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 re-enacted; 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 administration of this article, terms defined in this section shall have the meanings ascribed to them herein unless a different meaning is clearly required by either the context in which the term is used, or by specific definition in this article.

(b) Terms defined. —

1 (1) Business income. — The term “business income” means income arising from transactions and activity in the regular course of the taxpayer’s trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property or the rendering of services in connection therewith constitute integral parts of the taxpayer’s regular trade or business operations.

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

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

(i) The value of all common stock and preferred stock of the taxpayer;
(ii) The amount of paid-in or capital surplus;
(iii) The amount of retained earnings, appropriated and unappropriated; and
(iv) Less the cost of treasury stock.

(B) S Corporations. — In the case of an electing small business corporation, the average of the beginning and ending year balances of the sum of the following entries from Schedule L of Federal Form 1120S, prepared following generally accepted accounting principles and as filed by the taxpayer with the Internal Revenue Service for the taxable year:
(i) The value of all common stock and preferred stock of the taxpayer;
(ii) The amount of paid-in or capital surplus;
(iii) Retained earnings, appropriated and unappropriated;
(iv) The amount of shareholders' undistributed taxable income;
(v) The amount of the accumulated adjustments account;
(vi) The amount of the other adjustments account; and
(vii) Less the cost of treasury stock.

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

(D) Additional items in capital. — The term "capital" for purposes of this article shall include such adjustments thereto as the tax commissioner deems necessary to properly reflect capital and such additional items from the accounts of the taxpayer as the tax commissioner may by regulation prescribe, which fairly represent the net equity of the taxpayer as
defined in accordance with generally accepted accounting principles.

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

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

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

(II) Obligations of this state and any political subdivision of this state;

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

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

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

(3) Commercial domicile. — The term "commercial domicile" means the principal place from which the
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(4) Commissioner or tax commissioner. — The terms "commissioner" or "tax commissioner" are used interchangeably herein and mean the tax commissioner of the state of West Virginia, or his delegate.

(5) Compensation. — The term "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

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

(7) Delegate. — The term "delegate" in the phrase "or his delegate", when used in reference to the tax commissioner, means any officer or employee of the state tax department duly authorized by the tax commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this article or regulations promulgated thereunder.

(8) Doing business. — The term "doing business" means any activity of a corporation or partnership which enjoys the benefits and protection of the government and laws of this state, except the activity of agriculture and farming, which shall mean the production of food, fiber and woodland products (but not timbering activity) by means of cultivation, tillage of the soil and by the conduct of animal, livestock, dairy, apiary, equine or poultry husbandry, horticulture, or any other plant or animal production and all farm practices related, usual or incidental thereto, including the storage, packing, shipping and marketing, but not including any manufacturing, milling or processing of such products by persons other than the
producer thereof.

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

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

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

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

(12) Fiduciary. — The term “fiduciary” means, and includes, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any
(13) **Financial organization.** — The term "financial organization" means:

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

(B) A regulated financial corporation or a subsidiary thereof. As used in this section "regulated financial corporation" means:

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

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

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

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

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

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

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

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

(1) Making, acquiring, selling or servicing loans or 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
corporation” and the corporation which is so owned by the parent is defined to be a “subsidiary corporation”.

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

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

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

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

(21) State. — The term “state” means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States, and any foreign country or political subdivision thereof.

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

(23) Taxable year. — The term “taxable year” means the calendar year, or the fiscal year ending during
such calendar year, upon the basis of which tax liability is computed under this article. “Taxable year” means, in case of a return made for a fractional part of a year (short taxable year) under the provisions of this article, or under regulations promulgated by the tax commissioner, the period for which such return is made.

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

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

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

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

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

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

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

§11-23-5. **Apportionment of tax base.**

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

(b) Property factor. — The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used by it in this state during the taxable year, and the denominator of which is the average value of all real and tangible personal property owned or rented by the taxpayer and used by it during the taxable year, which is reported on Schedule L of Federal Form 1120 (or 1065 for partnerships), plus the average value of all real and tangible personal property leased and used by the taxpayer during the taxable year.

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

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

(2) Any amount payable as additional rent or in lieu of rents, such as interest, taxes, insurance, repairs or any other items which are required to be paid by the terms of the lease or other arrangement, not including amounts paid as service charges, such as utilities,
(d) **Movable property.** — The value of movable tangible personal property used both within and without this state shall be included in the numerator to the extent of its utilization in this state. The extent of such utilization shall be determined by multiplying the original cost of such property by a fraction, the numerator of which is the number of days of physical location of the property in this state during the taxable period, and the denominator of which is the number of days of physical location of the property everywhere during the taxable year. The number of days of physical location of the property may be determined on a statistical basis or by such other reasonable method acceptable to the tax commissioner.

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

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

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

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

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

(1) Any officer of a corporation; or

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

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

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

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

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

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

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

The term "base of operations" is the place of more or less permanent nature from which the employee starts his work and to which he customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of his trade or profession at some other point or points. The term "place from which the service is directed or controlled" refers to the place from which the power to direct or control is exercised by the taxpayer.

(k) Sales factor. — The sales factor is a fraction, the numerator of which is the gross receipts of the taxpayer derived from transactions and activity in the regular course of its trade or business in this state during the taxable year (business income), less returns and allowances. The denominator of the fraction shall be the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business during the taxable year (business income), and reflected in its gross income reported and as appearing on the taxpayer's Federal Form 1120 or 1065, and consisting of those certain pertinent portions of the (gross income) elements set forth: Provided, That if either the numerator or the denominator includes interest or dividends from obligations of the United States government which are exempt from taxation by this state, the amount of such interest and dividends, if any, shall be subtracted from the numerator or denominator in which it is included.

(1) Allocation of sales of tangible personal property. —

(1) Sales of tangible personal property are in this state if:
(i) The property is received in this state by the purchaser, other than the United States government, regardless of the f.o.b. point or other conditions of the sale. In the case of delivery by common carrier or other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered as the place at which such property is received by the purchaser. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by the purchaser, constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by the purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale; or

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

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

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

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

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

(3) The sale constitutes business income to the taxpayer, or the taxpayer is a financial organization not having its commercial domicile in this state, and in either case the sale is a receipt described as attributable to this state in section five-a of this article.
(n) Income-producing activity. — The term "income-producing activity" applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gain or profit. Such activity does not include transactions and activities performed on behalf of the taxpayer, such as those conducted on its behalf by an independent contractor. "Income-producing activity" includes, but is not limited to, the following:

1. The rendering of personal services by employees with utilization of tangible and intangible property by the taxpayer in performing a service;
2. The sale, rental, leasing, licensing or other use of real property;
3. The sale, rental, leasing, licensing or other use of tangible personal property; or
4. The sale, licensing or other use of intangible personal property. The mere holding of intangible personal property is not, in itself, an income-producing activity: Provided, That the conduct of the business of a financial organization shall constitute an income-producing activity.

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

(p) Other methods of allocation. —

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

(A) Separate accounting;

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

(D) The employment of any other method to effectuate an equitable allocation or apportionment of the taxpayer's tax base. Such petition shall be filed no later than the due date of the annual return for the taxable year for which the alternative method is requested, determined without regard to any extension of time for filing such return, and the petition shall include a statement of the petitioner's objections and of such alternative method of allocation or apportionment as it believes to be proper under the circumstances with such detail and proof as the tax commissioner may require.

(2) Burden of proof. — In any proceeding before the tax commissioner or in any court in which employment of one of the methods of allocation or apportionment provided for in subdivision (1) of this subsection is sought, on the ground that the allocation and apportionment provisions of subsection (a) do not fairly represent the extent of the taxpayer's business activities in this state, the burden of proof shall:

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

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

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

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

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

(a) General. — The Legislature hereby finds that the
general formula set forth in section five of this article for apportioning the tax base of corporations and partnerships taxable in this state as well as in another state is inappropriate for use by financial organizations due to the particular characteristics of those organizations and the manner in which their business is conducted. Accordingly, the general formula set forth in section five of this article may not be used to apportion the tax base of such financial organizations which shall use only the apportionment formula and methods set forth in this section.

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

(1) Nexus presumptions and exclusions. — A financial organization is presumed to be regularly engaging in business in this state if during any year it obtains or solicits business with twenty or more persons within this state, or if the sum of the value of its gross receipts attributable to sources in this state equals or exceeds one hundred thousand dollars. However, gross receipts from the following types of property (as well as those contacts with this state reasonably and exclusively required to evaluate and complete the acquisition or disposition of the property, the servicing of the property or the income from it, the collection of income from the property, or the acquisition or liquidation of collateral relating to the property) shall not be a factor in determining whether the owner is engaging in business in this state:

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

(B) An interest in a loan backed security representing ownership or participation in a pool of promissory notes or certificates of interest that provide for payments in relation to payments or reasonable
(C) An interest in a loan or other asset from which the interest is attributed to a consumer loan, a commercial loan or a secured commercial loan, and in which the payment obligations were solicited and entered into by a person that is independent, and not acting on behalf, of the owner;

(D) An interest in the right to service or collect income from a loan or other asset from which interest on the loan is attributed as a loan described in the previous paragraph, and in which the payment obligations were solicited and entered into by a person that is independent, and not acting on behalf, of the owner; and

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

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

(A) "Deposit" means:

(i) The unpaid balance of money or its equivalent received or held by a financial organization in the usual course of business and for which it has given or it is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time or thrift account whether or not advance notice is required to withdraw the credit funds, or which is evidenced by a certificate of deposit, thrift certificate, investment certificate, or certificate of indebtedness, or other similar name, or a check of draft drawn against a deposit account and certified by the financial organization, or a letter of credit or a traveler's check on which the financial organization is primarily liable:

Provided, That without limiting the generality of the term "money or its equivalent", any such account or instrument must be regarded as evidencing the receipt of the equivalent of money when credited or issued in exchange for checks or drafts or for a promissory note upon which the person obtaining any such credit or instrument is primarily or secondarily liable or for a charge against a deposit account or in settlement of
checks, drafts or other instruments forwarded to such
bank for collection;

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

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

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

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

(B) “Sales” means:
For purposes of apportionment, the “sales” of a financial organization shall mean the gross receipts described in the gross receipts factor in this subsection, regardless of their source.

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

(4) Apportionment rules. —

(A) General Method. —

If a financial organization not having its commercial domicile in this state is engaging in business both within and without this state, the portion of its capital attributable to such business, which is derived from sources within this state, shall be determined by apportionment in accordance with this subsection. The apportioned capital shall be determined by multiplying capital by the special gross receipts factor as defined in this subsection. Neither the numerator nor the denominator of the gross receipts factor shall include receipts from obligations described in paragraphs (A), (B), (C) and (D), subdivision (i), subsection (f), section six, article twenty-four of this chapter.

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

Numerator. — The numerator of the gross receipts factor shall include, in addition to items otherwise
inclutable in the sales factor under section five of this article, the following:

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

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

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

(iv) Interest income and other receipts from commercial loans and installment obligations which are unsecured or are secured by intangible property if and to the extent that the borrower or debtor is a resident of or is domiciled in this state: Provided, That such receipts are presumed to be from sources in this state and such presumption may be overcome by reference to factors described in rules to be promulgated by the tax commissioner, including the factor that the proceeds of any such loans were applied and used by the borrower entirely outside of this state;

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

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

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

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

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

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

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

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

(V) The service receipt is associated with the performance of any other service not identified above and the service is performed for an individual resident of, or for a corporation or other business domiciled in, this state and the economic benefit of such service is received in this state;

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

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

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

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

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

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

Effective for taxable years beginning on or after the first day of January, one thousand nine hundred ninety-one.
ninety-one, and notwithstanding any provisions of this code to the contrary, any financial organization, having its commercial domicile in this state shall be allowed a credit against the tax imposed by this article for any taxable year for taxes paid to another state or political subdivision thereof. That credit shall be equal in amount to the lesser of:

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

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

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


(a) Except as provided by subsection (b) of this section, for each taxable year every corporation and partnership that carries on any business activity or owns or maintains property in West Virginia for the taxable year shall file a business activity report with the tax commissioner. The report must be filed on or before the fifteenth day of the fourth month after the end of the corporation or partnership's taxable year. The filing of a report shall not be a factor in determining whether a corporation or partnership is subject to
taxation by this state.

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

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

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

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

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

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

(1) That arose under West Virginia law; or

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

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

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

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

(D) Provides adequate security, including a bond, in
an amount sufficient to cover all tax liabilities, including additions to tax, penalties and interest.

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

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

(2) The presence of employees, agents, representatives or independent contractors in West Virginia, if they are conducting business on behalf of the corporation or partnership, regardless of whether the individual or person is residing or regularly stationed in West Virginia;

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

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

ARTICLE 24. CORPORATION NET INCOME TAX.

§11-24-3a. Specific terms defined.

For purposes of this article:

(1) Business income. — The term “business income” means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property or the rendering of services in connection therewith constitute integral parts of the taxpayer's regular trade or business operations.

(2) Commercial domicile. — The term "commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed: Provided, That the commercial domicile of a financial organization, which is subject to regulation as such, shall be at the place designated as its principal
office with its regulating authority.

(3) Compensation. — The term "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(4) Corporation. — The term "corporation" includes a joint-stock company and any association or other organization which is taxable as a corporation under the federal income tax law.

(5) Delegate. — The term "delegate" in the phrase "or his delegate", when used in reference to the tax commissioner, means any officer or employee of the state tax department duly authorized by the tax commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this article or regulations promulgated thereunder.

(6) Domestic corporation. — The term "domestic corporation" means any corporation organized under the laws of West Virginia and certain corporations organized under the laws of the state of Virginia before the twentieth day of June, one thousand eight hundred sixty-three. Every other corporation is a foreign corporation.

(7) Engaging in business. — The term "engaging in business" or "doing business" means any activity of a corporation which enjoys the benefits and protection of government and laws in this state.

(8) Federal Form 1120. — The term "Federal Form 1120" means the annual federal income tax return of any corporation made pursuant to the United States Internal Revenue Code of 1986, as amended, or in successor provisions of the laws of the United States, in respect to the federal taxable income of a corporation, and filed with the federal Internal Revenue Service. In the case of a corporation that elects to file a federal income tax return as part of an affiliated group, but flies as a separate corporation under this article, then as to such corporation Federal Form 1120
means its pro forma Federal Form 1120.

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

(10) **Financial organization.** — The term "financial organization" means:

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

(B) A regulated financial corporation or a subsidiary thereof. As used in this section "regulated financial corporation" means:

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

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

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

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

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

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

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

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

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

(I) Secured or unsecured consumer loans;

(II) Installment obligations;

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

(IV) Credit card loans;

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

(VI) Loans arising in factoring.

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

(3) Operating a credit card business.

(4) Rendering estate or trust services.

(5) Receiving, maintaining or otherwise handling
deposits.

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

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

(12) Includes and including. — The terms “includes”
and “including” when used in a definition contained
in this article shall not be deemed to exclude other
things otherwise within the meaning of the term being
defined.
(13) Nonbusiness income. — The term “nonbusiness income” means all income other than business income.

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

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

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

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

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

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

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

(21) Tax commissioner. — The term “tax commissioner” means the tax commissioner of the state of West Virginia or his delegate.

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

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

(24) This state. — The term "this state" means the state of West Virginia.

(25) West Virginia taxable income. — The term "West Virginia taxable income" means the taxable income of a corporation as defined by the laws of the United States for federal income tax purposes, adjusted, as provided in section six of this article:

Provided, That in the case of a corporation having income from business activity which is taxable without this state, its "West Virginia taxable income" shall be such portion of its taxable income as so defined and adjusted as is allocated or apportioned to this state under the provisions of sections seven and seven-b of this article.


1. (a) General. — Any taxpayer having income from business activity which is taxable both in this state and in another state shall allocate and apportion its net income as provided in this section. For purposes of this section, the term "net income" means the taxpayer's federal taxable income adjusted as provided in section six.

2. (b) "Taxable in another state" defined. — For purposes of allocation and apportionment of net income under this section, a taxpayer is taxable in another state if:

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

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

3. (c) Business activities entirely within West Virginia. -- If the business activities of a taxpayer take place entirely within this state, the entire net income of
such taxpayer is subject to the tax imposed by this article. The business activities of a taxpayer shall be deemed to have taken place in their entirety within this state if such taxpayer is not "taxable in another state": Provided, That the business activities of a financial organization having its commercial domicile in this state shall be deemed to take place entirely in this state, notwithstanding that such organization may be "taxable in another state": Provided, however, That the income from the business activities of a financial organization not having its commercial domicile in this state shall be apportioned according to the applicable provisions of this article.

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

(1) Net rents and royalties. —

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

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

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

(ii) In their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not 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:
(i) If and to the extent that the patent or copyright is utilized by the payer in this state, or
(ii) If and to the extent that the patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(B) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

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

(5) Corporate partner's distributive share. —

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

(B) A corporate partner's distributive share of income, gain, loss, deduction or credit of a partnership shall be modified as provided in section six of this article for each partnership. Such distributive share shall then be allocated and apportioned as provided in section seven of this article, using the corporation's proportionate share of the partnership's property, payroll and sales factors. The sum of that portion of the distributive share allocated and apportioned to this state shall then be treated as distributive share allocated to this state; and that portion of distributive
share allocated or apportioned outside this state shall be treated as distributive share allocated outside this state, unless the taxpayer requests or the tax commissioner, under subsection (h) of this section requires that such distributive share be treated differently.

(e) Business activities partially within and partially without this state; apportionment of business income. — All net income, after deducting those items specifically allocated under subsection (d), shall be apportioned to this state by multiplying such net income by a fraction, the numerator of which is the property factor plus the payroll factor plus two times the sales factor, and the denominator of which is four, reduced by the number of factors, if any, having no denominator.

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

(2) Value of property. — Property owned by the taxpayer shall be valued at its original cost, adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc.: Provided, That where records of original cost are unavailable or cannot be obtained without unreasonable expense, property shall be valued at original cost as determined under regulations of the tax commissioner. Property rented by the taxpayer from others shall be valued at eight times the annual rental rate. The term “net annual rental rate” is the annual rental paid, directly or indirectly, by the taxpayer, or for its benefit, in money or other consideration for the use of property and includes:
(A) Any amount payable for the use of real or tangible personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise.

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

(3) Movable property. — The value of movable tangible personal property used both within and without this state shall be included in the numerator to the extent of its utilization in this state. The extent of such utilization shall be determined by multiplying the original cost of such property by a fraction, the numerator of which is the number of days of physical location of the property in this state during the taxable period, and the denominator of which is the number of days of physical location of the property everywhere during the taxable year. The number of days of physical location of the property may be determined on a statistical basis or by such other reasonable method acceptable to the tax commissioner.

(4) Leasehold improvements. — Leasehold improvements shall, for purposes of the property factor, be treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Leasehold improvements shall be included in the property factor at their original cost.

(5) Average value of property. — The average value of property shall be determined by averaging the values at the beginning and ending of the taxable year. Provided, That the tax commissioner may require the averaging of monthly values during the taxable year if
substantial fluctuations in the values of the property exist during the taxable year, or where property is acquired after the beginning of the taxable year, or is disposed of, or whose rental contract ceases, before the end of the taxable year.

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

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

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

(A) Any officer of a corporation; or

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

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

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

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

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

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

The term "base of operations" is the place of more or less permanent nature from which the employee starts his work and to which he customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of his trade or profession at some other point or points. The term "place from which the service is directed or controlled" refers to the place from which the power to direct or control is exercised by the taxpayer.

(10) Sales factor. — The sales factor is a fraction, the numerator of which is the gross receipts of the taxpayer derived from transactions and activity in the regular course of its trade or business in this state during the taxable year (business income), less returns and allowances. The denominator of the fraction shall be the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business during the taxable year (business income), and reflected in its gross income reported and consisting of those certain pertinent portions of the
(gross income) elements set forth: Provided, That if
either the numerator or the denominator includes
interest or dividends from obligations of the United
States government which are exempt from taxation by
this state, the amount of such interest and dividends,
if any, shall be subtracted from the numerator or
denominator in which it is included.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) The sale, licensing or other use of intangible
personal property.

The mere holding of intangible personal property is not, in itself, an income-producing activity: Provided, That the conduct of the business of a financial organization shall constitute an income-producing activity.

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

(h) Other methods of allocation and apportionment. —

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

(A) Separate accounting;

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

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

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

(2) Alternative method for public utilities. — If the taxpayer is a public utility and if the allocation and apportionment provisions of subsections (d) and (e) do
not fairly represent the taxpayer's business activities in this state, the taxpayer may petition for, or the tax commissioner may require, as an alternative to the other methods provided for in paragraph (1) of this subsection, the allocation and apportionment of the taxpayer's net income in accordance with any system of accounts prescribed by the public service commission of this state pursuant to the provisions of section eight, article two, chapter twenty-four of this code, provided the allocation and apportionment provisions of such system of accounts fairly represent the extent of the taxpayer's business activities in this state for the purposes of the tax imposed by this article.

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

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

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

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

(a) **General.** — The Legislature hereby finds that the general formula set forth in section seven of this article for apportioning the business income of corporations taxable in this state as well as in another state is inappropriate for use by financial organizations due to the particular characteristics of those organizations and the manner in which their business is conducted. Accordingly, the general formula set forth in section seven of this article may not be used to apportion the business income of such financial organizations, which shall use only the apportionment formula and methods set forth in this section.
(b) **Financial organizations with business activities partially within and partially without this state.** — A financial organization not having its commercial domicile in this state shall apportion the business income component of its federal taxable income (as adjusted by section six of this article) to this state as provided in this subsection if it regularly engages in business in this state.

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

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

(B) An interest in a loan backed security representing ownership or participation in a pool of promissory notes or certificates of interest that provide for payments in relation to payments or reasonable projections of payments on the notes or certificate;

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

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

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

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

(A) "Deposit" means:

(i) The unpaid balance of money or its equivalent
received or held by a financial organization in the
usual course of business and for which it has given or
it is obligated to give credit, either conditionally or
unconditionally, to a commercial, checking, savings,
time or thrift account whether or not advance notice
is required to withdraw the credit funds, or which is
evidenced by a certificate of deposit, thrift certificate,
investment certificate or certificate of indebtedness, or
other similar name, or a check or draft drawn against
a deposit account and certified by the financial orga-
nization, or a letter of credit or a traveler's check on
which the financial organization is primarily liable:
Provided, That without limiting the generality of the
term "money or its equivalent", any such account or
instrument must be regarded as evidencing the receipt
of the equivalent of money when credited or issued in
exchange for checks or drafts or for a promissory note
upon which the person obtaining any such credit or
instrument is primarily or secondarily liable or for a
charge against a deposit account or in settlement of
checks, drafts or other instruments forwarded to such
bank for collection;

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

(iii) Money received or held by a financial organiza-
tion or the credit given for money or its equivalent
received or held by a financial organization in the
usual course of business for a special or specific purpose, regardless of the legal relationship thereby established, including, without being limited to, escrow funds, funds held as security for an obligation due the financial organization or other (including funds held as dealers reserves) or for securities loaned by the financial organization, funds deposited by a debtor to meet maturing obligations, funds deposited as advance payment on subscriptions to United States Government securities, funds held for distribution or purchase of securities, funds held to meet its acceptances or letters of credit, and withheld taxes: Provided, That there shall not be included funds which are received by the financial organization for immediate application to the reduction of an indebtedness to the receiving financial organization, or under condition that the receipt thereof immediately reduces or extinguishes such an indebtedness;

(iv) Outstanding drafts (including advice or authorization to charge a financial organization's balance in another such organization), cashier's checks, money orders or other officer's checks issued in the usual course of business for any purpose, but not including those issued in payment for services, dividends or purchases or other costs or expenses of the financial organization itself; and

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

(B) "Sales" means:

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

(3) Commercial domicile - apportionment or credit. — Financial organizations which do not have their commercial domicile in West Virginia shall use the apportionment rules set forth in this section. Financial organizations with their commercial domicile in West
Virginia may not apportion their business income, but shall report all net income to West Virginia without apportionment: Provided, That any financial organizations with their commercial domicile in West Virginia shall be allowed the credit against their corporation net income tax liability as described in section twenty-four of this article.

(4) Apportionment rules. —

(A) General Method. —

If a financial organization not having its commercial domicile in this state is engaging in business both within and without this state, the portion of its net income arising from such business, which is derived from sources within this state, shall be determined by apportionment in accordance with this subsection. The apportioned net income shall be determined by multiplying net income by the special gross receipts factor as defined in this subsection. Neither the numerator nor the denominator of the gross receipts factor shall include receipts from obligations described in paragraphs (A), (B), (C) and (D), subdivision (1), subsection (f), section six of this article.

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

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

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

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

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

(iv) Interest income and other receipts from commercial loans and installment obligations which are unsecured or are secured by intangible property if and to the extent that the borrower or debtor is a resident of or is domiciled in this state: Provided, That such receipts are presumed to be from sources in this state and such presumption may be overcome by reference to factors described in rules to be promulgated by the tax commissioner, including the factor that the proceeds of any such loans were applied and used by the borrower entirely outside of this state;

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

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

(vii) Merchant discount income derived from financial institution credit card holder transactions with a merchant located in this state. In the case of merchants located within and without this state, only receipts from merchant discounts attributable to sales
made from locations within this state shall be attributed to this state. It shall be presumed, subject to rebuttal, that the location of a merchant is the address shown on the invoice submitted by the merchant to the taxpayer;

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

(I) The service receipts are loan-related fees, including loan servicing fees, and the borrower resides in this state, except that, at the taxpayer’s election, receipts from loan-related fees which are either: (a) “Pooled” or aggregated for collective financial accounting treatment; or (b) manually written as non-recurring extraordinary charges to be processed directly to the general ledger may either be attributed to a state based upon the borrowers’ residences or upon the ratio that total interest sourced to that state bears to total interest from all sources;

(II) The service receipts are deposit-related fees and the depositor resides in this state, except that, at the taxpayer’s election, receipts from deposit related fees which are either: (a) “Pooled” or aggregated for collective financial accounting treatment; or (b) manually written as non-recurring extraordinary charges to be processed directly to the general ledger may either be attributed to a state based upon the depositors’ residences or upon the ratio that total deposits sourced to that state bears to total deposits from all sources;

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

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

(V) The service receipt is associated with the performance of any other service not identified above and the service is performed for an individual resident of,
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or for a corporation or other business domiciled in, this state and the economic benefit of such service is received in this state;

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

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

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

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

Effective date. — The provisions of this section shall apply to all taxable years beginning on or after the first day of January, one thousand nine hundred ninety-one.

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

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

(a) The taxes such financial organization shall
actually have paid, which payments were made on or
before the filing date of the annual return required by
this article, to any other state or political subdivision
thereof, and which tax was based upon or measured
by the financial organization’s net income and was
paid with respect to the same taxable year; or
(b) The amount of such tax the financial organiza-
tion would have paid if the rate of tax imposed by this
article is applied to the tax base determined under the
law of such other state or political subdivision.

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

CHAPTER 31A. BANKS AND BANKING.

ARTICLE 2. DEPARTMENT OF BANKING.


On or before the fifteenth day of January, one
thousand nine hundred ninety-two and biennially
thereafter the commissioner shall prepare a report to
be submitted to the governor, the president of the
Senate, the speaker of the House of Delegates and the
commissioner of the tax division. Such report shall
detail the effect on credit availability and cost of credit
to consumers within this state resulting from the
imposition of the business franchise tax provided for
in article twenty-three, chapter eleven of this code and
the corporation net income tax provided for in article
twenty-four, chapter eleven of this code on out-of-state
financial organizations engaging in the transaction of
business that was not taxed prior to the taxable year
beginning the first day of January, one thousand nine
hundred ninety-one.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

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

Governor