

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990



ENROLLED

HOUSE BILL No. 4794

(By ~~the~~ Delegates Farley & Kiss)



Passed March 8, 1990

In Effect from 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

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

§11-23-5. Apportionment of tax base.

1 (a) A taxpayer subject to the tax imposed by this
2 article and also taxable in another state shall, for the
3 purposes of this tax, apportion its tax base to this state
4 by multiplying its tax base by a fraction, the numerator
5 of which is the sum of the property factor, plus the
6 payroll factor, plus two times the sales factor, all of
7 which shall be determined as hereinafter provided in
8 this section, and the denominator of which is four,
9 reduced by the number of factors, if any, having no
10 denominator, with the sales factor counting as two
11 factors.

12 (b) *Property factor.*—The property factor is a fraction,
13 the numerator of which is the average value of the
14 taxpayer's real and tangible personal property owned or

15 rented and used by it in this state during the taxable
16 year, and the denominator of which is the average value
17 of all real and tangible personal property owned or
18 rented by the taxpayer and used by it during the taxable
19 year, which is reported on Schedule L of Federal Form
20 1120 (or 1065 for partnerships), plus the average value
21 of all real and tangible personal property leased and
22 used by the taxpayer during the taxable year.

23 (c) *Value of property.*—Property owned by the tax-
24 payer shall be valued at its original cost, adjusted by
25 subsequent capital additions or improvements thereto
26 and partial disposition thereof, by reason of sale,
27 exchange, abandonment, etc.: *Provided*, That where
28 records of original cost are unavailable or cannot be
29 obtained without unreasonable expense, property shall
30 be valued at original cost as determined under regula-
31 tions of the tax commissioner. Property rented by the
32 taxpayer from others shall be valued at eight times the
33 net annual rental rate. Net annual rental rate is the
34 annual rental paid, directly or indirectly, by the
35 taxpayer, or for its benefit, in money or other consid-
36 eration for the use of the property and includes:

37 (1) Any amount payable for the use of real or tangible
38 personal property, or any part thereof, whether desig-
39 nated as a fixed sum of money or as a percentage of
40 sales, profits or otherwise.

41 (2) Any amount payable as additional rent or in lieu
42 of rents, such as interest, taxes, insurance, repairs or
43 any other items which are required to be paid by the
44 terms of the lease or other arrangement, not including
45 amounts paid as service charges, such as utilities,
46 janitor services, etc. If a payment includes rent and
47 other charges unsegregated, the amount of rent shall be
48 determined by consideration of the relative values of the
49 rent and the other items.

50 (d) *Movable property.*—The value of movable tangible
51 personal property used both within and without this
52 state shall be included in the numerator to the extent
53 of its utilization in this state. The extent of such
54 utilization shall be determined by multiplying the

55 original cost of such property by a fraction, the
56 numerator of which is the number of days of physical
57 location of the property in this state during the taxable
58 period, and the denominator of which is the number of
59 days of physical location of the property everywhere
60 during the taxable year. The number of days of physical
61 location of the property may be determined on a
62 statistical basis or by such other reasonable method
63 acceptable to the tax commissioner.

64 (e) *Leasehold improvements.*—Leasehold improve-
65 ments shall, for the purposes of the property factor, be
66 treated as property owned by the lessee regardless of
67 whether the lessee is entitled to remove the improve-
68 ments or the improvements revert to the lessor upon
69 expiration of the lease. Leasehold improvements shall be
70 included in the property factor at their original cost.

71 (f) *Average value of property.*—The average value of
72 property shall be determined by averaging the values
73 at the beginning and ending of the taxable year:
74 *Provided,* That the tax commissioner may require the
75 averaging of monthly values during the taxable year if
76 substantial fluctuations in the values of the property
77 exist during the taxable year, or where property is
78 acquired after the beginning of the taxable year, or is
79 disposed of, or whose rental contract ceases, before the
80 end of the taxable year.

81 (g) *Payroll factor.*—The payroll factor is a fraction,
82 the numerator of which is the total compensation paid
83 in this state during the taxable year by the taxpayer,
84 and the denominator of which is the total compensation
85 paid by the taxpayer during the taxable year as shown
86 on the taxpayer's federal income tax return as filed with
87 the internal revenue service, as reflected in the schedule
88 of wages and salaries and that portion of cost of goods
89 sold which reflects compensation, or as shown on a pro
90 forma return.

91 (h) *Compensation.*—The term "compensation" means
92 wages, salaries, commissions and any other form of
93 remuneration paid to employees for personal services.
94 Payments made to an independent contractor or to any

95 other person not properly classifiable as an employee
96 shall be excluded. Only the amounts paid directly to
97 employees shall be included in the payroll factor.
98 Amounts considered paid directly to employees include
99 the value of board, rent, housing, lodging, and other
100 benefits or services furnished to employees by the
101 taxpayer in return for personal services, provided such
102 amounts constitute income to the recipient for federal
103 income tax purposes.

104 (i) *Employee*.—The term “employee” means:

105 (1) Any officer of a corporation; or

106 (2) Any individual who, under the usual common-law
107 rules applicable in determining the employer-employee
108 relationship, has the status of an employee.

109 (j) *Compensation paid in this state*.—Compensation is
110 paid in this state if:

111 (1) The employee’s service is performed entirely
112 within the state;

113 (2) The employee’s service is performed both within
114 and without the state, but the service performed without
115 the state is incidental to the individual’s service within
116 the state. The word “incidental” means any service
117 which is temporary or transitory in nature, or which is
118 rendered in connection with an isolated transaction; or

119 (3) Some of the service is performed in the state and:

120 (A) The employee’s base of operations or, if there is
121 no base of operations, the place from which the service
122 is directed or controlled is in the state, or

123 (B) The base of operations or the place from which the
124 service is directed or controlled is not in any state in
125 which some part of the service is performed, but the
126 employee’s residence is in this state.

127 The term “base of operations” is the place of more or
128 less permanent nature from which the employee starts
129 his work and to which he customarily returns in order
130 to receive instructions from the taxpayer or communi-
131 cations from his customers or other persons or to

132 replenish stock or other materials, repair equipment, or
133 perform any other functions necessary to the exercise of
134 his trade or profession at some other point or points. The
135 term "place from which the service is directed or
136 controlled" refers to the place from which the power to
137 direct or control is exercised by the taxpayer.

138 (k) *Sales factor*.—The sales factor is a fraction, the
139 numerator of which is the gross receipts of the taxpayer
140 derived from transactions and activity in the regular
141 course of its trade or business in this state during the
142 taxable year, (business income) less returns and allow-
143 ances. The denominator of the fraction shall be the total
144 gross receipts derived by the taxpayer from transactions
145 and activity in the regular course of its trade or business
146 during the taxable year (business income), and reflected
147 in its gross income reported and as appearing on the
148 taxpayer's Federal Form 1120 or 1065, and consisting
149 of those certain pertinent portions of the (gross income)
150 elements set forth: *Provided*, That if either the numer-
151 ator or the denominator includes interest or dividends
152 from obligations of the United States government which
153 are exempt from taxation by this state, the amount of
154 such interest and dividends, if any, shall be subtracted
155 from the numerator or denominator in which it is
156 included.

157 (l) *Allocation of sales of tangible personal property*.

158 (1) Sales of tangible personal property are in this
159 state if:

160 (A) The property is received in this state by the
161 purchaser, other than the United States government,
162 regardless of the f.o.b. point or other conditions of the
163 sale. In the case of delivery by common carrier or other
164 means of transportation, the place at which such
165 property is ultimately received after all transportation
166 has been completed shall be considered as the place at
167 which such property is received by the purchaser.
168 Direct delivery in this state, other than for purposes of
169 transportation, to a person or firm designated by the
170 purchaser, constitutes delivery to the purchaser in this
171 state, and direct delivery outside this state to a person

172 or firm designated by the purchaser does not constitute
173 delivery to the purchaser in this state, regardless of
174 where title passes or other conditions of sale; or

175 (B) The property is shipped from an office, store,
176 warehouse, factory or other place of storage in this state
177 and the purchaser is the United States government.

178 (2) All other sales of tangible personal property
179 delivered or shipped to a purchaser within a state in
180 which the taxpayer is not taxed as defined in subsection
181 (b), section seven, article twenty-four of this chapter
182 shall be excluded from the denominator of the sales
183 factor.

184 (m) *Allocation of other sales.*—Sales, other than sales
185 of tangible personal property, are in this state if:

186 (1) The income-producing activity is performed in this
187 state; or

188 (2) The income-producing activity is performed both
189 in and outside this state and a greater proportion of the
190 income-producing activity is performed in this state
191 than in any other state, based on costs of performance.

192 (n) *Income producing activity.*—The term “income-
193 producing activity” applies to each separate item of
194 income and means the transactions and activity directly
195 engaged in by the taxpayer in the regular course of its
196 trade or business for the ultimate purpose of obtaining
197 gain or profit. Such activity does not include transac-
198 tions and activities performed on behalf of the taxpayer,
199 such as those conducted on its behalf by an independent
200 contractor. “Income-producing activity” includes, but is
201 not limited to, the following:

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

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

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

209 (4) The sale, licensing or other use of intangible
210 personal property. The mere holding of intangible
211 personal property is not, in itself, an income-producing
212 activity.

213 (o) *Cost of performance.*—The term “cost of perfor-
214 mance” means direct costs determined in manner
215 consistent with generally accepted accounting principles
216 and in accordance with accepted conditions or practices
217 in the trade or business of the taxpayer.

218 (p) *Other methods of allocation.*

219 (1) *General.*—If the allocation and apportionment
220 provisions of subsection (a) do not fairly represent the
221 extent of the taxpayer’s business activities in this state,
222 the taxpayer may petition for, or the tax commissioner
223 may require, in respect to all or any part of the
224 taxpayer’s business activities, if reasonable:

225 (A) Separate accounting;

226 (B) The exclusion of one of the factors;

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

230 (D) The employment of any other method to effectuate
231 an equitable allocation or apportionment of the taxpay-
232 er’s tax base. Such petition shall be filed no later than
233 the due date of the annual return for the taxable year
234 for which the alternative method is requested, deter-
235 mined without regard to any extension of time for filing
236 such return, and the petition shall include a statement
237 of the petitioner’s objections and of such alternative
238 method of allocation or apportionment as it believes to
239 be proper under the circumstances with such detail and
240 proof as the tax commissioner may require.

241 (2) *Burden of proof.*—In any proceeding before the tax
242 commissioner or in any court in which employment of
243 one of the methods of allocation or apportionment
244 provided for in subdivision (1) of this subsection is
245 sought, on the ground that the allocation and apportion-
246 ment provisions of subsection (a) do not fairly represent

247 the extent of the taxpayer's business activities in this
248 state, the burden of proof shall:

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

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

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

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

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

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

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

§11-24-13. Returns; time for filing.

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

6 (b) The tax commissioner may combine into one form
7 the annual return due under this article and the annual
8 return due under article twenty-three of this chapter.
9 When a combined business franchise tax and corpora-
10 tion net income tax annual return filed by a taxpayer,
11 the amount of tax remitted shall be applied first against
12 any business franchise tax that may be due for the
13 taxable year under article twenty-three of this chapter
14 and then against any corporation net income tax that
15 may be due for the taxable year. The tax commissioner
16 may also combine the forms for filing declarations of
17 estimated tax and the forms for making installment
18 payments of estimated tax.

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

§11-24-13a. Method of filing for business taxes.

1 (a) *Privilege to file.*—An “affiliated group” of corpora-
2 tions (as defined for purposes of filing a consolidated
3 federal income tax return), shall subject to the provi-
4 sions of this section and in accordance with any
5 regulations prescribed by the tax commissioner, have
6 the privilege of filing a consolidated return with respect
7 to the tax imposed by this article for the taxable year
8 in lieu of separate returns. The making of a consolidated
9 return shall be upon the condition that all corporations
10 which at any time during the taxable year have been
11 members of the affiliated group and which are included

12 in such return consent to the filing of such return. The
13 filing of a consolidated return shall be considered as
14 such consent. In the case of a corporation which is a
15 member of the affiliated group for a fractional part of
16 the year, the consolidated return shall include the
17 income of such corporation for such part of the year as
18 it is a member of the affiliated group.

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

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

34 (d) *Regulations.*—The tax commissioner shall pres-
35 cribe such regulations as he may deem necessary in
36 order that the tax liability of any affiliated group of
37 corporations making a consolidated return and of each
38 corporation in the group, both during and after the
39 period of affiliation, may be returned, determined,
40 computed, assessed, collected and adjusted, in such
41 manner as the tax commissioner deems necessary to
42 clearly reflect the income tax liability and the income
43 factors necessary for the determination of such liability,
44 and in order to prevent avoidance of such tax liability.

45 (e) *Computation and payment of tax.*—In any case in
46 which a consolidated return is filed, or is required to be
47 filed, the tax due under this article from the affiliated
48 group, shall be determined, computed, assessed, col-
49 lected and adjusted in accordance with regulations
50 prescribed by the tax commissioner, in effect on the last
51 day prescribed by law for the filing of such return, and

52 such affiliated group shall be treated as the taxpayer.

53 (f) *Consolidated return required.*—If any affiliated
54 group of corporations has not elected to file a consoli-
55 dated return, the tax commissioner may require such
56 corporations to make a consolidated return in order to
57 clearly reflect the taxable income of such corporations.

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

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

Frederick J. Burke
Chairman Senate Committee

Bernard V. Kelly
Chairman House Committee

Originating in the House.

Takes effect from passage.

Harrell Estlin
Clerk of the Senate

Donald L. Fogg
Clerk of the House of Delegates

Kath Slaughter
President of the Senate

Robert J. C. ...
Speaker of the House of Delegates

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

Walter C. ...
Governor

PRESENTED TO THE

GOVERNOR

Date 9/19/90

Time 4:26 pm

RECEIVED

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OFFICE OF THE
SECRETARY OF THE