property under section six of this article if the prop-
217 erty otherwise qualifies as property purchased or
218 leased for business expansion.

219 (3) *New business facility*.—The term “new business
220 facility” means a business facility which satisfies all
221 the requirements of subparagraphs (A), (B), (C) and
222 (D) of this paragraph.

223 (A) The facility is employed by the taxpayer in the
224 conduct of a business the net income of which is or
225 would be taxable under article twenty-one or twenty-
226 four of this chapter. Such facility shall not be consid-
227 ered a new business facility in the hands of the
228 taxpayer if the taxpayer’s only activity with respect to

229 such facility is to lease it to another person or persons.

230 (B) Such facility is purchased by, or leased to, the
231 taxpayer after the first day of March, one thousand
232 nine hundred eighty-five.

233 (C) The facility was not purchased or leased by the
234 taxpayer from a related person or a project partici-
235 pant, or related person of a project participant, in any
236 certified project in which the taxpayer is a participant.
237 The tax commissioner may waive this requirement if
238 the facility was acquired from a related party for its
239 fair market value and the acquisition was not tax
240 motivated.

241 (D) Such facility was not in service or use during the
242 ninety days immediately prior to transfer of the title
243 to such facility, or prior to the commencement of the
244 term of the lease of such facility: *Provided*, That this
245 ninety day period may be waived by the tax commis-
246 sioner if the commissioner determines that persons
247 employed at the facility may be treated as “new
248 employees” as that term is defined under paragraph
249 (4) of this subsection.

250 (4) *New Employee.*

251 (A) The term “new employee” means a person
252 residing and domiciled in this state, hired by the
253 taxpayer to fill a position or a job in this state which
254 previously did not exist in taxpayer’s business enter-
255 prise in this state prior to the date on which the
256 taxpayer’s qualified investment is placed in service or
257 use in this state. In no case shall the number of new
258 employees directly attributable to such investment for
259 purposes of this credit exceed the total net increase in
260 the taxpayer’s employment in this state: *Provided*,
261 That with respect to taxpayers who file application for
262 certification after the date of passage of this section,
263 the tax commissioner may require that the net
264 increase in the taxpayer’s employment in this state be
265 determined and certified for the taxpayer’s controlled
266 group; and in the case of a project involving more than
267 one person for the controlled groups of all participants,
268 taken as a whole: *Provided, however*, That persons

269 filling jobs saved as a direct result of taxpayer's
 270 qualified investment in property purchased or leased
 271 for business expansion on or after the effective date of
 272 this section may be treated as new employees filling
 273 new jobs if the taxpayer certifies the material facts to
 274 the tax commissioner and the tax commissioner
 275 expressly finds that:

276 (i) But for the new employer purchasing the assets
 277 of a business in bankruptcy under chapter seven or
 278 eleven of the United States Bankruptcy Code and such
 279 new employer making qualified investment in prop-
 280 erty purchased or leased for business expansion, the
 281 assets would have been sold by the United States
 282 bankruptcy court in a liquidation sale and the jobs so
 283 saved would have been lost; or

284 (ii) But for taxpayer's qualified investment in
 285 property purchased or leased for business expansion in
 286 this state, taxpayer would have closed its business
 287 facility in this state and the employees of the taxpayer
 288 located at such facility would have lost their jobs:
 289 *Provided*, That the tax commissioner shall not make
 290 this certification unless the tax commissioner finds
 291 that the taxpayer is insolvent as defined in 11 U.S.C.
 292 §101 (31) or that the taxpayer's business facility was
 293 destroyed in whole or in significant part by fire, flood
 294 or other act of God.

295 (B) A person shall be deemed to be a "new
 296 employee" only if such person's duties in connection
 297 with the operation of the business facility are on:

298 (i) A regular, full-time and permanent basis.

299 (I) "Full-time employment" means employment for
 300 at least one hundred forty hours per month at a wage
 301 not less than the prevailing state or federal minimum
 302 wage, depending on which minimum wage provision is
 303 applicable to the business.

304 (II) "Permanent employment" does not include
 305 employment that is temporary or seasonal and there-
 306 fore the wages, salaries and other compensation paid
 307 to such temporary or seasonal employees will not be

308 considered for purposes of sections five and seven of
309 this article; or

310 (ii) A regular, part-time and permanent basis:
311 *Provided*, That such person is customarily performing
312 such duties at least twenty hours per week for at least
313 six months during the taxable year.

314 (5) *Leased property*.—The term “leased property”
315 does not include property which the taxpayer is
316 required to show on its books and records as an asset
317 under generally accepted principles of financial
318 accounting. If the taxpayer is prohibited from expens-
319 ing the lease payments for federal income tax pur-
320 poses, the property shall be treated as purchased
321 property under this section if the property was
322 purchased on or after the date of passage of this
323 section.

324 (6) *Small business*.—The term “small business”
325 means a small business which has an annual payroll of
326 one million seven hundred thousand dollars or less,
327 and annual gross receipts of not more than five million
328 five hundred thousand dollars: *Provided*, That on or
329 before the fifteenth of January, one thousand nine
330 hundred ninety-one, and on or before each fifteenth
331 day of January thereafter, the tax commissioner shall
332 prescribe amounts which shall apply in lieu of the
333 above amounts for taxable years beginning on or after
334 the first day of January of the calendar year in which
335 determination is made: *Provided, however*, That this
336 determination shall not apply to small business pro-
337 jects which have received certification from the tax
338 commissioner prior to the passage of this section if the
339 said small business projects which have previously
340 received certification continue to meet the require-
341 ments of a small business as in effect at the time of the
342 certification of the project. Such prescribed amounts
343 shall be determined in accordance with section seven-
344 a of this article and notice thereof shall be filed in the
345 state register. For purposes of this definition:

346 (A) *Annual Payroll*.—The annual payroll of a busi-
347 ness shall include the employees of its domestic and

348 foreign affiliates, whether employed on a full-time,
349 part-time, temporary, or other basis, during the
350 preceding twelve months. If a business has not been in
351 existence for twelve months, the payroll of the busi-
352 ness shall be divided by the number of weeks, includ-
353 ing fractions of a week, that it has been in business,
354 and the result multiplied by fifty-two. That amount
355 shall then be added to the twelve month payrolls of its
356 domestic and foreign affiliates to determine the annual
357 payroll of the business for purposes of this section.

358 (B) *Annual gross receipts*.—The annual gross
359 receipts of a business shall include the annual gross
360 receipts of its foreign and domestic affiliates.

361 (i) The “annual gross receipts” of a business which
362 has been in business for three or more complete fiscal
363 years means the annual gross revenues of the business
364 for the last three fiscal years. For purposes of this
365 definition, the gross revenues of the business includes
366 revenues from sales of tangible personal property and
367 services, interest, rents, royalties, fees, commissions
368 and receipts from any other source, but less returns
369 and allowances, sales of fixed assets, interaffiliated
370 transactions between a business and its domestic and
371 foreign affiliates, and taxes collected for remittance to
372 a third party, as shown on its books for federal income
373 tax purposes.

374 (ii) The annual receipts of a business that has been
375 in business for less than three complete fiscal years
376 means its total receipts for the period it has been in
377 business, divided by the number of weeks including
378 fractions of a week that it has been in business, and
379 multiplied by fifty-two.

380 (C) *Affiliates*.—The term “affiliates” includes all
381 concerns which are affiliates of each other when
382 either directly or indirectly (i) one concern controls or
383 has the power to control the other or (ii) a third party
384 or parties controls or has the power to control both. In
385 determining whether concerns are independently
386 owned and operated and whether or not affiliation
387 exists, consideration shall be given to all appropriate

388 factors, including common ownership, common man-
389 agement and contractual relationships.

390 (D) *Concern*.—The term “concern” means any
391 business entity organized for profit (even if its owner-
392 ship is in the hands of a nonprofit entity), having a
393 place of business located in this state, and which
394 makes a contribution to the economy of this state
395 through payment of taxes, or the sale or use in this
396 state of tangible personal property, or the procure-
397 ment or providing of services in this state, or the
398 hiring of employees who work in this state. “Concern”
399 includes but is not limited to any person as defined in
400 paragraph eighteen, subsection (b), section three of
401 this article.

402 (f) *Application for credit required*.

403 (1) *Application required*.—Notwithstanding any
404 provision of this article to the contrary, no credit shall
405 be allowed or applied under this article for any
406 qualified investment property placed in service or use
407 on or after the first day of January, one thousand nine
408 hundred ninety, until the person asserting a claim for
409 the allowance of credit under this article makes
410 written application to the tax commissioner for allow-
411 ance of credit as provided in this subsection and
412 receives written acknowledgement of its receipt from
413 tax commissioner: *Provided*, That in the case of a
414 multiparticipant project this notice may be filed by the
415 managing project participant on behalf of all partici-
416 pants in that project. An application for credit shall be
417 filed no later than the last day of the due date, without
418 extensions, for filing the tax returns required under
419 article twenty-one or twenty-four of this chapter for
420 the taxable year in which the property to which the
421 credit relates is placed in service or use and all
422 information required by such form shall be provided.

423 (2) *Failure to file*.—The failure to timely apply for
424 the credit shall result in the forfeiture of fifty percent
425 of the annual credit allowance otherwise allowable
426 under this article. This penalty shall apply annually
427 until such application is filed.

428 (g) *Regulations*.—Within one hundred eighty days
429 after the effective date of this section, the tax commis-
430 sioner shall promulgate emergency regulations for this
431 section, which shall also be filed as proposed legislative
432 rules, in conformity with the provisions of article
433 three, chapter twenty-nine-a of this code; and, if such
434 regulations are timely filed, the Legislature shall act
435 upon such proposed legislative regulations at its next
436 regular session to begin in the year one thousand nine
437 hundred ninety-one.

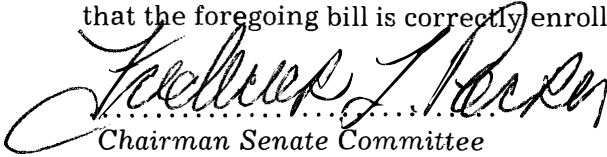
438 (h) *Studies and reviews*.—The tax commissioner
439 shall review the accounts of all taxpayers who are
440 currently claiming tax credits under this article for
441 the purpose of ensuring that such credits are being
442 claimed only in accordance with this article. The tax
443 commissioner shall report his findings and conclusions
444 based on such reviews at the next regular session of
445 the Legislature along with recommendations for any
446 further legislative change: *Provided*, That the confi-
447 dentiality of all taxpayers and taxpayer information
448 shall be preserved in such report and that this report
449 shall in no way be deemed to affect future enforce-
450 ment of this section.

451 (i) *Effective date*.

452 (1) Except as otherwise expressly provided in this
453 section, the provisions of this section shall apply to
454 property placed in service or use on or after the date
455 of passage of this section by the Legislature, notwith-
456 standing any provision of prior law which may be in
457 conflict with this section. In the case of any such
458 ambiguity, the provisions of this section shall control
459 resolution of such ambiguity.

460 (2) The term “date of passage of this section” means
461 the date on which this bill, as enacted, becomes an
462 enrolled bill.”

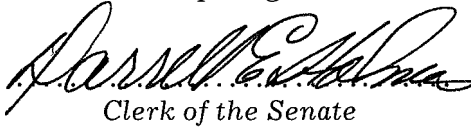
The Joint Committee on Enrolled Bills hereby certifies
that the foregoing bill is correctly enrolled.


Chairman Senate Committee


Chairman House Committee

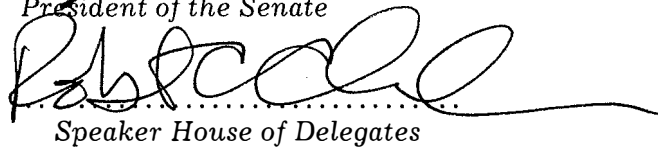
Originated in the Senate.

In effect from passage.


Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker House of Delegates

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


Governor

PRESENTED TO THE

GOVERNOR

Date 3/22/40

Time 9:25 am

RECEIVED

1030 MAR 23 PM 3:02

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE