

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1991



## ENROLLED

SENATE BILL NO. 632  
(Originating in the Committee  
(By Senator on Finance )



PASSED March 8, 1991  
In Effect from Passage

**ENROLLED**

**Senate Bill No. 632**

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AN ACT to amend and reenact sections three and five, article twenty-three, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said article by adding thereto three new sections, designated sections five-a, twenty-seven and twenty-eight; and to amend and reenact sections three-a and seven, article twenty-four of said chapter; and to further amend said article by adding thereto two new sections, designated sections seven-b and twenty-four; to amend article two, chapter thirty-one-a by adding thereto a new section designated section fifteen, all relating to imposing the business franchise tax and corporation net income tax on out-of-state financial organizations engaging in certain activities in this state; defining the term "financial organization" and amending the terms "business income" and "commercial domicile"; providing credit for franchise tax and income tax paid to another state; and requiring corporations and partnerships doing business or owning or maintaining property in this state to file a notice of business activities report required by the commissioner of banking to prepare a report to the governor, legislature and tax commissioner.

*Be it enacted by the Legislature of West Virginia:*

That sections three 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 said article be further amended by adding

thereto three new sections, designated sections five-a, twenty-seven and twenty-eight; and that sections three-a and seven, article twenty-four of said chapter be amended and reenacted; and that said article be further amended by adding thereto two new sections, designated sections seven-b and twenty-four; and that article two, chapter thirty-one-a be amended by adding thereto a new section designated section fifteen, all to read as follows:

## **CHAPTER 11. TAXATION.**

### **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  
4 herein unless a different meaning is clearly required  
5 by either the context in which the term is used, or by  
6 specific 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 disposi-  
13 tion of the property or the rendering of services in  
14 connection therewith constitute integral parts of the  
15 taxpayer’s regular trade or business operations.

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

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

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

- 28 (ii) The amount of paid-in or capital surplus;
- 29 (iii) The amount of retained earnings, appropriated  
30 and unappropriated; and
- 31 (iv) Less the cost of treasury stock.
- 32 (B) *S Corporations*. — In the case of an electing  
33 small business corporation, the average of the begin-  
34 ning and ending year balances of the sum of the  
35 following entries from Schedule L of Federal Form  
36 1120S, prepared following generally accepted account-  
37 ing principles and as filed by the taxpayer with the  
38 Internal Revenue Service for the taxable year:
- 39 (i) The value of all common stock and preferred  
40 stock of the taxpayer;
- 41 (ii) The amount of paid-in or capital surplus;
- 42 (iii) Retained earnings, appropriated and un-  
43 appropriated;
- 44 (iv) The amount of shareholders' undistributed  
45 taxable income;
- 46 (v) The amount of the accumulated adjustments  
47 account;
- 48 (vi) The amount of the other adjustments account;  
49 and
- 50 (vii) Less the cost of treasury stock.
- 51 (C) *Partnerships*. — In the case of a partnership, the  
52 average of the beginning and ending year balances of  
53 the value of partner's capital accounts from Schedule  
54 L of Federal Form 1065, prepared following accepted  
55 accounting principles and as filed by the taxpayer with  
56 the Internal Revenue Service for the taxable year.
- 57 (D) *Additional items in capital*. — The term "cap-  
58 ital" for purposes of this article shall include such  
59 adjustments thereto as the tax commissioner deems  
60 necessary to properly reflect capital and such addi-  
61 tional items from the accounts of the taxpayer as the  
62 tax commissioner may by regulation prescribe, which  
63 fairly represent the net equity of the taxpayer as

64 defined in accordance with generally accepted  
65 accounting principles.

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

70 (i) The numerator of which is the average of the  
71 monthly beginning and ending account balances  
72 during the taxable year (account balances to be  
73 determined at cost in the same manner that such  
74 obligations, investments and loans are reported on  
75 Schedule L of the Federal Form 1120 or Federal Form  
76 1065) of the following:

77 (I) Obligations and securities of the United States, or  
78 of any agency, authority, commission or instrumental-  
79 ity of the United States and any other corporation or  
80 entity created under the authority of the United States  
81 Congress for the purpose of implementing or further-  
82 ing an objective of national policy;

83 (II) Obligations of this state and any political subdi-  
84 vision of this state;

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

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

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

100 (3) *Commercial domicile.* — The term “commercial  
101 domicile” means the principal place from which the

102 trade or business of the taxpayer is directed or  
103 managed: *Provided*, That the commercial domicile of a  
104 financial organization, which is subject to regulation as  
105 such, shall be at the place designated as its principal  
106 office with its regulating authority.

107 (4) *Commissioner or tax commissioner*. — The terms  
108 “commissioner” or “tax commissioner” are used  
109 interchangeably herein and mean the tax commis-  
110 sioner of the state of West Virginia, or his delegate.

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

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

120 (7) *Delegate*. — The term “delegate” in the phrase  
121 “or his delegate”, when used in reference to the tax  
122 commissioner, means any officer or employee of the  
123 state tax department duly authorized by the tax  
124 commissioner directly, or indirectly by one or more  
125 redelegations of authority, to perform the functions  
126 mentioned or described in this article or regulations  
127 promulgated thereunder.

128 (8) *Doing business*. — The term “doing business”  
129 means any activity of a corporation or partnership  
130 which enjoys the benefits and protection of the  
131 government and laws of this state, except the activity  
132 of agriculture and farming, which shall mean the  
133 production of food, fiber and woodland products (but  
134 not timbering activity) by means of cultivation, tillage  
135 of the soil and by the conduct of animal, livestock,  
136 dairy, apiary, equine or poultry husbandry, horticul-  
137 ture, or any other plant or animal production and all  
138 farm practices related, usual or incidental thereto,  
139 including the storage, packing, shipping and market-  
140 ing, but not including any manufacturing, milling or  
141 processing of such products by persons other than the

142 producer thereof.

143 The activity of agriculture and farming shall mean  
144 such activity, as above defined, occurring on not less  
145 than five acres of land and the improvements thereon,  
146 used in the production of the aforementioned activi-  
147 ties, and shall mean the production of at least one  
148 thousand dollars of products per annum through the  
149 conduct of such principal business activities as set  
150 forth in section ten, article one-a, chapter eleven of  
151 this code.

152 (9) *Domestic corporation.* — The term “domestic  
153 corporation” means a corporation organized under the  
154 laws of this state, and certain corporations organized  
155 under the laws of the state of Virginia before the  
156 twentieth day of June, one thousand eight hundred  
157 sixty-three. Every other corporation is a foreign  
158 corporation.

159 (10) *Federal Form 1120.* — The term “Federal Form  
160 1120” means the annual federal income tax return of  
161 any corporation made pursuant to the United States  
162 Internal Revenue Code of 1986, as amended, or in  
163 successor provisions of the laws of the United States,  
164 in respect to the taxable income of a corporation, and  
165 filed with the federal Internal Revenue Service. In the  
166 case of a corporation that elects to file a federal  
167 income tax return as part of an affiliated group, but  
168 files as a separate corporation under this article, then  
169 as to such corporation Federal Form 1120 means its  
170 pro forma Federal Form 1120.

171 (11) *Federal Form 1065.* — The term “Federal Form  
172 1065” means the annual federal income tax return of  
173 a partnership made pursuant to Section 6031 of the  
174 United States Internal Revenue Code of 1986, as  
175 amended or renumbered, or in successor provisions of  
176 the laws of the United States, in respect to the taxable  
177 income of a partnership, and filed with the federal  
178 Internal Revenue Service.

179 (12) *Fiduciary.* — The term “fiduciary” means, and  
180 includes, a guardian, trustee, executor, administrator,  
181 receiver, conservator or any person acting in any

182 fiduciary capacity for any person.

183 (13) *Financial organization*. — The term “financial  
184 organization” means:

185 (A) A holding company or a subsidiary thereof. As  
186 used in this section “holding company” means a  
187 corporation registered under the federal bank holding  
188 company act of 1956 or registered as a savings and loan  
189 holding company other than a diversified savings and  
190 loan holding company (as defined in section  
191 408(a)(1)(F) of the federal national housing act (12  
192 U.S.C. 1730(a)(1)(F));

193 (B) A regulated financial corporation or a subsidiary  
194 thereof. As used in this section “regulated financial  
195 corporation” means:

196 (1) An institution, the deposits, shares or accounts of  
197 which are insured under the federal deposit insurance  
198 act, or by the federal savings and loan insurance  
199 corporation;

200 (2) An institution that is a member of a federal  
201 home loan bank;

202 (3) Any other bank or thrift institution incorporated  
203 or organized under the laws of a state that is engaged  
204 in the business of receiving deposits;

205 (4) A credit union incorporated and organized under  
206 the laws of this state;

207 (5) A production credit association organized under  
208 12 U.S.C. 2071;

209 (6) A corporation organized under 12 U.S.C. 611  
210 through 631 (an edge act corporation); or

211 (7) A federal or state agency or branch of a foreign  
212 bank (as defined in 12 U.S.C. 3101); or

213 (C) A corporation which derives more than fifty  
214 percent of its gross business income from one or more  
215 of the following activities:

216 (1) Making, acquiring, selling or servicing loans or  
217 extensions of credit. Loans and extensions of credit



218 include:

219 (I) Secured or unsecured consumer loans;

220 (II) Installment obligations;

221 (III) Mortgages or other loans secured by real estate  
222 or tangible personal property;

223 (IV) Credit card loans;

224 (V) Secured and unsecured commercial loans of any  
225 type; and

226 (VI) Loans arising in factoring.

227 (2) Leasing or acting as an agent, broker or advisor  
228 in connection with leasing real and personal property  
229 that is the economic equivalent of an extension of  
230 credit (as defined by the Federal Reserve Board in 12  
231 C.F.R. 225.25(b)(5)).

232 (3) Operating a credit card business.

233 (4) Rendering estate or trust services.

234 (5) Receiving, maintaining or otherwise handling  
235 deposits.

236 (6) Engaging in any other activity with an economic  
237 effect comparable to those activities described in item  
238 (1), (2), (3), (4) or (5) of this subparagraph.

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

244 (15) *Includes and including*. — The terms “includes”  
245 and “including” when used in a definition contained  
246 in this article shall not be deemed to exclude other  
247 things otherwise within the meaning of the term being  
248 defined.

249 (16) *Parent and subsidiary corporations*. — A corpo-  
250 ration which owns on average during the taxable year  
251 more than fifty percent of the stock of all classes of  
252 another corporation is defined to be the “parent

253 corporation” and the corporation which is so owned by  
254 the parent is defined to be a “subsidiary corporation”.

255 (17) *Partnership and partner.* — The term “partner-  
256 ship” includes a syndicate, group, pool, joint venture  
257 or other unincorporated organization through or by  
258 means of which any business, financial operation or  
259 venture is carried on, and which is not a trust or  
260 estate, a corporation or a sole proprietorship or an  
261 unincorporated organization which under Section 761  
262 of the Internal Revenue Code of 1986, as amended, and  
263 is not treated as a partnership for the taxable year for  
264 federal income tax purposes. The term “partner”  
265 includes a member in such a syndicate, group, pool,  
266 joint venture or other unincorporated organization  
267 which is a partnership.

268 (18) *Person.* — The term “person” includes any  
269 corporation or partnership.

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

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

278 (21) *State.* — The term “state” means a state of the  
279 United States, the District of Columbia, the Common-  
280 wealth of Puerto Rico, or any territory or possession of  
281 the United States, and any foreign country or political  
282 subdivision thereof.

283 (22) *Stock.* — The term “stock” includes shares in a  
284 corporation, association or joint-stock company. It shall  
285 not include nonvoting stock which is limited and  
286 preferred as to dividends, or treasury stock. “Stock  
287 owned by a corporation” shall include stock owned  
288 directly by such corporation and stock which is subject  
289 to an option to acquire stock.

290 (23) *Taxable year.* — The term “taxable year” means  
291 the calendar year, or the fiscal year ending during

292 such calendar year, upon the basis of which tax  
293 liability is computed under this article. "Taxable year"  
294 means, in case of a return made for a fractional part  
295 of a year (short taxable year) under the provisions of  
296 this article, or under regulations promulgated by the  
297 tax commissioner, the period for which such return is  
298 made.

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

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

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

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

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

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

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

#### §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 numer-  
5 ator of which is the sum of the property factor, plus  
6 the payroll factor, plus two times the sales factor, all  
7 of which shall be determined as hereinafter provided

8 in 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  
13 fraction, the numerator of which is the average value  
14 of the taxpayer's real and tangible personal property  
15 owned or rented and used by it in this state during the  
16 taxable year, and the denominator of which is the  
17 average value of all real and tangible personal prop-  
18 erty owned or rented by the taxpayer and used by it  
19 during the taxable year, which is reported on Sched-  
20 ular L of Federal Form 1120 (or 1065 for partnerships),  
21 plus the average value of all real and tangible personal  
22 property leased and used by the taxpayer during the  
23 taxable year.

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

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

43 (2) Any amount payable as additional rent or in lieu  
44 of rents, such as interest, taxes, insurance, repairs or  
45 any other items which are required to be paid by the  
46 terms of the lease or other arrangement, not including  
47 amounts paid as service charges, such as utilities,

48 janitor services, etc. If a payment includes rent and  
49 other charges unsegregated, the amount of rent shall  
50 be determined by consideration of the relative values  
51 of the rent and the other items.

52 (d) *Movable property.* — The value of movable  
53 tangible personal property used both within and  
54 without this state shall be included in the numerator  
55 to the extent of its utilization in this state. The extent  
56 of such utilization shall be determined by multiplying  
57 the original cost of such property by a fraction, the  
58 numerator of which is the number of days of physical  
59 location of the property in this state during the taxable  
60 period, and the denominator of which is the number  
61 of days of physical location of the property every-  
62 where during the taxable year. The number of days of  
63 physical location of the property may be determined  
64 on a statistical basis or by such other reasonable  
65 method acceptable to the tax commissioner.

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

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

84 (g) *Payroll factor.* — The payroll factor is a fraction,  
85 the numerator of which is the total compensation paid  
86 in this state during the taxable year by the taxpayer,  
87 and the denominator of which is the total compensa-

88 tion paid by the taxpayer during the taxable year as  
89 shown on the taxpayer's federal income tax return as  
90 filed with the internal revenue service, as reflected in  
91 the schedule of wages and salaries and that portion of  
92 cost of goods sold which reflects compensation, or as  
93 shown on a pro forma return.

94 (h) *Compensation.* — The term "compensation"  
95 means wages, salaries, commissions and any other  
96 form of remuneration paid to employees for personal  
97 services. Payments made to an independent contractor  
98 or to any other person not properly classifiable as an  
99 employee shall be excluded. Only the amounts paid  
100 directly to employees shall be included in the payroll  
101 factor. Amounts considered paid directly to employees  
102 include the value of board, rent, housing, lodging and  
103 other benefits or services furnished to employees by  
104 the taxpayer in return for personal services, provided  
105 such amounts constitute income to the recipient for  
106 federal income tax purposes.

107 (i) *Employee.* — The term "employee" means:

108 (1) Any officer of a corporation; or

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

112 (j) *Compensation paid in this state.* — Compensation  
113 is paid in this state if:

114 (1) The employee's service is performed entirely  
115 within the state;

116 (2) The employee's service is performed both within  
117 and without the state, but the service performed  
118 without the state is incidental to the individual's  
119 service within the state. The word "incidental" means  
120 any service which is temporary or transitory in  
121 nature, or which is rendered in connection with an  
122 isolated transaction; or

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

124 (A) The employee's base of operations or, if there is  
125 no base of operations, the place from which the service

126 is directed or controlled is in the state; or

127 (B) The base of operations or the place from which  
128 the service is directed or controlled is not in any state  
129 in which some part of the service is performed, but  
130 the employee's residence is in this state.

131 The term "base of operations" is the place of more  
132 or less permanent nature from which the employee  
133 starts his work and to which he customarily returns in  
134 order to receive instructions from the taxpayer or  
135 communications from his customers or other persons  
136 or to replenish stock or other materials, repair equip-  
137 ment, or perform any other functions necessary to the  
138 exercise of his trade or profession at some other point  
139 or points. The term "place from which the service is  
140 directed or controlled" refers to the place from which  
141 the power to direct or control is exercised by the  
142 taxpayer.

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

162 (l) *Allocation of sales of tangible personal property.* —

163 (1) Sales of tangible personal property are in this  
164 state if:

165 (i) The property is received in this state by the  
166 purchaser, other than the United States government,  
167 regardless of the f.o.b. point or other conditions of the  
168 sale. In the case of delivery by common carrier or  
169 other means of transportation, the place at which such  
170 property is ultimately received after all transportation  
171 has been completed shall be considered as the place at  
172 which such property is received by the purchaser.  
173 Direct delivery in this state, other than for purposes of  
174 transportation, to a person or firm designated by the  
175 purchaser, constitutes delivery to the purchaser in this  
176 state, and direct delivery outside this state to a person  
177 or firm designated by the purchaser does not consti-  
178 tute delivery to the purchaser in this state, regardless  
179 of where title passes or other conditions of sale; or

180 (ii) The property is shipped from an office, store,  
181 warehouse, factory or other place of storage in this  
182 state and the purchaser is the United States  
183 government.

184 (2) All other sales of tangible personal property  
185 delivered or shipped to a purchaser within a state in  
186 which the taxpayer is not taxed as defined in subsec-  
187 tion (b), section seven, article twenty-four of this  
188 chapter shall be excluded from the denominator of the  
189 sales factor.

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

192 (1) The income-producing activity is performed in  
193 this state;

194 (2) The income-producing activity is performed both  
195 in and outside this state and a greater proportion of  
196 the income-producing activity is performed in this  
197 state than in any other state, based on costs of  
198 performance; or

199 (3) The sale constitutes business income to the  
200 taxpayer, or the taxpayer is a financial organization  
201 not having its commercial domicile in this state, and in  
202 either case the sale is a receipt described as attribut-  
203 able to this state in section five-a of this article.



204 (n) *Income-producing activity*. — The term “income-  
205 producing activity” applies to each separate item of  
206 income and means the transactions and activity  
207 directly engaged in by the taxpayer in the regular  
208 course of its trade or business for the ultimate purpose  
209 of obtaining gain or profit. Such activity does not  
210 include transactions and activities performed on behalf  
211 of the taxpayer, such as those conducted on its behalf  
212 by an independent contractor. “Income-producing  
213 activity” includes, but is not limited to, the following:

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

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

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

221 (4) The sale, licensing or other use of intangible  
222 personal property. The mere holding of intangible  
223 personal property is not, in itself, an income-producing  
224 activity: *Provided*, That the conduct of the business of  
225 a financial organization shall constitute an income-  
226 producing activity.

227 (o) *Cost of performance*. — The term “cost of  
228 performance” means direct costs determined in a  
229 manner consistent with generally accepted accounting  
230 principles and in accordance with accepted conditions  
231 or practices in the trade or business of the taxpayer.

232 (p) *Other methods of allocation*. —

233 (1) *General*. — If the allocation and apportionment  
234 provisions of subsection (a) do not fairly represent the  
235 extent of the taxpayer’s business activities in this  
236 state, the taxpayer may petition for, or the tax  
237 commissioner may require, in respect to all or any  
238 part of the taxpayer’s business activities, if reasonable:

239 (A) Separate accounting;

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

241 (C) The inclusion of one or more additional factors  
242 which will fairly represent the taxpayer's business  
243 activity in this state; or

244 (D) The employment of any other method to effec-  
245 tuate an equitable allocation or apportionment of the  
246 taxpayer's tax base. Such petition shall be filed no  
247 later than the due date of the annual return for the  
248 taxable year for which the alternative method is  
249 requested, determined without regard to any exten-  
250 sion of time for filing such return, and the petition  
251 shall include a statement of the petitioner's objections  
252 and of such alternative method of allocation or appor-  
253 tionment as it believes to be proper under the circum-  
254 stances with such detail and proof as the tax commis-  
255 sioner may require.

256 (2) *Burden of proof.* — In any proceeding before the  
257 tax commissioner or in any court in which employ-  
258 ment of one of the methods of allocation or appor-  
259 tionment provided for in subdivision (1) of this subsection  
260 is sought, on the ground that the allocation and  
261 apportionment provisions of subsection (a) do not  
262 fairly represent the extent of the taxpayer's business  
263 activities in this state, the burden of proof shall:

264 (A) If the tax commissioner seeks employment of  
265 one of such methods, be on the tax commissioner; or

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

268 (3) Notwithstanding any other provisions of this  
269 section, financial organizations shall use only the  
270 special apportionment rules set forth in section five-a  
271 of this article.

272 (q) *Effective date.* — The amendments to this section  
273 made by this act shall apply to all taxable years ending  
274 after the effective date of this act. The provisions of  
275 paragraph (3), subsection (p) of this section shall apply  
276 to all taxable years beginning on or after the first day  
277 of January, one thousand nine hundred ninety-one.

**§11-23-5a. Special apportionment rules — financial organizations.**

1 (a) *General.* — The Legislature hereby finds that the

2 general formula set forth in section five of this article  
3 for apportioning the tax base of corporations and  
4 partnerships taxable in this state as well as in another  
5 state is inappropriate for use by financial organizations  
6 due to the particular characteristics of those organiza-  
7 tions and the manner in which their business is  
8 conducted. Accordingly, the general formula set forth  
9 in section five of this article may not be used to  
10 apportion the tax base of such financial organizations  
11 which shall use only the apportionment formula and  
12 methods set forth in this section.

13 (b) *Financial organizations with business activities*  
14 *partially within and partially without this state.* — A  
15 financial organization not having its commercial  
16 domicile in this state shall apportion its tax base to this  
17 state as provided in this subsection if it regularly  
18 engages in business in this state.

19 (1) *Nexus presumptions and exclusions.* — A finan-  
20 cial organization is presumed to be regularly engaging  
21 in business in this state if during any year it obtains  
22 or solicits business with twenty or more persons  
23 within this state, or if the sum of the value of its gross  
24 receipts attributable to sources in this state equals or  
25 exceeds one hundred thousand dollars. However, gross  
26 receipts from the following types of property (as well  
27 as those contacts with this state reasonably and  
28 exclusively required to evaluate and complete the  
29 acquisition or disposition of the property, the servicing  
30 of the property or the income from it, the collection of  
31 income from the property, or the acquisition or  
32 liquidation of collateral relating to the property) shall  
33 not be a factor in determining whether the owner is  
34 engaging in business in this state:

35 (A) An interest in a real estate mortgage investment  
36 conduit, a real estate investment trust, or a regulated  
37 investment company;

38 (B) An interest in a loan backed security represent-  
39 ing ownership or participation in a pool of promissory  
40 notes or certificates of interest that provide for  
41 payments in relation to payments or reasonable

42 projections of payments on the notes or certificates;

43 (C) An interest in a loan or other asset from which  
44 the interest is attributed to a consumer loan, a  
45 commercial loan or a secured commercial loan, and in  
46 which the payment obligations were solicited and  
47 entered into by a person that is independent, and not  
48 acting on behalf, of the owner;

49 (D) An interest in the right to service or collect  
50 income from a loan or other asset from which interest  
51 on the loan is attributed as a loan described in the  
52 previous paragraph, and in which the payment obliga-  
53 tions were solicited and entered into by a person that  
54 is independent, and not acting on behalf, of the owner;  
55 and

56 (E) Any amounts held in an escrow or trust account  
57 with respect to property described above.

58 (2) *Definitions.* — For purposes of this subsection:

59 (A) “Deposit” means:

60 (i) The unpaid balance of money or its equivalent  
61 received or held by a financial organization in the  
62 usual course of business and for which it has given or  
63 it is obligated to give credit, either conditionally or  
64 unconditionally, to a commercial, checking, savings,  
65 time or thrift account whether or not advance notice  
66 is required to withdraw the credit funds, or which is  
67 evidenced by a certificate of deposit, thrift certificate,  
68 investment certificate, or certificate of indebtedness,  
69 or other similar name, or a check of draft drawn  
70 against a deposit account and certified by the financial  
71 organization, or a letter of credit or a traveler’s check  
72 on which the financial organization is primarily liable:  
73 *Provided*, That without limiting the generality of the  
74 term “money or its equivalent”, any such account or  
75 instrument must be regarded as evidencing the receipt  
76 of the equivalent of money when credited or issued in  
77 exchange for checks or drafts or for a promissory note  
78 upon which the person obtaining any such credit or  
79 instrument is primarily or secondarily liable or for a  
80 charge against a deposit account or in settlement of

81 checks, drafts or other instruments forwarded to such  
82 bank for collection;

83 (ii) Trust funds received or held by such financial  
84 organization, whether held in the trust department or  
85 held or deposited in any other department of such  
86 financial organization;

87 (iii) Money received or held by a financial organiza-  
88 tion or the credit given for money or its equivalent  
89 received or held by a financial organization in the  
90 usual course of business for a special or specific  
91 purpose, regardless of the legal relationship thereby  
92 established, including, without being limited to, escrow  
93 funds, funds held as security for an obligation due the  
94 financial organization or other (including funds held as  
95 dealers reserves) or for securities loaned by the  
96 financial organization, funds deposited by a debtor to  
97 meet maturing obligations, funds deposited as advance  
98 payment on subscriptions to United States Govern-  
99 ment securities, funds held for distribution or pur-  
100 chase of securities, funds held to meet its acceptances  
101 or letters of credit, and withheld taxes: *Provided*, That  
102 there shall not be included funds which are received  
103 by the financial organization for immediate application  
104 to the reduction of an indebtedness to the receiving  
105 financial organization, or under condition that the  
106 receipt thereof immediately reduces or extinguishes  
107 such an indebtedness;

108 (iv) Outstanding drafts (including advice or authori-  
109 zation to charge a financial organization's balance in  
110 another such organization), cashier's checks, money  
111 orders, or other officer's checks issued in the usual  
112 course of business for any purpose, but not including  
113 those issued in payment for services, dividends or  
114 purchases or other costs or expenses of the financial  
115 organization itself; and

116 (v) Money or its equivalent held as a credit balance  
117 by a financial organization on behalf of its customer if  
118 such entity is engaged in soliciting and holding such  
119 balances in the regular course of its business.

120 (B) "Sales" means:

121 For purposes of apportionment, the “sales” of a  
122 financial organization shall mean the gross receipts  
123 described in the gross receipts factor in this subsection,  
124 regardless of their source.

125 (3) *Commercial domicile - apportionment or credit.*  
126 — Financial organizations which do not have their  
127 commercial domicile in West Virginia shall use the  
128 apportionment rules set forth in this section. Financial  
129 organizations with their commercial domicile in West  
130 Virginia may not apportion their tax base, but shall  
131 allocate all capital to West Virginia without apportion-  
132 ment: *Provided*, That any financial organizations with  
133 their commercial domicile in West Virginia shall be  
134 allowed the credit against their business franchise tax  
135 liability as described in section twenty-seven of this  
136 article.

137 (4) *Apportionment rules.* —

138 (A) *General Method.* —

139 If a financial organization not having its commercial  
140 domicile in this state is engaging in business both  
141 within and without this state, the portion of its capital  
142 attributable to such business, which is derived from  
143 sources within this state, shall be determined by  
144 apportionment in accordance with this subsection. The  
145 apportioned capital shall be determined by multiplying  
146 capital by the special gross receipts factor as defined in  
147 this subsection. Neither the numerator nor the denom-  
148 inator of the gross receipts factor shall include receipts  
149 from obligations described in paragraphs (A), (B), (C)  
150 and (D), subdivision (1), subsection (f), section six,  
151 article twenty-four of this chapter.

152 (B) *Special gross receipts factor.* — The gross  
153 receipts factor is a fraction, the numerator of which is  
154 the total gross receipts of the taxpayer from sources  
155 within this state during the taxable year and the  
156 denominator of which is the total gross receipts of the  
157 taxpayer wherever earned during the taxable year.

158 *Numerator.* — The numerator of the gross receipts  
159 factor shall include, in addition to items otherwise

160 includable in the sales factor under section five of this  
161 article, the following:

162 (i) Gross receipts from the lease or rental of real or  
163 tangible personal property (whether as the economic  
164 equivalent of an extension of credit or otherwise) if  
165 the property is located in this state;

166 (ii) Interest income and other receipts from assets in  
167 the nature of loans which are secured primarily by  
168 real estate or tangible personal property if such  
169 security property is located in this state. In the event  
170 that such security property is also located in one or  
171 more other states, such receipts shall be presumed to  
172 be from sources within this state, subject to rebuttal  
173 based upon factors described in rules to be promul-  
174 gated by the tax commissioner, including the factor  
175 that the proceeds of any such loans were applied and  
176 used by the borrower entirely outside of this state;

177 (iii) Interest income and other receipts from consu-  
178 mer loans which are unsecured or are secured by  
179 intangible property that are made to residents of this  
180 state, whether at a place of business, by traveling loan  
181 officer, by mail, by telephone or other electronic  
182 means or otherwise;

183 (iv) Interest income and other receipts from com-  
184 mercial loans and installment obligations which are  
185 unsecured or are secured by intangible property if and  
186 to the extent that the borrower or debtor is a resident  
187 of or is domiciled in this state: *Provided*, That such  
188 receipts are presumed to be from sources in this state  
189 and such presumption may be overcome by reference  
190 to factors described in rules to be promulgated by the  
191 tax commissioner, including the factor that the pro-  
192 ceeds of any such loans were applied and used by the  
193 borrower entirely outside of this state;

194 (v) Interest income and other receipts from a  
195 financial organization's syndication and participation  
196 loans, under the rules set forth in items (i) through  
197 (iv) above;

198 (vi) Interest income and other receipts, including

199 service charges, from financial institution credit card  
200 and travel and entertainment credit card receivables  
201 and credit card holders' fees if the borrower or debtor  
202 is a resident of this state or if the billings for any such  
203 receipts are regularly sent to an address in this state;

204 (vii) Merchant discount income derived from finan-  
205 cial institution credit card holder transactions with a  
206 merchant located in this state. In the case of mer-  
207 chants located within and without this state, only  
208 receipts from merchant discounts attributable to sales  
209 made from locations within this state shall be attrib-  
210 uted to this state. It shall be presumed, subject to  
211 rebuttal, that the location of a merchant is the address  
212 shown on the invoice submitted by the merchant to  
213 the taxpayer;

214 (viii) Gross receipts from the performance of servi-  
215 ces which are attributed to this state if:

216 (I) The service receipts are loan-related fees, includ-  
217 ing loan servicing fees, and the borrower resides in  
218 this state; except that, at the taxpayer's election,  
219 receipts from loan-related fees which are either: (a)  
220 "Pooled" or aggregated for collective financial  
221 accounting treatment; or (b) manually written as non-  
222 recurring extraordinary charges to be processed  
223 directly to the general ledger may either be attributed  
224 to a state based upon the borrowers' residences or  
225 upon the ratio that total interest sourced to that state  
226 bears to total interest from all sources;

227 (II) The service receipts are deposit-related fees and  
228 the depositor resides in this state, except that, at the  
229 taxpayer's election, receipts from deposit related fees  
230 which are either: (a) "Pooled" or aggregated for  
231 collective financial accounting treatment; or (b) man-  
232 ually written as non-recurring extraordinary charges  
233 to be processed directly to the general ledger may  
234 either be attributed to a state based upon the deposi-  
235 tors' residences or upon the ratio that total deposits  
236 sourced to that state bear to total deposits from all  
237 sources;

238 (III) The service receipt is a brokerage fee and the



239 account holder is a resident of this state;

240 (IV) The service receipts are fees related to estate or  
241 trust services and the estate's decedent was a resident  
242 of this state immediately before death; or the grantor  
243 who either funded or established the trust is a resident  
244 of this state; or

245 (V) The service receipt is associated with the perfor-  
246 mance of any other service not identified above and  
247 the service is performed for an individual resident of,  
248 or for a corporation or other business domiciled in,  
249 this state and the economic benefit of such service is  
250 received in this state;

251 (ix) Gross receipts from the issuance of travelers  
252 checks and money orders if such checks and money  
253 orders are purchased in this state; and

254 (x) All other receipts not attributed by this rule to  
255 a state in which the taxpayer is taxable shall be  
256 attributed pursuant to the laws of the state of the  
257 taxpayer's commercial domicile.

258 *Denominator.* — The denominator of the receipts  
259 factor shall include all of the taxpayer's receipts from  
260 transactions of the kind included in the numerator,  
261 but without regard to their source or situs.

262 (c) *Method of filing.* — Financial organizations  
263 subject to apportionment under subsection (b) of this  
264 section shall file only separate tax returns, and may  
265 not file on a consolidated or any other basis: *Provided,*  
266 That financial organizations which are members of an  
267 affiliated group may file on a consolidated basis if all  
268 members of the affiliated group have their commercial  
269 domicile in this state.

270 (d) *Effective date.* — The provisions of this section  
271 shall apply to all taxable years beginning on or after  
272 the first day of January, one thousand nine hundred  
273 ninety-one.

**§11-23-27. Credit for franchise tax paid to another state.**

1 Effective for taxable years beginning on or after the  
2 first day of January, one thousand nine hundred

3 ninety-one, and notwithstanding any provisions of this  
4 code to the contrary, any financial organization,  
5 having its commercial domicile in this state shall be  
6 allowed a credit against the tax imposed by this article  
7 for any taxable year for taxes paid to another state or  
8 political subdivision thereof. That credit shall be equal  
9 in amount to the lesser of:

10 (a) The taxes such financial organization shall  
11 actually have paid, which payments were made on or  
12 before the filing date of the annual return required by  
13 this article, to any other state or political subdivision  
14 thereof, and which tax was based upon or measured  
15 by the financial organization's capital and was paid  
16 with respect to the same taxable year; or

17 (b) The portion of the tax actually paid that the  
18 financial organization would have paid if the rate of  
19 tax imposed by this article is applied to the tax base  
20 determined under the law of such other state or  
21 political subdivision.

22 Any additional payments of such tax to other states,  
23 or to political subdivisions thereof, by a financial  
24 organization described in this section, and any refunds  
25 of such taxes, made or received by such financial  
26 organization with respect to the taxable year, but after  
27 the due date of the annual return required by this  
28 article for the taxable year, including any extensions,  
29 shall likewise be accounted for in the taxable year in  
30 which such additional payment is made or such refund  
31 is received by the financial organization.

**§11-23-28. Notice of business activities report.**

1 (a) Except as provided by subsection (b) of this  
2 section, for each taxable year every corporation and  
3 partnership that carries on any business activity or  
4 owns or maintains property in West Virginia for the  
5 taxable year shall file a business activity report with  
6 the tax commissioner. The report must be filed on or  
7 before the fifteenth day of the fourth month after the  
8 end of the corporation or partnership's taxable year.  
9 The filing of a report shall not be a factor in determin-  
10 ing whether a corporation or partnership is subject to

11 taxation by this state.

12 (b) A corporation or partnership is not required to  
13 file a report under this section if:

14 (1) During the taxable year for which a report is  
15 due, the corporation or partnership is registered to  
16 engage in business in West Virginia in accordance with  
17 the provisions of article twelve of this chapter;

18 (2) A tax return was filed for that taxable year for  
19 any of the taxes subject to the provisions of article ten,  
20 chapter eleven of this code;

21 (3) The corporation or partnership is a type of  
22 organization expressly exempted from taxation by  
23 West Virginia or federal statute or regulation; or

24 (4) The activities or interests in property owned in  
25 this state by the corporation or partnership consist  
26 solely of activities or property expressly exempted  
27 from taxation by West Virginia or federal statute or  
28 regulation.

29 (c) Until a report is filed in compliance with this  
30 section, a corporation or partnership may not pursue  
31 in the courts of this state any claim not relating to tax  
32 liability:

33 (1) That arose under West Virginia law; or

34 (2) On a contract that is executed under West  
35 Virginia law, if the claim arose or the contract was  
36 executed before or during the taxable year for which  
37 a report should have been filed. However, the court in  
38 which such a claim is filed may allow the claim to be  
39 pursued if the corporation or partnership:

40 (A) Establishes that it was not required to file a  
41 report under subsection (b);

42 (B) Files a report for each year for which a report  
43 is due;

44 (C) Files a tax return for each year for which a  
45 return is due; or

46 (D) Provides adequate security, including a bond, in

47 an amount sufficient to cover all tax liabilities,  
48 including additions to tax, penalties and interest.

49 (d) As used in this section, carrying on an activity or  
50 maintaining property in West Virginia includes, but is  
51 not limited to, any of the following:

52 (1) Maintaining an office or other place of business  
53 in West Virginia;

54 (2) The presence of employees, agents, representa-  
55 tives or independent contractors in West Virginia, if  
56 they are conducting business on behalf of the corpora-  
57 tion or partnership, regardless of whether the individ-  
58 ual or person is residing or regularly stationed in West  
59 Virginia;

60 (3) Owning or maintaining real property, tangible  
61 personal property, or intangible property that is in  
62 West Virginia; or

63 (4) Any activity of a financial organization described  
64 in item (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix) or (x)  
65 of paragraph (B), subdivision (4), subsection (b),  
66 section five-a of this article.

#### ARTICLE 24. CORPORATION NET INCOME TAX.

##### §11-24-3a. Specific terms defined.

1 For purposes of this article:

2 (1) *Business income*. — The term “business income”  
3 means income arising from transactions and activity in  
4 the regular course of the taxpayer’s trade or business  
5 and includes income from tangible and intangible  
6 property if the acquisition, management and disposi-  
7 tion of the property or the rendering of services in  
8 connection therewith constitute integral parts of the  
9 taxpayer’s regular trade or business operations.

10 (2) *Commercial domicile*. — The term “commercial  
11 domicile” means the principal place from which the  
12 trade or business of the taxpayer is directed or  
13 managed: *Provided*, That the commercial domicile of a  
14 financial organization, which is subject to regulation as  
15 such, shall be at the place designated as its principal

16 office with its regulating authority.

17 (3) *Compensation*. — The term “compensation”  
18 means wages, salaries, commissions and any other  
19 form of remuneration paid to employees for personal  
20 services.

21 (4) *Corporation*. — The term “corporation” includes  
22 a joint-stock company and any association or other  
23 organization which is taxable as a corporation under  
24 the federal income tax law.

25 (5) *Delegate*. — The term “delegate” in the phrase  
26 “or his delegate”, when used in reference to the tax  
27 commissioner, means any officer or employee of the  
28 state tax department duly authorized by the tax  
29 commissioner directly, or indirectly by one or more  
30 redelegations of authority, to perform the functions  
31 mentioned or described in this article or regulations  
32 promulgated thereunder.

33 (6) *Domestic corporation*. — The term “domestic  
34 corporation” means any corporation organized under  
35 the laws of West Virginia and certain corporations  
36 organized under the laws of the state of Virginia  
37 before the twentieth day of June, one thousand eight  
38 hundred sixty-three. Every other corporation is a  
39 foreign corporation.

40 (7) *Engaging in business*. — The term “engaging in  
41 business” or “doing business” means any activity of a  
42 corporation which enjoys the benefits and protection  
43 of government and laws in this state.

44 (8) *Federal Form 1120*. — The term “Federal Form  
45 1120” means the annual federal income tax return of  
46 any corporation made pursuant to the United States  
47 Internal Revenue Code of 1986, as amended, or in  
48 successor provisions of the laws of the United States,  
49 in respect to the federal taxable income of a corpora-  
50 tion, and filed with the federal Internal Revenue  
51 Service. In the case of a corporation that elects to file  
52 a federal income tax return as part of an affiliated  
53 group, but files as a separate corporation under this  
54 article, then as to such corporation Federal Form 1120

55 means its pro forma Federal Form 1120.

56 (9) *Fiduciary*. — The term “fiduciary” means, and  
57 includes, a guardian, trustee, executor, administrator,  
58 receiver, conservator or any person acting in any  
59 fiduciary capacity for any person.

60 (10) *Financial organization*. — The term “financial  
61 organization” means:

62 (A) A holding company or a subsidiary thereof. As  
63 used in this section “holding company” means a  
64 corporation registered under the federal bank holding  
65 company act of 1956 or registered as a savings and loan  
66 holding company other than a diversified savings and  
67 loan holding company (as defined in section  
68 408(a)(1)(F) of the federal national housing act (12  
69 U.S.C. 1730(a)(1)(F));

70 (B) A regulated financial corporation or a subsidiary  
71 thereof. As used in this section “regulated financial  
72 corporation” means:

73 (1) An institution, the deposits, shares or accounts of  
74 which are insured under the federal deposit insurance  
75 act, or by the federal savings and loan insurance  
76 corporation;

77 (2) An institution that is a member of a federal  
78 home loan bank;

79 (3) Any other bank or thrift institution incorporated  
80 or organized under the laws of a state that is engaged  
81 in the business of receiving deposits;

82 (4) A credit union incorporated and organized under  
83 the laws of this state;

84 (5) A production credit association organized under  
85 12 U.S.C. 2071;

86 (6) A corporation organized under 12 U.S.C. 611  
87 through 631 (an edge act corporation); or

88 (7) A federal or state agency or branch of a foreign  
89 bank (as defined in 12 U.S.C. 3101); or

90 (C) A corporation which derives more than fifty

91 percent of its gross business income from one or more  
92 of the following activities:

93 (1) Making, acquiring, selling or servicing loans or  
94 extensions of credit. Loans and extensions of credit  
95 include:

96 (I) Secured or unsecured consumer loans;

97 (II) Installment obligations;

98 (III) Mortgages or other loans secured by real estate  
99 or tangible personal property;

100 (IV) Credit card loans;

101 (V) Secured and unsecured commercial loans of any  
102 type; and

103 (VI) Loans arising in factoring.

104 (2) Leasing or acting as an agent, broker or advisor  
105 in connection with leasing real and personal property  
106 that is the economic equivalent of an extension of  
107 credit (as defined by the Federal Reserve Board in 12  
108 C.F.R. 225.25(b)(5)).

109 (3) Operating a credit card business.

110 (4) Rendering estate or trust services.

111 (5) Receiving, maintaining or otherwise handling  
112 deposits.

113 (6) Engaging in any other activity with an economic  
114 effect comparable to those activities described in item  
115 (1), (2), (3), (4) or (5) of this subparagraph.

116 (11) *Fiscal year*. — The term “fiscal year” means an  
117 accounting period of twelve months ending on any day  
118 other than the last day of December, and on the basis  
119 of which the taxpayer is required to report for federal  
120 income tax purposes.

121 (12) *Includes and including*. — The terms “includes”  
122 and “including” when used in a definition contained  
123 in this article shall not be deemed to exclude other  
124 things otherwise within the meaning of the term being  
125 defined.

126 (13) *Nonbusiness income*. — The term “nonbusiness  
127 income” means all income other than business income.

128 (14) *Person*. — The term “person” is to be deemed  
129 interchangeable with the term “corporation” in this  
130 section.

131 (15) *Pro forma return*. — The term “pro forma  
132 return” when used in this article means the return  
133 which the taxpayer would have filed with the Internal  
134 Revenue Service had it not elected to file federally as  
135 part of an affiliated group.

136 (16) *Public utility*. — The term “public utility”  
137 means any business activity to which the jurisdiction  
138 of the public service commission of West Virginia  
139 extends under section one, article two, chapter  
140 twenty-four of the code of West Virginia.

141 (17) *Sales*. — The term “sales” means all gross  
142 receipts of the taxpayer that are “business income”, as  
143 defined in this section.

144 (18) *State*. — The term “state” means any state of  
145 the United States, the District of Columbia, the  
146 Commonwealth of Puerto Rico, any territory or  
147 possession of the United States, and any foreign  
148 country or political subdivision thereof.

149 (19) *Taxable year*. — The term “taxable year” means  
150 the taxable year for which the taxable income of the  
151 taxpayer is computed under the federal income tax  
152 law.

153 (20) *Tax*. — The term “tax” includes, within its  
154 meaning, interest and additions to tax, unless the  
155 intention to give it a more limited meaning is disclosed  
156 by the context.

157 (21) *Tax commissioner*. — The term “tax commis-  
158 sioner” means the tax commissioner of the state of  
159 West Virginia or his delegate.

160 (22) *Taxpayer*. — The term “taxpayer” means a  
161 corporation subject to the tax imposed by this article.

162 (23) *This code*. — The term “this code” means the



163 code of West Virginia, one thousand nine hundred  
164 thirty-one, as amended.

165 (24) *This state*. — The term “this state” means the  
166 state of West Virginia.

167 (25) *West Virginia taxable income*. — The term  
168 “West Virginia taxable income” means the taxable  
169 income of a corporation as defined by the laws of the  
170 United States for federal income tax purposes,  
171 adjusted, as provided in section six of this article:  
172 *Provided*, That in the case of a corporation having  
173 income from business activity which is taxable with-  
174 out this state, its “West Virginia taxable income” shall  
175 be such portion of its taxable income as so defined and  
176 adjusted as is allocated or apportioned to this state  
177 under the provisions of sections seven and seven-b of  
178 this article.

**§11-24-7. Allocation and apportionment.**

1 (a) *General*. — Any taxpayer having income from  
2 business activity which is taxable both in this state and  
3 in another state shall allocate and apportion its net  
4 income as provided in this section. For purposes of this  
5 section, the term “net income” means the taxpayer’s  
6 federal taxable income adjusted as provided in section  
7 six.

8 (b) “*Taxable in another state*” defined. — For  
9 purposes of allocation and apportionment of net  
10 income under this section, a taxpayer is taxable in  
11 another state if:

12 (1) In that state the taxpayer is subject to a net  
13 income tax, a franchise tax measured by net income,  
14 a franchise tax for the privilege of doing business, or  
15 a corporation stock tax; or

16 (2) That state has jurisdiction to subject the taxpayer  
17 to a net income tax, regardless of whether, in fact, that  
18 state does or does not subject the taxpayer to such tax.

19 (c) *Business activities entirely within West Virginia*.  
20 — If the business activities of a taxpayer take place  
21 entirely within this state, the entire net income of

22 such taxpayer is subject to the tax imposed by this  
23 article. The business activities of a taxpayer shall be  
24 deemed to have taken place in their entirety within  
25 this state if such taxpayer is not "taxable in another  
26 state": *Provided*, That the business activities of a  
27 financial organization having its commercial domicile  
28 in this state shall be deemed to take place entirely in  
29 this state, notwithstanding that such organization may  
30 be "taxable in another state": *Provided, however*, That  
31 the income from the business activities of a financial  
32 organization not having its commercial domicile in this  
33 state shall be apportioned according to the applicable  
34 provisions of this article.

35 (d) *Business activities partially within and partially*  
36 *without West Virginia; allocation of nonbusiness*  
37 *income.* — If the business activities of a taxpayer take  
38 place partially within and partially without this state  
39 and such taxpayer is also taxable in another state,  
40 rents and royalties from real or tangible personal  
41 property, capital gains, interest, dividends or patent or  
42 copyright royalties, to the extent that they constitute  
43 nonbusiness income of the taxpayer, shall be allocated  
44 as provided in subdivisions (1) through (4): *Provided*,  
45 That to the extent such items constitute business  
46 income of the taxpayer, they shall not be so allocated  
47 but they shall be apportioned to this state according to  
48 the provisions of subsection (e) of this section and to  
49 the applicable provisions of section seven-b of this  
50 article.

51 (1) *Net rents and royalties.* —

52 (A) Net rents and royalties from real property  
53 located in this state are allocable to this state.

54 (B) Net rents and royalties from tangible personal  
55 property are allocable to this state:

56 (i) If and to the extent that the property is utilized  
57 in this state; or

58 (ii) In their entirety if the taxpayer's commercial  
59 domicile is in this state and the taxpayer is not  
60 organized under the laws of or taxable in the state in

61 which the property is utilized.

62 (C) The extent of utilization of tangible personal  
63 property in a state is determined by multiplying the  
64 rents and royalties by a fraction, the numerator of  
65 which is the number of days of physical location of the  
66 property in the state during the rental or royalty  
67 period in the taxable year and the denominator of  
68 which is the number of days of physical location of the  
69 property everywhere during all rental or royalty  
70 periods in the taxable year. If the physical location of  
71 the property during the rental or royalty period is  
72 unknown or unascertainable by the taxpayer, tangible  
73 personal property is utilized in the state in which the  
74 property was located at the time the rental or royalty  
75 payer obtained possession.

76 (2) *Capital gains.* —

77 (A) Capital gains and losses from sales of real  
78 property located in this state are allocable to this state.

79 (B) Capital gains and losses from sales of tangible  
80 personal property are allocable to this state if:

81 (i) The property had a situs in this state at the time  
82 of the sale; or

83 (ii) The taxpayer's commercial domicile is in this  
84 state and the taxpayer is not taxable in the state in  
85 which the property had a situs.

86 (C) Capital gains and losses from sales of intangible  
87 personal property are allocable to this state if the  
88 taxpayer's commercial domicile is in this state.

89 (D) Gains pursuant to section 631 (a) and (b) of the  
90 Internal Revenue Code of 1986, as amended, from sales  
91 of natural resources severed in this state shall be  
92 allocated to this state if they are nonbusiness income.

93 (3) *Interest and dividends are allocable to this state*  
94 *if the taxpayer's commercial domicile is in this state.*

95 (4) *Patent and copyright royalties.* —

96 (A) Patent and copyright royalties are allocable to  
97 this state:

98 (i) If and to the extent that the patent or copyright  
99 is utilized by the payer in this state, or

100 (ii) If and to the extent that the patent or copyright  
101 is utilized by the payer in a state in which the  
102 taxpayer is not taxable and the taxpayer's commercial  
103 domicile is in this state.

104 (B) A patent is utilized in a state to the extent that  
105 it is employed in production, fabrication, manufactur-  
106 ing or other processing in the state or to the extent  
107 that a patented product is produced in the state. If the  
108 basis of receipts from patent royalties does not permit  
109 allocation to states or if the accounting procedures do  
110 not reflect states of utilization, the patent is utilized in  
111 the state in which the taxpayer's commercial domicile  
112 is located.

113 (C) A copyright is utilized in a state to the extent  
114 that printing or other publication originates in the  
115 state. If the basis of receipts from copyright royalties  
116 does not permit allocation to states or if the accounting  
117 procedures do not reflect states of utilization, the  
118 copyright is utilized in the state in which the taxpay-  
119 er's commercial domicile is located.

120 (5) *Corporate partner's distributive share.* —

121 (A) Persons carrying on business as partners in a  
122 partnership, as defined in section 761 of the Internal  
123 Revenue Code of 1986, as amended, are liable for  
124 income tax only in their separate or individual  
125 capacities.

126 (B) A corporate partner's distributive share of  
127 income, gain, loss, deduction or credit of a partnership  
128 shall be modified as provided in section six of this  
129 article for each partnership. Such distributive share  
130 shall then be allocated and apportioned as provided in  
131 section seven of this article, using the corporation's  
132 proportionate share of the partnership's property,  
133 payroll and sales factors. The sum of that portion of  
134 the distributive share allocated and apportioned to this  
135 state shall then be treated as distributive share  
136 allocated to this state; and that portion of distributive

137 share allocated or apportioned outside this state shall  
138 be treated as distributive share allocated outside this  
139 state, unless the taxpayer requests or the tax commis-  
140 sioner, under subsection (h) of this section requires  
141 that such distributive share be treated differently.

142 (e) *Business activities partially within and partially*  
143 *without this state; apportionment of business income.*  
144 — All net income, after deducting those items specif-  
145 ically allocated under subsection (d), shall be apporti-  
146 oned to this state by multiplying such net income by  
147 a fraction, the numerator of which is the property  
148 factor plus the payroll factor plus two times the sales  
149 factor, and the denominator of which is four, reduced  
150 by the number of factors, if any, having no  
151 denominator.

152 (1) *Property factor.* — The property factor is a  
153 fraction, the numerator of which is the average value  
154 of the taxpayer's real and tangible personal property  
155 owned or rented and used by it in this state during the  
156 taxable year and the denominator of which is the  
157 average value of all the taxpayer's real and tangible  
158 personal property owned or rented and used by the  
159 taxpayer during the taxable year, which is reported on  
160 Schedule L Federal Form 1120, plus the average value  
161 of all real and tangible personal property leased and  
162 used by the taxpayer during the taxable year.

163 (2) *Value of property.* — Property owned by the  
164 taxpayer shall be valued at its original cost, adjusted  
165 by subsequent capital additions or improvements  
166 thereto and partial disposition thereof, by reason of  
167 sale, exchange, abandonment, etc.: *Provided,* That  
168 where records of original cost are unavailable or  
169 cannot be obtained without unreasonable expense,  
170 property shall be valued at original cost as determined  
171 under regulations of the tax commissioner. Property  
172 rented by the taxpayer from others shall be valued at  
173 eight times the annual rental rate. The term "net  
174 annual rental rate" is the annual rental paid, directly  
175 or indirectly, by the taxpayer, or for its benefit, in  
176 money or other consideration for the use of property  
177 and includes:

178 (A) Any amount payable for the use of real or  
179 tangible personal property, or any part thereof,  
180 whether designated as a fixed sum of money or as a  
181 percentage of sales, profits or otherwise.

182 (B) Any amount payable as additional rent or in lieu  
183 of rents, such as interest, taxes, insurance, repairs or  
184 any other items which are required to be paid by the  
185 terms of the lease or other arrangement, not including  
186 amounts paid as service charges, such as utilities,  
187 janitor services, etc. If a payment includes rent and  
188 other charges unsegregated, the amount of rent shall  
189 be determined by consideration of the relative values  
190 of the rent and the other items.

191 (3) *Movable property.* — The value of movable  
192 tangible personal property used both within and  
193 without this state shall be included in the numerator  
194 to the extent of its utilization in this state. The extent  
195 of such utilization shall be determined by multiplying  
196 the original cost of such property by a fraction, the  
197 numerator of which is the number of days of physical  
198 location of the property in this state during the taxable  
199 period, and the denominator of which is the number  
200 of days of physical location of the property every-  
201 where during the taxable year. The number of days of  
202 physical location of the property may be determined  
203 on a statistical basis or by such other reasonable  
204 method acceptable to the tax commissioner.

205 (4) *Leasehold improvements.* — Leasehold improve-  
206 ments shall, for purposes of the property factor, be  
207 treated as property owned by the taxpayer regardless  
208 of whether the taxpayer is entitled to remove the  
209 improvements or the improvements revert to the  
210 lessor upon expiration of the lease. Leasehold  
211 improvements shall be included in the property factor  
212 at their original cost.

213 (5) *Average value of property.* — The average value  
214 of property shall be determined by averaging the  
215 values at the beginning and ending of the taxable year:  
216 *Provided,* That the tax commissioner may require the  
217 averaging of monthly values during the taxable year if

218 substantial fluctuations in the values of the property  
219 exist during the taxable year, or where property is  
220 acquired after the beginning of the taxable year, or is  
221 disposed of, or whose rental contract ceases, before the  
222 end of the taxable year.

223 (6) *Payroll factor*. — The payroll factor is a fraction,  
224 the numerator of which is the total compensation paid  
225 in this state during the taxable year by the taxpayer  
226 for compensation, and the denominator of which is the  
227 total compensation paid by the taxpayer during the  
228 taxable year, as shown on the taxpayer's federal  
229 income tax return as filed with the Internal Revenue  
230 Service, as reflected in the schedule of wages and  
231 salaries and that portion of cost of goods sold which  
232 reflects compensation, or as shown on a pro forma  
233 return.

234 (7) *Compensation*. — The term "compensation"  
235 means wages, salaries, commissions and any other  
236 form of remuneration paid to employees for personal  
237 services. Payments made to an independent contractor  
238 or to any other person not properly classifiable as an  
239 employee shall be excluded. Only amounts paid  
240 directly to employees are included in the payroll  
241 factor. Amounts considered as paid directly to  
242 employees include the value of board, rent, housing,  
243 lodging and other benefits or services furnished to  
244 employees by the taxpayer in return for personal  
245 services, provided such amounts constitute income to  
246 the recipient for federal income tax purposes.

247 (8) *Employee*. — The term "employee" means:

248 (A) Any officer of a corporation; or

249 (B) Any individual who, under the usual common-  
250 law rule applicable in determining the employer-  
251 employee relationship, has the status of an employee.

252 (9) *Compensation*. — Compensation is paid or  
253 accrued in this state if:

254 (A) The employee's service is performed entirely  
255 within this state; or

256 (B) The employee's service is performed both within  
257 and without this state, but the service performed  
258 without the state is incidental to the individual's  
259 service within this state. The word "incidental" means  
260 any service which is temporary or transitory in  
261 nature, or which is rendered in connection with an  
262 isolated transaction; or

263 (C) Some of the service is performed in this state  
264 and:

265 (i) The employee's base of operations or, if there is  
266 no base of operations, the place from which the service  
267 is directed or controlled is in the state; or

268 (ii) The base of operations or the place from which  
269 the service is directed or controlled is not in any state  
270 in which some part of the service is performed, but  
271 the employee's residence is in this state.

272 The term "base of operations" is the place of more  
273 or less permanent nature from which the employee  
274 starts his work and to which he customarily returns in  
275 order to receive instructions from the taxpayer or  
276 communications from his customers or other persons  
277 or to replenish stock or other materials, repair equip-  
278 ment, or perform any other functions necessary to the  
279 exercise of his trade or profession at some other point  
280 or points. The term "place from which the service is  
281 directed or controlled" refers to the place from which  
282 the power to direct or control is exercised by the  
283 taxpayer.

284 (10) *Sales factor*. — The sales factor is a fraction, the  
285 numerator of which is the gross receipts of the  
286 taxpayer derived from transactions and activity in the  
287 regular course of its trade or business in this state  
288 during the taxable year (business income), less returns  
289 and allowances. The denominator of the fraction shall  
290 be the total gross receipts derived by the taxpayer  
291 from transactions and activity in the regular course of  
292 its trade or business during the taxable year (business  
293 income), and reflected in its gross income reported and  
294 as appearing on the taxpayer's Federal Form 1120, and  
295 consisting of those certain pertinent portions of the



296 (gross income) elements set forth: *Provided*, That if  
297 either the numerator or the denominator includes  
298 interest or dividends from obligations of the United  
299 States government which are exempt from taxation by  
300 this state, the amount of such interest and dividends,  
301 if any, shall be subtracted from the numerator or  
302 denominator in which it is included.

303 (11) *Allocation of sales of tangible personal property.* —

304 (A) Sales of tangible personal property are in this  
305 state if:

306 (i) The property is received in this state by the  
307 purchaser, other than the United States government,  
308 regardless of the f.o.b. point or other conditions of the  
309 sale. In the case of delivery by common carrier or  
310 other means of transportation, the place at which such  
311 property is ultimately received after all transportation  
312 has been completed shall be considered as the place at  
313 which such property is received by the purchaser.  
314 Direct delivery in this state, other than for purposes of  
315 transportation, to a person or firm designated by the  
316 purchaser, constitutes delivery to the purchaser in this  
317 state, and direct delivery outside this state to a person  
318 or firm designated by the purchaser does not consti-  
319 tute delivery to the purchaser in this state, regardless  
320 of where title passes or other conditions of sale; or

321 (ii) The property is shipped from an office, store,  
322 warehouse, factory or other place of storage in this  
323 state and the purchaser is the United States  
324 government.

325 (B) All other sales of tangible personal property  
326 delivered or shipped to a purchaser within a state in  
327 which the taxpayer is not taxed (as defined in subsec-  
328 tion (b) of this section) shall be excluded from the  
329 denominator of the sales factor.

330 (12) *Allocation of other sales.* — Sales, other than  
331 sales of tangible personal property are in this state if:

332 (A) The income-producing activity is performed in  
333 this state; or

334 (B) The income-producing activity is performed both

335 in and outside this state and a greater proportion of  
336 the income-producing activity is performed in this  
337 state than in any other state, based on costs of  
338 performance; or

339 (C) The sale constitutes business income to the  
340 taxpayer, or the taxpayer is a financial organization  
341 not having its commercial domicile in this state, and in  
342 either case the sale is a receipt described as attribut-  
343 able to this state in subsection (b), section seven-b of  
344 this article.

345 (13) *Financial organizations and other taxpayers*  
346 *with business activities partially within and partially*  
347 *without this state.* — Notwithstanding anything con-  
348 tained in this section to the contrary, in the case of  
349 financial organizations and other taxpayers, not having  
350 their commercial domicile in this state, the rules of  
351 this subsection shall apply to the apportionment of  
352 income from their business activities except as  
353 expressly otherwise provided in subsection (b), section  
354 seven-b of this article.

355 (f) *Income-producing activity.* — The term “income-  
356 producing activity” applies to each separate item of  
357 income and means the transactions and activity  
358 directly engaged in by the taxpayer in the regular  
359 course of its trade or business for the ultimate purpose  
360 of obtaining gain or profit. Such activity does not  
361 include transactions and activities performed on behalf  
362 of the taxpayer, such as those conducted on its behalf  
363 by an independent contractor. “Income-producing  
364 activity” includes, but is not limited to, the following:

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

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

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

372 (4) The sale, licensing or other use of intangible

373 personal property.

374 The mere holding of intangible personal property is  
375 not, in itself, an income-producing activity: *Provided*,  
376 That the conduct of the business of a financial organi-  
377 zation shall constitute an income-producing activity.

378 (g) *Cost of performance.* — The term “cost of  
379 performance” means direct costs determined in a  
380 manner consistent with generally accepted accounting  
381 principles and in accordance with accepted conditions  
382 or practices in the trade or business of the taxpayer.

383 (h) *Other methods of allocation and apportionment.* —

384 (1) *General.* — If the allocation and apportionment  
385 provisions of subsections (d) and (e) of this section do  
386 not fairly represent the extent of the taxpayer’s  
387 business activities in this state, the taxpayer may  
388 petition for or the tax commissioner may require, in  
389 respect to all or any part of the taxpayer’s business  
390 activities, if reasonable:

391 (A) Separate accounting;

392 (B) The exclusion of one or more of the factors;

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

396 (D) The employment of any other method to effec-  
397 tuate an equitable allocation or apportionment of the  
398 taxpayer’s income. Such petition shall be filed no later  
399 than the due date of the annual return for the taxable  
400 year for which the alternative method is requested,  
401 determined without regard to any extension of time  
402 for filing such return, and the petition shall include a  
403 statement of the petitioner’s objections and of such  
404 alternative method of allocation or apportionment as it  
405 believes to be proper under the circumstances with  
406 such detail and proof as the tax commissioner may  
407 require.

408 (2) *Alternative method for public utilities.* — If the  
409 taxpayer is a public utility and if the allocation and  
410 apportionment provisions of subsections (d) and (e) do

411 not fairly represent the taxpayer's business activities  
412 in this state, the taxpayer may petition for, or the tax  
413 commissioner may require, as an alternative to the  
414 other methods provided for in paragraph (1) of this  
415 subsection, the allocation and apportionment of the  
416 taxpayer's net income in accordance with any system  
417 of accounts prescribed by the public service commis-  
418 sion of this state pursuant to the provisions of section  
419 eight, article two, chapter twenty-four of this code,  
420 provided the allocation and apportionment provisions  
421 of such system of accounts fairly represent the extent  
422 of the taxpayer's business activities in this state for the  
423 purposes of the tax imposed by this article.

424 (3) *Burden of proof.* — In any proceeding before the  
425 tax commissioner or in any court in which employ-  
426 ment of one of the methods of allocation or apportion-  
427 ment provided for in paragraph (1) or (2) of this  
428 subsection is sought, on the ground that the allocation  
429 and apportionment provisions of subsections (d) and  
430 (e) do not fairly represent the extent of the taxpayer's  
431 business activities in this state, the burden of proof  
432 shall:

433 (A) If the tax commissioner seeks employment of  
434 one of such methods, be on the tax commissioner; or

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

**§11-24-7b. Special apportionment rules — financial organizations.**

1 (a) *General.* — The Legislature hereby finds that the  
2 general formula set forth in section seven of this  
3 article for apportioning the business income of corpo-  
4 rations taxable in this state as well as in another state  
5 is inappropriate for use by financial organizations due  
6 to the particular characteristics of those organizations  
7 and the manner in which their business is conducted.  
8 Accordingly, the general formula set forth in section  
9 seven of this article may not be used to apportion the  
10 business income of such financial organizations, which  
11 shall use only the apportionment formula and methods  
12 set forth in this section.

13 (b) *Financial organizations with business activities*  
14 *partially within and partially without this state.* — A  
15 financial organization not having its commercial  
16 domicile in this state shall apportion the business  
17 income component of its federal taxable income (as  
18 adjusted by section six of this article) to this state as  
19 provided in this subsection if it regularly engages in  
20 business in this state.

21 (1) *Nexus presumptions and exclusions.* — A finan-  
22 cial organization is presumed to be regularly engaging  
23 in business in this state if during any year it obtains  
24 or solicits business with twenty or more persons  
25 within this state, or if the sum of the value of its gross  
26 receipts attributable to sources in this state equals or  
27 exceeds one hundred thousand dollars. However, gross  
28 receipts from the following types of property (as well  
29 as those contacts with this state reasonably and  
30 exclusively required to evaluate and complete the  
31 acquisition or disposition of the property, the servicing  
32 of the property or the income from it, the collection of  
33 income from the property, or the acquisition or  
34 liquidation of collateral relating to the property) shall  
35 not be a factor in determining whether the owner is  
36 engaging in business in this state:

37 (A) An interest in a real estate mortgage investment  
38 conduit, a real estate investment trust or a regulated  
39 investment company;

40 (B) An interest in a loan backed security represent-  
41 ing ownership or participation in a pool of promissory  
42 notes or certificates of interest that provide for  
43 payments in relation to payments or reasonable  
44 projections of payments on the notes or certificate;

45 (C) An interest in a loan or other asset from which  
46 the interest is attributed to a consumer loan, a  
47 commercial loan or a secured commercial loan, and in  
48 which the payment obligations were solicited and  
49 entered into by a person that is independent, and not  
50 acting on behalf, of the owner;

51 (D) An interest in the right to service or collect  
52 income from a loan or other asset from which interest

53 on the loan is attributed as a loan described in the  
54 previous paragraph, and in which the payment obliga-  
55 tions were solicited and entered into by a person that  
56 is independent, and not acting on behalf, of the owner;  
57 and

58 (E) Any amounts held in an escrow or trust account  
59 with respect to property described above.

60 (2) *Definitions.* — For purposes of this subsection:

61 (A) “Deposit” means:

62 (i) The unpaid balance of money or its equivalent  
63 received or held by a financial organization in the  
64 usual course of business and for which it has given or  
65 it is obligated to give credit, either conditionally or  
66 unconditionally, to a commercial, checking, savings,  
67 time or thrift account whether or not advance notice  
68 is required to withdraw the credit funds, or which is  
69 evidenced by a certificate of deposit, thrift certificate,  
70 investment certificate or certificate of indebtedness, or  
71 other similar name, or a check or draft drawn against  
72 a deposit account and certified by the financial orga-  
73 nization, or a letter of credit or a traveler’s check on  
74 which the financial organization is primarily liable:  
75 *Provided*, That without limiting the generality of the  
76 term “money or its equivalent”, any such account or  
77 instrument must be regarded as evidencing the receipt  
78 of the equivalent of money when credited or issued in  
79 exchange for checks or drafts or for a promissory note  
80 upon which the person obtaining any such credit or  
81 instrument is primarily or secondarily liable or for a  
82 charge against a deposit account or in settlement of  
83 checks, drafts or other instruments forwarded to such  
84 bank for collection;

85 (ii) Trust funds received or held by such financial  
86 organization, whether held in the trust department or  
87 held or deposited in any other department of such  
88 financial organization;

89 (iii) Money received or held by a financial organiza-  
90 tion or the credit given for money or its equivalent  
91 received or held by a financial organization in the

92 usual course of business for a special or specific  
93 purpose, regardless of the legal relationship thereby  
94 established, including, without being limited to, escrow  
95 funds, funds held as security for an obligation due the  
96 financial organization or other (including funds held as  
97 dealers reserves) or for securities loaned by the  
98 financial organization, funds deposited by a debtor to  
99 meet maturing obligations, funds deposited as advance  
100 payment on subscriptions to United States Govern-  
101 ment securities, funds held for distribution or pur-  
102 chase of securities, funds held to meet its acceptances  
103 or letters of credit, and withheld taxes: *Provided*, That  
104 there shall not be included funds which are received  
105 by the financial organization for immediate application  
106 to the reduction of an indebtedness to the receiving  
107 financial organization, or under condition that the  
108 receipt thereof immediately reduces or extinguishes  
109 such an indebtedness;

110 (iv) Outstanding drafts (including advice or authori-  
111 zation to charge a financial organization's balance in  
112 another such organization), cashier's checks, money  
113 orders or other officer's checks issued in the usual  
114 course of business for any purpose, but not including  
115 those issued in payment for services, dividends or  
116 purchases or other costs or expenses of the financial  
117 organization itself; and

118 (v) Money or its equivalent held as a credit balance  
119 by a financial organization on behalf of its customer if  
120 such entity is engaged in soliciting and holding such  
121 balances in the regular course of its business.

122 (B) "Sales" means:

123 For purposes of apportionment, the "sales" of a  
124 financial organization shall mean the gross receipts  
125 described in the gross receipts factor in this subsection,  
126 regardless of their source.

127 (3) *Commercial domicile - apportionment or credit.*  
128 — Financial organizations which do not have their  
129 commercial domicile in West Virginia shall use the  
130 apportionment rules set forth in this section. Financial  
131 organizations with their commercial domicile in West

132 Virginia may not apportion their business income, but  
133 shall report all net income to West Virginia without  
134 apportionment: *Provided*, That any financial organiza-  
135 tions with their commercial domicile in West Virginia  
136 shall be allowed the credit against their corporation  
137 net income tax liability as described in section twenty-  
138 four of this article.

139 (4) *Apportionment rules.* —

140 (A) *General Method.* —

141 If a financial organization not having its commercial  
142 domicile in this state is engaging in business both  
143 within and without this state, the portion of its net  
144 income arising from such business, which is derived  
145 from sources within this state, shall be determined by  
146 apportionment in accordance with this subsection. The  
147 apportioned net income shall be determined by mul-  
148 tiplying net income by the special gross receipts factor  
149 as defined in this subsection. Neither the numerator  
150 nor the denominator of the gross receipts factor shall  
151 include receipts from obligations described in para-  
152 graphs (A), (B), (C) and (D), subdivision (1), subsection  
153 (f), section six of this article.

154 (B) *Special gross receipts factor.* — The gross  
155 receipts factor is a fraction, the numerator of which is  
156 the total gross receipts of the taxpayer from sources  
157 within this state during the taxable year and the  
158 denominator of which is the total gross receipts of the  
159 taxpayer wherever earned during the taxable year.

160 *Numerator.* — The numerator of the gross receipts  
161 factor shall include, in addition to items otherwise  
162 includable in the sales factor under section seven of  
163 this article, the following:

164 (i) Receipts from the lease or rental of real or  
165 tangible personal property (whether as the economic  
166 equivalent of an extension of credit or otherwise) if  
167 the property is located in this state;

168 (ii) Interest income and other receipts from assets in  
169 the nature of loans which are secured primarily by  
170 real estate or tangible personal property if such



171 security property is located in the state. In the event  
172 that such security property is also located in one or  
173 more other states, such receipts shall be presumed to  
174 be from sources within this state, subject to rebuttal  
175 based upon factors described in rules to be promul-  
176 gated by the tax commissioner, including the factor  
177 that the proceeds of any such loans were applied and  
178 used by the borrower entirely outside of this state;

179 (iii) Interest income and other receipts from consu-  
180 mer loans which are unsecured or are secured by  
181 intangible property that are made to residents of this  
182 state, whether at a place of business, by traveling loan  
183 officer, by mail, by telephone or other electronic  
184 means or otherwise;

185 (iv) Interest income and other receipts from com-  
186 mercial loans and installment obligations which are  
187 unsecured or are secured by intangible property if and  
188 to the extent that the borrower or debtor is a resident  
189 of or is domiciled in this state: *Provided*, That such  
190 receipts are presumed to be from sources in this state  
191 and such presumption may be overcome by reference  
192 to factors described in rules to be promulgated by the  
193 tax commissioner, including the factor that the pro-  
194 ceeds of any such loans were applied and used by the  
195 borrower entirely outside of this state;

196 (v) Interest income and other receipts from a  
197 financial organization's syndication and participation  
198 in loans, under the rules set forth in items (i) through  
199 (iv) above;

200 (vi) Interest income and other receipts, including  
201 service charges, from financial institution credit card  
202 and travel and entertainment credit card receivables  
203 and credit card holders' fees if the borrower or debtor  
204 is a resident of this state or if the billings for any such  
205 receipts are regularly sent to an address in this state;

206 (vii) Merchant discount income derived from finan-  
207 cial institution credit card holder transactions with a  
208 merchant located in this state. In the case of mer-  
209 chants located within and without this state, only  
210 receipts from merchant discounts attributable to sales

211 made from locations within this state shall be attrib-  
212 uted to this state. It shall be presumed, subject to  
213 rebuttal, that the location of a merchant is the address  
214 shown on the invoice submitted by the merchant to  
215 the taxpayer;

216 (viii) Receipts from the performance of services  
217 which are attributed to this state if:

218 (I) The service receipts are loan-related fees, includ-  
219 ing loan servicing fees, and the borrower resides in  
220 this state, except that, at the taxpayer's election,  
221 receipts from loan-related fees which are either: (a)  
222 "Pooled" or aggregated for collective financial  
223 accounting treatment; or (b) manually written as non-  
224 recurring extraordinary charges to be processed  
225 directly to the general ledger may either be attributed  
226 to a state based upon the borrowers' residences or  
227 upon the ratio that total interest sourced to that state  
228 bears to total interest from all sources;

229 (II) The service receipts are deposit-related fees and  
230 the depositor resides in this state, except that, at the  
231 taxpayer's election, receipts from deposit related fees  
232 which are either: (a) "Pooled" or aggregated for  
233 collective financial accounting treatment; or (b) man-  
234 ually written as non-recurring extraordinary charges  
235 to be processed directly to the general ledger may  
236 either be attributed to a state based upon the deposi-  
237 tors' residences or upon the ratio that total deposits  
238 sourced to that state bears to total deposits from all  
239 sources;

240 (III) The service receipt is a brokerage fee and the  
241 account holder is a resident of this state;

242 (IV) The service receipts are fees related to estate or  
243 trust services and the estate's decedent was a resident  
244 of this state immediately before death, or the grantor  
245 who either funded or established the trust is a resident  
246 of this state; or

247 (V) The service receipt is associated with the perfor-  
248 mance of any other service not identified above and  
249 the service is performed for an individual resident of,

250 or for a corporation or other business domiciled in,  
251 this state and the economic benefit of such service is  
252 received in this state;

253 (ix) Gross receipts from the issuance of travelers  
254 checks and money orders if such checks and money  
255 orders are purchased in this state; and

256 (x) All other receipts not attributed by this rule to  
257 a state in which the taxpayer is taxable shall be  
258 attributed pursuant to the laws of the state of the  
259 taxpayer's commercial domicile.

260 *Denominator.* — The denominator of the gross  
261 receipts factor shall include all of the taxpayer's gross  
262 receipts from transactions of the kind included in the  
263 numerator, but without regard to their source or situs.

264 (c) *Method of filing.* — Financial organizations  
265 subject to apportionment under subsection (b) of this  
266 section shall file only separate tax returns, and may  
267 not file on a consolidated or any other basis: *Provided,*  
268 That financial organizations which are members of an  
269 affiliated group may file on a consolidated basis if all  
270 members of the affiliated group have their commercial  
271 domicile in this state.

272 (d) *Effective date.* — The provisions of this section  
273 shall apply to all taxable years beginning on or after  
274 the first day of January, one thousand nine hundred  
275 ninety-one.

**§11-24-24. Credit for income tax paid to another state.**

1 Effective for taxable years beginning on or after the  
2 first day of January, one thousand nine hundred and  
3 ninety-one, and notwithstanding any provisions of this  
4 code to the contrary, any financial organization, the  
5 business activities of which take place, or are deemed  
6 to take place, entirely within this state, shall be  
7 allowed a credit against the tax imposed by this article  
8 for any taxable year for taxes paid to another state or  
9 political subdivision thereof. That credit shall be equal  
10 in amount to the lesser of:

11 (a) The taxes such financial organization shall

12 actually have paid, which payments were made on or  
13 before the filing date of the annual return required by  
14 this article, to any other state or political subdivision  
15 thereof, and which tax was based upon or measured  
16 by the financial organization's net income and was  
17 paid with respect to the same taxable year; or

18 (b) The amount of such tax the financial organiza-  
19 tion would have paid if the rate of tax imposed by this  
20 article is applied to the tax base determined under the  
21 law of such other state or political subdivision.

22 Any additional payments of such tax to other states,  
23 or to political subdivisions thereof, by a financial  
24 organization described in this section, and any refunds  
25 of such taxes, made or received by such financial  
26 organization with respect to the taxable year, but after  
27 the due date of the annual return required by this  
28 article for the taxable year, including any extensions,  
29 shall likewise be accounted for in the taxable year in  
30 which such additional payment is made or such refund  
31 is received by the financial organization.

## **CHAPTER 31A. BANKS AND BANKING.**

### **ARTICLE 2. DEPARTMENT OF BANKING.**

#### **§31A-2-15. Report by the Commissioner.**

1 On or before the fifteenth day of January, one  
2 thousand nine hundred ninety-two and biennially  
3 thereafter the commissioner shall prepare a report to  
4 be submitted to the governor, the president of the  
5 Senate, the speaker of the House of Delegates and the  
6 commissioner of the tax division. Such report shall  
7 detail the effect on credit availability and cost of credit  
8 to consumers within this state resulting from the  
9 imposition of the business franchise tax provided for  
10 in article twenty-three, chapter eleven of this code and  
11 the corporation net income tax provided for in article  
12 twenty-four, chapter eleven of this code on out-of-state  
13 financial organizations engaging in the transaction of  
14 business that was not taxed prior to the taxable year  
15 beginning the first day of January, one thousand nine  
16 hundred ninety-one.

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

*Homer Seck*  
.....  
Chairman Senate Committee

*Bernest Moore*  
.....  
Chairman House Committee

Originated in the Senate.

In effect from passage.

*Harrell E. McRae*  
.....  
Clerk of the Senate

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

*Keith Foustette*  
.....  
President of the Senate

*R. A. Aubrey*  
.....  
Speaker House of Delegates

The within is *approved* this the *3rd*  
day of *April* ....., 1991.

*Gordon Capen*  
.....  
Governor

PRESENTED TO THE

GOVERNOR

Date 3/28/91

Time 10:50am