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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1996

ENROLLED

SENATE BILL NO. 129

(By Senator Craigo, et al)

PASSED February 22, 1996
In Effect from Passage

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Senate Bill No. 129

(BY SENATORS CRAIGO, PLYMALE AND OLIVERIO)

[Passed February 22, 1996; in effect from passage.]

AN ACT to amend and reenact sections five-a, nine and twenty-seven, article twenty-three, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article by adding thereto a new section, designated section nine-a; to amend and reenact sections seven-b, thirteen-a and twenty-four, article twenty-four of said chapter; and to further amend said article by adding thereto a new section, designated section thirty-eight, all relating generally to how financial organizations and other corporations determine tax liability, file returns and pay business franchise and corporation net income taxes; and specifying effective dates.

Be it enacted by the Legislature of West Virginia:

That sections five-a, nine and twenty-seven, article twenty-

three, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said article be further amended by adding thereto a new section, designated section nine-a; that sections seven-b, thirteen-a and twenty-four, article twenty-four of said chapter be amended and reenacted; and that said article be further amended by adding thereto a new section, designated section thirty-eight, all to read as follows:

ARTICLE 23. BUSINESS FRANCHISE TAX.

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

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

13 (b) *West Virginia financial organizations taxable in*
14 *another state.* — A financial organization that has its
15 commercial domicile in this state and which is taxable in
16 another state may not apportion its tax base as provided
17 in section five of this article, but shall allocate all of its
18 tax base to West Virginia without apportionment:
19 *Provided,* That such financial organization shall be
20 allowed as a credit against its tax liability under this
21 article the credit described in section twenty-seven of
22 this article.

23 (c) *Out-of-state financial organizations with business*
24 *activities in this state.* — A financial organization that
25 does not have its commercial domicile in this state and
26 which regularly engages in business in this state shall

27 apportion its tax base to this state by multiplying it by
28 the special gross receipts factor calculated as provided
29 in subsection (f) of this section. The product of this
30 multiplication is the portion of its tax base that is
31 attributable to business activity in this state.

32 (d) *Engaging in business — nexus presumptions and*
33 *exclusions.* — A financial organization that has its
34 commercial domicile in another state is presumed to be
35 regularly engaging in business in this state if during any
36 year it obtains or solicits business with twenty or more
37 persons within this state, or if the sum of the value of its
38 gross receipts attributable to sources in this state equals
39 or exceeds one hundred thousand dollars. However,
40 gross receipts from the following types of property (as
41 well as those contacts with this state reasonably and
42 exclusively required to evaluate and complete the
43 acquisition or disposition of the property, the servicing
44 of the property or the income from it, the collection of
45 income from the property, or the acquisition or liquida-
46 tion of collateral relating to the property) shall not be a
47 factor in determining whether the owner is engaging in
48 business in this state:

49 (1) An interest in a real estate mortgage investment
50 conduit, a real estate investment trust or a regulated
51 investment company;

52 (2) An interest in a loan backed security representing
53 ownership or participation in a pool of promissory notes
54 or certificates of interest that provide for payments in
55 relation to payments or reasonable projections of pay-
56 ments on the notes or certificates;

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

63 (4) An interest in the right to service or collect income

64 from a loan or other asset from which interest on the
65 loan is attributed as a loan described in the previous
66 paragraph, and in which the payment obligations were
67 solicited and entered into by a person that is independ-
68 ent, and not acting on behalf, of the owner; and

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

71 (e) *Definitions*. — For purposes of this section:

72 (1) “Commercial domicile”. See section three of this
73 article.

74 (2) “Deposit” means: (A) The unpaid balance of money
75 or its equivalent received or held by a financial organi-
76 zation in the usual course of business and for which it
77 has given or it is obligated to give credit, either condi-
78 tionally or unconditionally, to a commercial checking,
79 savings, time or thrift account whether or not advance
80 notice is required to withdraw the credit funds, or which
81 is evidenced by a certificate of deposit, thrift certificate,
82 investment certificate or certificate of indebtedness, or
83 other similar name, or a check or draft drawn against a
84 deposit account and certified by the financial organiza-
85 tion, or a letter of credit or a traveler’s check on which
86 the financial organization is primarily liable: *Provided*,
87 That without limiting the generality of the term “money
88 or its equivalent”, any such account or instrument must
89 be regarded as evidencing the receipt of the equivalent
90 of money when credited or issued in exchange for checks
91 or drafts or for a promissory note upon which the person
92 obtaining any such credit or instrument is primarily or
93 secondarily liable or for a charge against a deposit
94 account or in settlement of checks, drafts or other
95 instruments forwarded to such bank for collection;

96 (B) Trust funds received or held by such financial
97 organization, whether held in the trust department or
98 held or deposited in any other department of such
99 financial organization;

100 (C) Money received or held by a financial organization

101 or the credit given for money or its equivalent received
102 or held by a financial organization in the usual course of
103 business for a special or specific purpose, regardless of
104 the legal relationship thereby established, including,
105 without being limited to, escrow funds, funds held as
106 security for an obligation due the financial organization
107 or other (including funds held as dealers' reserves) or for
108 securities loaned by the financial organization, funds
109 deposited by a debtor to meet maturing obligations,
110 funds deposited as advance payment on subscriptions to
111 United States government securities, funds held for
112 distribution or purchase of securities, funds held to meet
113 its acceptances or letters of credit and withheld taxes:
114 *Provided*, That there shall not be included funds which
115 are received by the financial organization for immediate
116 application to the reduction of an indebtedness to the
117 receiving financial organization, or under condition that
118 the receipt thereof immediately reduces or extinguishes
119 such an indebtedness;

120 (D) Outstanding drafts (including advice or authoriza-
121 tion to charge a financial organization's balance in
122 another such organization), cashier's checks, money
123 orders or other officer's checks issued in the usual course
124 of business for any purpose, but not including those
125 issued in payment for services, dividends or purchases or
126 other costs or expenses of the financial organization
127 itself; and

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

132 (3) "Financial organization" means a financial organi-
133 zation as defined in subdivision (13), subsection (b),
134 section three of this article, as well as a partnership
135 which derives more than fifty percent of its gross busi-
136 ness income from one or more of the activities enumer-
137 ated in subparagraphs (1) through (6), paragraph (C) of
138 said subdivision.

139 (4) "Sales" means: For purposes of apportionment
140 under this section, the gross receipts of a financial
141 organization included in the gross receipts factor de-
142 scribed in subsection (f) of this section, regardless of
143 their source.

144 (f) *Special gross receipts factor.* — The gross receipts
145 factor is a fraction, the numerator of which is the total
146 gross receipts of the taxpayer from sources within this
147 state during the taxable year and the denominator of
148 which is the total gross receipts of the taxpayer wherever
149 earned during the taxable year: *Provided*, That neither
150 the numerator nor the denominator of the gross receipts
151 factor shall include receipts from obligations described
152 in paragraphs (A), (B), (C) and (D), subdivision (1),
153 subsection (f), section six, article twenty-four of this
154 chapter.

155 (1) *Numerator.* — The numerator of the gross receipts
156 factor shall include, in addition to items otherwise
157 includable in the sales factor under section five of this
158 article, the following:

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

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

174 (C) Interest income and other receipts from consumer
175 loans which are unsecured or are secured by intangible

176 property that are made to residents of this state, whether
177 at a place of business, by traveling loan officer, by mail,
178 by telephone or other electronic means or otherwise;

179 (D) Interest income and other receipts from commer-
180 cial loans and installment obligations which are unse-
181 cured or are secured by intangible property if and to the
182 extent that the borrower or debtor is a resident of or is
183 domiciled in this state: *Provided*, That such receipts are
184 presumed to be from sources in this state and such
185 presumption may be overcome by reference to factors
186 described in rules to be promulgated by the tax commis-
187 sioner, including the factor that the proceeds of any such
188 loans were applied and used by the borrower entirely
189 outside of this state;

190 (E) Interest income and other receipts from a financial
191 organization's syndication and participation in loans,
192 under the rules set forth in (A) through (D), above;

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

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

208 (H) Gross receipts from the performance of services are
209 attributed to this state if:

210 (i) The service receipts are loan-related fees, including
211 loan servicing fees, and the borrower resides in this
212 state, except that, at the taxpayer's election, receipts

213 from loan-related fees which are either: (I) "Pooled" or
214 aggregated for collective financial accounting treatment;
215 or (II) manually written as nonrecurring extraordinary
216 charges to be processed directly to the general ledger
217 may either be attributed to a state based upon the
218 borrowers' residences or upon the ratio that total inter-
219 est sourced to that state bears to total interest from all
220 sources;

221 (ii) The service receipts are deposit-related fees and the
222 depositor resides in this state, except that, at the tax-
223 payer's election, receipts from deposit-related fees which
224 are either: (I) "Pooled" or aggregated for collective
225 financial accounting treatment; or (II) manually written
226 as nonrecurring extraordinary charges to be processed
227 directly to the general ledger may either be attributed to
228 a state based upon the depositors' residences or upon the
229 ratio that total deposits sourced to that state bears to
230 total deposits from all sources;

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

233 (iv) The service receipts are fees related to estate or
234 trust services and the state's decedent was a resident of
235 this state immediately before death, or the grantor who
236 either funded or established the trust is a resident of this
237 state; or

238 (v) The service receipt is associated with the perfor-
239 mance of any other service not identified above and the
240 service is performed for an individual resident of, or for
241 a corporation or other business domiciled in, this state
242 and the economic benefit of such service is received in
243 this state;

244 (I) Gross receipts from the issuance of travelers' checks
245 and money orders if such checks and money orders are
246 purchased in this state; and

247 (J) All other receipts not attributed by this rule to a
248 state in which the taxpayer is taxable shall be attributed
249 pursuant to the laws of the state of the taxpayer's

250 commercial domicile.

251 (2) *Denominator.* — The denominator of the gross
252 receipts factor shall include all of the taxpayer's gross
253 receipts from transactions of the kind included in the
254 numerator, but without regard to their source or situs.

255 (g) *Effective date.* — The provisions of this section
256 enacted in chapter one hundred sixty-seven, acts of the
257 Legislature, one thousand nine hundred ninety-one, shall
258 apply to all taxable years beginning on or after the first
259 day of January, one thousand nine hundred ninety-one.
260 The amendments to this section, enacted in the year one
261 thousand nine hundred ninety-six, shall apply to taxable
262 years beginning after the thirty-first day of December,
263 one thousand nine hundred ninety-five.

§11-23-9. Annual returns.

1 (a) *In general.* — Every person subject to the tax
2 imposed by this article shall make and file an annual
3 return for its taxable year with the tax commissioner on
4 or before:

5 (1) The fifteenth day of the third month of the next
6 succeeding taxable year if the person is a corporation; or

7 (2) The fifteenth day of the fourth month of the next
8 succeeding taxable year if the corporation is a partner-
9 ship.

10 The annual return shall include such information as
11 the tax commissioner may require for determining the
12 amount of taxes due under this article for the taxable
13 year.

14 (b) *Special rule for tax exempt organizations with*
15 *unrelated business taxable income.* — Notwithstanding
16 the provisions of subsection (a) of this section, when a
17 business franchise tax return is required from an organi-
18 zation generally exempt from tax under subsection (b),
19 section seven of this article, which has unrelated busi-
20 ness taxable income, the annual return shall be filed on
21 or before the fifteenth day of the fifth month following

22 the close of the taxable year.

23 (c) *Effective date.* — The amendments to this section,
24 made in the year one thousand nine hundred ninety-six,
25 shall apply to tax returns that become due for taxable
26 years beginning on or after the first day of that year.

§11-23-9a. Method of filing for business taxes.

1 (a) *Privilege to file consolidated return.* — An affiliated
2 group of corporations (as defined for purposes of filing
3 a consolidated federal income tax return) shall, subject
4 to the provisions of this section and in accordance with
5 any regulations prescribed by the tax commissioner,
6 have the privilege of filing a consolidated return with
7 respect to the tax imposed by this article for the taxable
8 year in lieu of filing separate returns. The making of a
9 consolidated return shall be upon the condition that all
10 corporations which at any time during the taxable year
11 have been members of the affiliated group are included
12 in such return and consent to the filing of such return.
13 The filing of a consolidated return shall be considered as
14 such consent. When a corporation is a member of an
15 affiliated group for a fractional part of the year, the
16 consolidated return shall include the tax base of such
17 corporation for that part of the year during which it is a
18 member of the affiliated group.

19 (b) *Election binding.* — If an affiliated group of corpo-
20 rations elects to file a consolidated return under this
21 article, such election once made shall not be revoked for
22 any subsequent taxable year without the written ap-
23 proval of the tax commissioner consenting to the revoca-
24 tion.

25 (c) *Consolidated return — financial organizations.* —
26 An affiliated group that includes one or more financial
27 organizations may elect under this section to file a
28 consolidated return when that affiliated group complies
29 with all of the following rules:

30 (1) The affiliated group of which the financial organi-

31 zation is a member must file a federal consolidated
32 income tax return for the taxable year;

33 (2) All members of the affiliated group included in the
34 federal consolidated return must consent to being
35 included in the consolidated return filed under this
36 article. The filing of a consolidated return under this
37 article is conclusive proof of such consent;

38 (3) The taxable capital of the affiliated group shall be
39 the sum of:

40 (A) The pro forma West Virginia taxable capital of all
41 financial organizations having their commercial domicile
42 in this state that are included in the federal consolidated
43 return, as shown on a combined pro forma West Virginia
44 return prepared for such financial organizations; plus

45 (B) The pro forma West Virginia taxable capital of all
46 financial organizations not having their commercial
47 domicile in this state that are included in the federal
48 consolidated return, as shown on a combined pro forma
49 West Virginia return prepared for such financial organi-
50 zations; plus

51 (C) The pro forma West Virginia taxable capital of all
52 other members included in the federal consolidated
53 income tax return, as shown on a combined pro forma
54 West Virginia return prepared for all such nonfinancial
55 organization members, except that the capital, appor-
56 tionments factors and other items considered when
57 determining tax liability shall not be included in the pro
58 forma return prepared under this paragraph for a
59 member that is totally exempt from tax under section
60 seven of this article, or for a member that is subject to a
61 different special industry apportionment rule provided
62 for in this article. When a different special industry
63 apportionment rule applies, the taxable capital of a
64 member(s) subject to that special industry appor-
65 tionment rule shall be determined on a separate pro forma
66 West Virginia return for the member(s) subject to that
67 special industry rule and the taxable capital so deter-

68 mined shall be included in the consolidated return;

69 (4) The West Virginia consolidated return is prepared
70 in accordance with regulations of the tax commissioner
71 promulgated as provided in article three, chapter
72 twenty-nine-a of this code; and

73 (5) The filing of a consolidated return does not distort
74 the taxable capital of the affiliated group. In any
75 proceeding, the burden of proof that the taxpayer's
76 method of filing does not distort taxable capital under
77 this article shall be upon the taxpayer.

78 (d) *Combined return.* — A combined return may be
79 filed under this article by a unitary group, including a
80 unitary group that includes one or more financial
81 organizations, only pursuant to the prior written ap-
82 proval of the tax commissioner. A request for permis-
83 sion to file a combined return must be filed on or before
84 the statutory due date of the return, determined without
85 inclusion of any extension of time to file the return.
86 Permission to file a combined return may be granted by
87 the tax commissioner only when taxpayer submits
88 evidence that conclusively establishes that failure to
89 allow the filing of a combined return will result in an
90 unconstitutional distortion of the measure of tax under
91 this article. When permission to file a combined return
92 is granted, combined filing will be allowed for the year(s)
93 stated in the tax commissioner's letter. The combined
94 return must be filed in accordance with regulations of
95 the tax commissioner promulgated in accordance with
96 article three, chapter twenty-nine-a of this code.

97 (e) *Method of filing under this article deemed control-*
98 *ling for purposes of other business taxes articles.* — The
99 taxpayer shall file on the same basis under article
100 twenty-four of this chapter as such taxpayer files under
101 this article for the taxable year.

102 (f) *Regulations.* — The tax commissioner shall pre-
103 scribe such regulations as he may deem necessary in
104 order that the tax liability of any affiliated group of

105 corporations filing a consolidated return, or of any
106 unitary group of corporations filing a combined return,
107 and of each corporation in an affiliated or unitary group,
108 both during and after the period of affiliation, may be
109 returned, determined, computed, assessed, collected and
110 adjusted, in such manner as the tax commissioner deems
111 necessary to clearly reflect tax liability under this article
112 and the factors necessary for the determination of such
113 liability, and in order to prevent avoidance of such tax
114 liability.

115 (g) *Computation and payment of tax.* — In any case in
116 which a consolidated or combined return is filed, or
117 required to be filed, the tax due under this article from
118 the affiliated or unitary group shall be determined,
119 computed, assessed, collected and adjusted in accor-
120 dance with regulations prescribed by the tax commis-
121 sioner, in effect on the last day prescribed by section
122 nine of this article for the filing of such return, and such
123 affiliated or unitary group, as the case may be, shall be
124 treated as the taxpayer. However, when any member of
125 an affiliated or unitary group that files a consolidated or
126 combined return under this article is allowed to claim
127 credit against its tax liability under this article for
128 payment of any other tax, the amount of credit allowed
129 may not exceed that member's proportionate share of the
130 affiliated or unitary group's precredit tax liability under
131 this article, as shown on its pro forma return.

132 (h) *Consolidated or combined return may be required.*
133 — If any affiliated group of corporations has not elected
134 to file a consolidated return, or if any unitary group of
135 corporations has not applied for permission to file a
136 combined return, the tax commissioner may require such
137 corporations to make a consolidated or combined return,
138 as the case may be, in order to clearly reflect taxable
139 capital of such corporations.

140 (i) *Effective date.* — This section shall apply to taxable
141 years beginning on or after the first day of January, one
142 thousand nine hundred ninety-six, except that financial

143 organizations that are part of an affiliated group may
144 elect, after the effective date of this act of the Legisla-
145 ture, to file a consolidated return prepared in accordance
146 with the provisions of this section and subject to appli-
147 cable statutes of limitation, for taxable years beginning
148 on or after the first day of January, one thousand nine
149 hundred ninety-one, but before the first day of January,
150 one thousand nine hundred ninety-six, notwithstanding
151 provisions then in effect prohibiting out-of-state finan-
152 cial organizations from filing consolidated returns for
153 those years: *Provided*, That when the statute of limita-
154 tions on filing an amended return for any of those years
155 expires before the first day of July, one thousand nine
156 hundred ninety-six, the consolidated return for such
157 year, if filed, must be filed by said first day of July.

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

1 (a) Effective for taxable years beginning on or after the
2 first day of January, one thousand nine hundred ninety-
3 one, and notwithstanding any provisions of this code to
4 the contrary, any financial organization having its
5 commercial domicile in this state shall be allowed a
6 credit against the tax imposed by this article for any
7 taxable year for taxes paid to another state. That credit
8 shall be equal in amount to the lessor of:

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

15 (2) The portion of the tax actually paid that the finan-
16 cial organization would have paid if the rate of tax
17 imposed by this article is applied to the tax base deter-
18 mined under the law of such other state.

19 (b) Any additional payments of such tax to other states,
20 or to political subdivisions thereof, by a financial
21 organization described in this section, and any refunds

22 of such taxes, made or received by such financial organi-
23 zation with respect to the taxable year, but after the due
24 date of the annual return required by this article for the
25 taxable year, including any extensions, shall likewise be
26 accounted for in the taxable year in which such addi-
27 tional payment is made or such refund is received by the
28 financial organization.

ARTICLE 24. CORPORATION NET INCOME TAX.

**§11-24-7b. Special apportionment rules — Financial organi-
zations.**

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

13 (b) *West Virginia financial organizations taxable in*
14 *another state.* — The West Virginia taxable income of a
15 financial organization that has its commercial domicile
16 in this state and which is taxable in another state shall
17 be the sum of: (1) The nonbusiness income component of
18 its adjusted federal taxable income for the taxable year
19 which is allocated to this state as provided in subsection
20 (d), section seven of this article; plus (2) the total amount
21 of the business income component of its adjusted federal
22 taxable income for the taxable year, without apportion-
23 ment, regardless of where such business income was
24 derived: *Provided*, That such financial organization
25 shall be allowed as a credit against its tax liability under
26 this article the credit described in section twenty-four of
27 this article.

28 (c) *Out-of-state financial organizations with business*
29 *activities in this state.* — The West Virginia taxable
30 income of a financial organization that does not have its
31 commercial domicile in this state but which regularly
32 engages in business in this state shall be the sum of: (1)
33 The nonbusiness income component of its adjusted
34 federal taxable income for the taxable year which is
35 allocated to this state as provided in subsection (d),
36 section seven of this article; plus (2) the business income
37 component of its adjusted federal taxable income for the
38 taxable year which is apportioned to this state as pro-
39 vided in this section.

40 (d) *Engaging in business — nexus presumptions and*
41 *exclusions.* — A financial organization that has its
42 commercial domicile in another state is presumed to be
43 regularly engaging in business in this state if during any
44 year it obtains or solicits business with twenty or more
45 persons within this state, or if the sum of the value of its
46 gross receipts attributable to sources in this state equals
47 or exceeds one hundred thousand dollars. However,
48 gross receipts from the following types of property (as
49 well as those contacts with this state reasonably and
50 exclusively required to evaluate and complete the
51 acquisition or disposition of the property, the servicing
52 of the property or the income from it, the collection of
53 income from the property, or the acquisition or liquida-
54 tion of collateral relating to the property) shall not be a
55 factor in determining whether the owner is engaging in
56 business in this state:

57 (1) An interest in a real estate mortgage investment
58 conduit, a real estate investment trust or a regulated
59 investment company;

60 (2) An interest in a loan backed security representing
61 ownership or participation in a pool of promissory notes
62 or certificates of interest that provide for payments in
63 relation to payments or reasonable projections of pay-
64 ments on the notes or certificates;

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

71 (4) An interest in the right to service or collect income
72 from a loan or other asset from which interest on the
73 loan is attributed as a loan described in the previous
74 paragraph, and in which the payment obligations were
75 solicited and entered into by a person that is independ-
76 ent, and not acting on behalf, of the owner; and

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

79 (e) *Definitions.* — For purposes of this section:

80 (1) “Commercial domicile”. See section three-a of this
81 article;

82 (2) “Deposit” means: (A) The unpaid balance of money
83 or its equivalent received or held by a financial organi-
84 zation in the usual course of business and for which it
85 has given or it is obligated to give credit, either condi-
86 tionally or unconditionally, to a commercial checking,
87 savings, time or thrift account whether or not advance
88 notice is required to withdraw the credit funds, or which
89 is evidenced by a certificate of deposit, thrift certificate,
90 investment certificate or certificate of indebtedness, or
91 other similar name, or a check or draft drawn against a
92 deposit account and certified by the financial organiza-
93 tion, or a letter of credit or a traveler’s check on which
94 the financial organization is primarily liable: *Provided,*
95 That without limiting the generality of the term “money
96 or its equivalent”, any such account or instrument must
97 be regarded as evidencing the receipt of the equivalent
98 of money when credited or issued in exchange for checks
99 or drafts or for a promissory note upon which the person
100 obtaining any such credit or instrument is primarily or
101 secondarily liable or for a charge against a deposit

102 account or in settlement of checks, drafts or other
103 instruments forwarded to such bank for collection;

104 (B) Trust funds received or held by such financial
105 organization, whether held in the trust department or
106 held or deposited in any other department of such
107 financial organization;

108 (C) Money received or held by a financial organization
109 or the credit given for money or its equivalent received
110 or held by a financial organization in the usual course of
111 business for a special or specific purpose, regardless of
112 the legal relationship thereby established, including,
113 without being limited to, escrow funds, funds held as
114 security for an obligation due the financial organization
115 or other (including funds held as dealers' reserves) or for
116 securities loaned by the financial organization, funds
117 deposited by a debtor to meet maturing obligations,
118 funds deposited as advance payment on subscriptions to
119 United States government securities, funds held for
120 distribution or purchase of securities, funds held to meet
121 its acceptances or letters of credit, and withheld taxes:
122 *Provided*, That there shall not be included funds which
123 are received by the financial organization for immediate
124 application to the reduction of an indebtedness to the
125 receiving financial organization, or under condition that
126 the receipt thereof immediately reduces or extinguishes
127 such an indebtedness;

128 (D) Outstanding drafts (including advice or authoriza-
129 tion to charge a financial organization's balance in
130 another such organization), cashier's checks, money
131 orders or other officer's checks issued in the usual course
132 of business for any purpose, but not including those
133 issued in payment for services, dividends or purchases or
134 other costs or expenses of the financial organization
135 itself; and

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

140 (3) "Financial organization". See section three-a of
141 this article; and

142 (4) "Sales" means, for purposes of apportionment
143 under this section, the gross receipts of a financial
144 organization included in the gross receipts factor de-
145 scribed in subsection (g) of this section, regardless of
146 their source.

147 (f) *Apportionment rules.* — A financial organization
148 not having its commercial domicile in this state which
149 regularly engages in business both within and without
150 this state shall apportion the business income component
151 of its federal taxable income, after adjustment as pro-
152 vided in section six of this article, by multiplying the
153 amount thereof by the special gross receipts factor
154 determined as provided in subsection (g) of this section.

155 (g) *Special gross receipts factor.* — The gross receipts
156 factor is a fraction, the numerator of which is the total
157 gross receipts of the taxpayer from sources within this
158 state during the taxable year and the denominator of
159 which is the total gross receipts of the taxpayer wherever
160 earned during the taxable year: *Provided*, That neither
161 the numerator nor the denominator of the gross receipts
162 factor shall include receipts from obligations described
163 in paragraphs (A), (B), (C) and (D), subdivision (1),
164 subsection (f), section six of this article:

165 (1) *Numerator.* — The numerator of the gross receipts
166 factor shall include, in addition to items otherwise
167 includable in the sales factor under section seven of this
168 article, the following:

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

173 (B) Interest income and other receipts from assets in
174 the nature of loans which are secured primarily by real
175 estate or tangible personal property if such security
176 property is located in the state. In the event that such

177 security property is also located in one or more other
178 states, such receipts shall be presumed to be from
179 sources within this state, subject to rebuttal based upon
180 factors described in rules to be promulgated by the tax
181 commissioner, including the factor that the proceeds of
182 any such loans were applied and used by the borrower
183 entirely outside of this state;

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

189 (D) Interest income and other receipts from commer-
190 cial loans and installment obligations which are unse-
191 cured or are secured by intangible property if and to the
192 extent that the borrower or debtor is a resident of or is
193 domiciled in this state: *Provided*, That such receipts are
194 presumed to be from sources in this state and such
195 presumption may be overcome by reference to factors
196 described in rules to be promulgated by the tax commis-
197 sioner, including the factor that the proceeds of any such
198 loans were applied and used by the borrower entirely
199 outside of this state;

200 (E) Interest income and other receipts from a financial
201 organization's syndication and participation in loans,
202 under the rules set forth in items (A) through (D), above;

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

209 (G) Merchant discount income derived from financial
210 institution credit card holder transactions with a mer-
211 chant located in this state. In the case of merchants
212 located within and without this state, only receipts from
213 merchant discounts attributable to sales made from

214 locations within this state shall be attributed to this
215 state. It shall be presumed, subject to rebuttal, that the
216 location of a merchant is the address shown on the
217 invoice submitted by the merchant to the taxpayer;

218 (H) Gross receipts from the performance of services are
219 attributed to this state if:

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

231 (ii) The service receipts are deposit-related fees and the
232 depositor resides in this state, except that, at the tax-
233 payer's election, receipts from deposit-related fees which
234 are either: (I) "Pooled" or aggregated for collective
235 financial accounting treatment; or (II) manually written
236 as nonrecurring extraordinary charges to be processed
237 directly to the general ledger may either be attributed to
238 a state based upon the depositors' residences or upon the
239 ratio that total deposits sourced to that state bears to
240 total deposits from all sources;

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

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

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

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

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

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

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

265 (h) *Effective date.* — The provisions of this section
266 enacted as chapter one hundred sixty-seven, acts of the
267 Legislature, one thousand nine hundred ninety-one, shall
268 apply to all taxable years beginning on or after the first
269 day of January, one thousand nine hundred ninety-one.
270 Amendments to this section enacted in the year one
271 thousand nine hundred ninety-six shall apply to taxable
272 years beginning after the thirty-first day of December,
273 one thousand nine hundred ninety-five.

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

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

14 such consent. When a corporation is a member of an
15 affiliated group for a fractional part of the year, the
16 consolidated return shall include the income of such
17 corporation for that part of the year during which it is a
18 member of the affiliated group.

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

26 (c) *Consolidated return — financial organizations.* —
27 An affiliated group that includes one or more financial
28 organizations may elect under this section to file a
29 consolidated return when that affiliated group complies
30 with all of the following rules:

31 (1) The affiliated group of which the financial organi-
32 zation is a member must file a federal consolidated
33 income tax return for the taxable year.

34 (2) All members of the affiliated group included in the
35 federal consolidated return must consent to being
36 included in the consolidated return filed under this
37 article. The filing of a consolidated return under this
38 article is conclusive proof of such consent.

39 (3) The West Virginia taxable income of the affiliated
40 group shall be the sum of:

41 (A) The pro forma West Virginia taxable income of all
42 financial organizations having their commercial domicile
43 in this state that are included in the federal consolidated
44 return, as shown on a combined pro forma West Virginia
45 return prepared for such financial organizations; plus

46 (B) The pro forma West Virginia taxable income of all
47 financial organizations not having their commercial
48 domicile in this state that are included in the federal
49 consolidated return, as shown on a combined pro forma

50 West Virginia return prepared for such financial organi-
51 zations; plus

52 (C) The pro forma West Virginia taxable income of all
53 other members included in the federal consolidated
54 income tax return, as shown on a combined pro forma
55 West Virginia return prepared for all such nonfinancial
56 organization members, except that income, income
57 adjustments and exclusions, apportionment factors and
58 other items considered when determining tax liability
59 shall not be included in the pro forma return prepared
60 under this paragraph for a member that is totally exempt
61 from tax under section five of this article, or for a
62 member that is subject to a different special industry
63 apportionment rule provided for in this article. When a
64 different special industry apportionment rule applies,
65 the West Virginia taxable income of a member(s) subject
66 to that special industry apportionment rule shall be
67 determined on a separate pro forma West Virginia return
68 for the member(s) subject to that special industry rule
69 and the West Virginia taxable income so determined
70 shall be included in the consolidated return.

71 (4) The West Virginia consolidated return is prepared
72 in accordance with regulations of the tax commissioner
73 promulgated as provided in article three, chapter
74 twenty-nine-a of this code.

75 (5) The filing of a consolidated return does not distort
76 taxable income. In any proceeding, the burden of proof
77 that taxpayer's method of filing does not distort taxable
78 income shall be upon the taxpayer.

79 (d) *Combined return.* — A combined return may be
80 filed under this article by a unitary group, including a
81 unitary group that includes one or more financial
82 organizations, only pursuant to the prior written ap-
83 proval of the tax commissioner. A request for permis-
84 sion to file a combined return must be filed on or before
85 the statutory due date of the return, determined without
86 inclusion of any extension of time to file the return.
87 Permission to file a combined return may be granted by

88 the tax commissioner only when taxpayer submits
89 evidence that conclusively establishes that failure to
90 allow the filing of a combined return will result in an
91 unconstitutional distortion of taxable income. When
92 permission to file a combined return is granted, com-
93 bined filing will be allowed for the year(s) stated in the
94 tax commissioner's letter. The combined return must be
95 filed in accordance with regulations of the tax commis-
96 sioner promulgated in accordance with article three,
97 chapter twenty-nine-a of this code.

98 (e) *Method of filing under this article deemed control-*
99 *ling for purposes of other business taxes articles.* — The
100 taxpayer shall file on the same basis under article
101 twenty-three of this chapter as such taxpayer files under
102 this article for the taxable year.

103 (f) *Regulations.* — The tax commissioner shall pre-
104 scribe such regulations as he may deem necessary in
105 order that the tax liability of any affiliated group of
106 corporations filing a consolidated return, or of any
107 unitary group of corporations filing a combined return,
108 and of each corporation in the affiliated or unitary
109 group, both during and after the period of affiliation,
110 may be returned, determined, computed, assessed,
111 collected and adjusted, in such manner as the tax
112 commissioner deems necessary to clearly reflect the
113 income tax liability and the income factors necessary for
114 the determination of such liability, and in order to
115 prevent avoidance of such tax liability.

116 (g) *Computation and payment of tax.* — In any case in
117 which a consolidated or combined return is filed, or
118 required to be filed, the tax due under this article from
119 the affiliated or unitary group shall be determined,
120 computed, assessed, collected and adjusted in accor-
121 dance with regulations prescribed by the tax commis-
122 sioner, in effect on the last day prescribed by section
123 thirteen of this article for the filing of such return, and
124 such affiliated or unitary group, as the case may be, shall
125 be treated as the taxpayer. However, when any member

126 of an affiliated or unitary group that files a consolidated
127 or combined return under this article is allowed to claim
128 credit against its tax liability under this article for
129 payment of any other tax, the amount of credit allowed
130 may not exceed that member's proportionate share of the
131 affiliated or unitary group's precredit tax liability under
132 this article, as shown on its pro forma return.

133 (h) *Consolidated or combined return may be required.*
134 — If any affiliated group of corporations has not elected
135 to file a consolidated return, or if any unitary group of
136 corporations has not applied for permission to file a
137 combined return, the tax commissioner may require such
138 corporations to make a consolidated or combined return,
139 as the case may be, in order to clearly reflect the taxable
140 income of such corporations.

141 (i) *Effective date.* — The amendments to this section
142 made by chapter one hundred seventy-nine, acts of the
143 Legislature in the year one thousand nine hundred
144 ninety, shall apply to all taxable years ending after the
145 eighth day of March, one thousand nine hundred ninety.
146 Amendments to this article enacted by this act in the
147 year one thousand nine hundred ninety-six, shall apply
148 to taxable years beginning on or after the first day of
149 January, one thousand nine hundred ninety-six, except
150 that financial organizations that are part of an affiliated
151 group may elect, after the effective date of this act, to
152 file a consolidated return prepared in accordance with
153 the provisions of this section, as amended, and subject to
154 applicable statutes of limitation, for taxable years
155 beginning on or after the first day of January, one
156 thousand nine hundred ninety-one, but before the first
157 day of January, one thousand nine hundred ninety-six,
158 notwithstanding provisions then in effect prohibiting
159 out-of-state financial organizations from filing consoli-
160 dated returns for those years: *Provided*, That when the
161 statute of limitation on filing an amended return for any
162 of those years expires before the first day of July, one
163 thousand nine hundred ninety-six, the consolidated
164 return for such year, if filed, must be filed by said first

165 day of July.

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

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

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

16 (2) The amount of such tax the financial organization
17 would have paid if the rate of tax imposed by this article
18 is applied to the tax base determined under the laws of
19 such other state.

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

§11-24-38. Deposit of revenue.

1 (a) Section thirteen of this article authorizes the tax
2 commissioner to combine into one form the annual
3 returns due under this article and article twenty-three of
4 this chapter. To facilitate combining returns, reports

5 and declarations for these two taxes, and to allow a
6 taxpayer to pay both taxes with one remittance, the
7 amount of taxes collected under this article and article
8 twenty-three of this chapter, including any additions to
9 tax, penalties or interest collected with respect to such
10 taxes, pursuant to a combined return, report or declara-
11 tion shall be deposited in one account: *Provided*, That
12 the tax commissioner shall keep such records as may be
13 necessary to separately account for the amount of each
14 tax collected, including additions to tax, penalties or
15 interest collected with respect to each tax, during each
16 fiscal year of the state.

17 (b) Overpayments of the tax imposed by article twenty-
18 three of this chapter may be applied against tax due
19 under this article for same taxable year, and over-
20 payments of the tax imposed by this article may be
21 applied against underpayment of the tax imposed by
22 article twenty-three of this chapter for the same taxable
23 year.

24 (c) The provisions of this section shall take effect upon
25 passage.

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

Randy Schumover
.....
Chairman Senate Committee

Randy Seaint
.....
Chairman House Committee

Originated in the Senate.

In effect from passage.

Parrell Edwards
.....
Clerk of the Senate

Gregory W. Bond
.....
Clerk of the House of Delegates

Earl Ray Tomblin
.....
President of the Senate

Paul Barber
.....
Speaker House of Delegates

The within *is approved* this the *5th*
day of *March*, 1996.

Garston Capenbor
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 2/28/96

Time 12:16pm