WEST VIRGINIA LEGISLATURE

SECOND REGULAR SESSION, 1998

ENROLLED

Com. Sub. for House Bill No. 4308

(By Mr. Speaker, Mr. Kiss, and Delegates Beach, Pettit, Michael, Mezzatesta, Warner and Amores)

Passed March 14, 1998

In Effect from Passage

ENROLLED

COMMITTEE SUBSTITUTE

FOR

H. B. 4308

(By Mr. Speaker, Mr. Kiss, and Delegates Beach, Pettit, Michael, Mezzatesta, Warner and Amores)

[Passed March 14, 1998; in effect from passage.]

AN ACT to amend chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article thirteen-n, relating to allowing a tax credit of two hundred fifty dollars per full-time hourly employee for eligible taxpayers engaged in new steel manufacturing operations; manufacturing, adding value to primary steel products; and beginning operations within this state after the first day of July, one thousand nine hundred ninety-eight, or for the addition of a new product or line of an existing value-added steel products manufacturing facility after the first day of July, one thousand nine hundred ninety-eight; setting forth legislative purpose; specifying definitions; providing that the credit applies to wrought nickel-based products; setting eligibility for credit; creation of the credit; amount of credit allowed; expiration of the credit; annual credit allowance; proration of credit; annual computation; credit to successors; credit recapture; administrative rules; construction and effective date.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 13N. TAX CREDIT FOR NEW STEEL MANUFACTURING OPERATIONS AFTER JULY 1, 1998.

§11-13N-1. Legislative purpose.

The Legislature finds that production of value-added steel products is very important to the economy of this state and that a sound economy is in the public interest and promotes the general welfare of the people of this state. In order to encourage capital investment in this state, through the manufacture of value-added steel products after the thirtieth day of June, one thousand nine hundred ninety-eight, thereby increasing employment and economic development, there is hereby provided to eligible taxpayers a credit for each new job filled by a full-time hourly employee who works in a new value-added steel product manufacturing facility, or in a new value-added steel product line of an existing manufacturing facility, that begins operating in this state after the thirtieth day of June, one thousand nine hundred ninety-eight.

§11-13N-2. Definitions.

(a) *General.* — When used in this article, or in the administration of this article, terms defined in subsection (b) of this section have the meanings ascribed to them by this section, unless a different meaning is clearly required by the context in which the term is used.

(b) *Terms defined.* —

(1) "Affiliate" means and includes all persons, as defined in this section, which are affiliates of each other when either directly or indirectly:

(A) One person controls or has the power to control the other; or

(B) A third party or third parties control or have the power to control two persons, the two thus being affiliates. In determining whether concerns are independently owned and operated and whether or not an affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management and contractual relationships.

(2) "Commissioner" or "tax commissioner" means the tax commissioner of the state of West Virginia, or the tax commissioner's designee.

(3) "Corporation" includes any corporation, a joint-stock company and any association or other organization which is classified as a corporation under federal income tax law.

(4) "Designee," when used in reference to the tax commissioner, means any officer or employee of the tax division of the department of tax and revenue 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.

(5) "Eligible taxpayer" means a person who after the thirtieth day of June, one thousand nine hundred ninety-eight, begins manufacturing a value-added steel product at a new manufacturing facility located in this state, or begins manufacturing a new value-added steel product line at an existing manufacturing facility located in this state, which results in the creation of new jobs filled by full-time employees.

(6) "Employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that if the person for whom the individual performs or performed the service does not have control of the payment of wages for such services, the term "employer" means the person having control of the payment of such wages.

(7) "Existing manufacturing facility" means a building which, at anytime during the twelve months preceding the month in which manufacture of a value-added steel product begins, was used by the taxpayer, or by a related person, to manufacture tangible personal property.

(8) "Full-time employee" means a permanent hourly employee of an eligible taxpayer, who is a West Virginia domiciled resident, and works in a new value-added steel product manufacturing facility in this state, or in a new value-added steel product line of an existing manufacturing facility in this state, more than eighteen hundred hours during the entire twelve-month period ending on the last day of the taxable year of the eligible employer, whether these hours are hours worked at the manufacturing facility, or include hours of employer paid vacation leave or other employer paid leave. Full-time employee does not include an employee who is a part-time, seasonal or temporary employee.

(9) "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended, of the United States.

(10) "Manufacturing facility" means any facility which is used in the manufacturing of tangible personal property (including processing resulting in a change in the condition of such property).

(11) "New value-added steel product line" means the manufacture of a value-added steel product in an existing manufacturing facility in this state that first begins manufacturing the new value-added steel product line after the thirtieth day of June, one thousand nine hundred ninety-eight.

(12) "New value-added steel product manufacturing facility" means a building that is primarily used by the eligible taxpayer to manufacture a value-added steel product that is first placed in service and used for that purpose by the eligible taxpayer after the thirtieth day of June, one thousand nine hundred ninety-eight. If the facility was used by the taxpayer, or by a related person, to manufacture tangible personal property at any time during the twelve months preceding the month in which the facility is first used by the taxpayer to manufacture a value-added steel product, the building is not a new value-added steel product manufacturing facility.

(13) "New job" means a job at a new value-added steel product manufacturing facility located in this state, or at a

new value-added steel product line at an existing manufacturing facility located in this state, which did not exist in this state with any employer as of the first day of the second calendar month preceding the calendar month in which the new value-added steel product manufacturing facility begins to manufacture value-added steel products, or in which the new value-added steel product line begins to manufacture value-added steel products in an existing manufacturing facility located in this state, that is filled by a full-time employee of the eligible taxpayer.

(14) "Partnership" means and 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, which is classified as a partnership for federal income tax purposes for the taxable year.

(15) "Partner" includes a member in a syndicate, group, pool, joint venture or organization classified as a partnership for federal income tax purposes for the taxable year.

(16) "Part-time employee" means any employee who normally works twenty hours or less per week.

(17) "Seasonal employee" means an employee who normally works on a full-time basis less than five months in a year.

(18) "Temporary employee" means an employee performing services under a contractual arrangement with the employer of two years or less duration.

(19) "Person" means and includes an individual, a trust, estate, partnership, association, company or corporation.

(20) "Related entity," "related person," "entity related to" or "person related to" means:

(A) An individual, corporation, partnership, affiliate, association or trust or any combination or group thereof controlled by the taxpayer;

(B) An individual, corporation, partnership, affiliate, association or trust or any combination or group thereof that is in control of the taxpayer;

(C) An individual, corporation, partnership, affiliate, association or trust or any combination or group thereof controlled by an individual, corporation, partnership, affiliate, association or trust or any combination or group thereof that is in control of the taxpayer; or

(D) A member of the same controlled group as the taxpayer. For purposes of this subdivision (20), "control," with respect to a corporation, means ownership, directly or indirectly, of stock possessing fifty percent or more of the total combined voting power of all classes of the stock of the corporation which entitles its owner to vote. "Control," with respect to a trust, means ownership, directly or indirectly, of fifty percent or more of the beneficial interest in the principal or income of the trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association or of a beneficial interest in a trust shall be determined in accordance with the rules for constructive ownership of stock provided in section 267(c) of the Internal Revenue Code: *Provided*, That paragraph (3) of section 267(c) of the Internal Revenue Code shall not apply.

(21) "Tax year" or "taxable year," means the tax year of the taxpayer for federal income tax purposes.

(22) "Taxpayer" means any person subject to the tax imposed by article twenty-one, twenty-three or twenty-four of this chapter.

(23) "Value-added steel product" means any product that adds to, increases or enhances the value of any raw, base or unimproved steel or wrought nickel-based product through processes including, but not limited to, anodization, coating, fabrication, machining, molding, melting, stamping and any other processing which adds value.

§11-13N-3. Eligibility for tax credits; creation of the credit.

There shall be allowed to every eligible taxpayer a credit against the taxes imposed in articles twenty-one, twenty-three and twenty-four of this chapter. The amount of this credit shall be determined and applied as provided in this article.

§11-13N-4. Amount of credit allowed; expiration of the credit.

(a) *Credit allowable.* — The amount of annual credit allowable under this article to an eligible taxpayer shall be two hundred fifty dollars for each new job at a new value-added steel product manufacturing facility located in this state, or at a new value-added steel product line of an existing manufacturing facility located in this state, that is filled by a full-time employee of the eligible taxpayer during the taxable year, subject to the following:

(1) When the new value-added steel product manufacturing facility, or the new steel product line of an existing value-added steel product manufacturing facility, is in operation for less than twelve months of the taxable year in which it is placed in service, the credit allowed by subsection (a) of this section shall be prorated by the ratio that the number of months in the taxpayer's taxable year during which the new value-added steel products facility, or the new products line of an existing value-added steel product manufacturing facility, was in service bears to twelve.

(2) When the eligible taxpayer stops manufacturing value-added steel products at the new value-added steel product manufacturing facility, or at the new steel product line of an existing value-added steel product manufacturing facility, during the taxable year, the credit allowed by subsection (a) of this section shall be prorated by the ratio that the number of months in the taxpayer's taxable year during which the new value-added steel products facility, or the new products line of an existing value-added steel product manufacturing facility, was in operation manufacturing value-added steel product bears to twelve.

(3) When determining the number of full-time employees who fill new jobs at the new value-added steel product manufacturing facility located in this state, or who fill new jobs at a new value-added steel product line of an

existing manufacturing facility located in this state, the eligible taxpayer shall not include any position occupied by any employee of the eligible taxpayer, or of a related person, which existed in this state as of the first day of the second calendar month preceding the calendar month in which the new value-added steel product manufacturing facility, or a new value-added steel product line at an existing value-added steel products manufacturing facility first becomes operational, whether such positions are filled by permanent, seasonal, temporary or part-time employees.

(4) The amount of credit allowable each taxable year shall be calculated annually based upon the number of new jobs filled by full-time employees during the taxable year: *Provided*, That the credit provided for in this article may only be taken one time for each new job created, and once claimed in a tax year for a new job the credit may not be claimed in a subsequent year for that position.

(b) *Expiration of credit.* — This credit shall expire on the first day of July, two thousand five. When the first day of July in the year two thousand five falls during the taxable year of the eligible taxpayer, the amount of credit allowable for that taxable year shall be limited to that portion of the amount of credit that would have been allowable had the credit not expired multiplied by the ratio of the number of months during taxpayers taxable year ending before the first day of July, two thousand five, bears to twelve.

§11-13N-5. Application of annual credit allowance.

(a) *Application of credit against business franchise tax.* — The amount of credit allowed under section four of this article shall first be applied against the eligible taxpayer's liability for the tax imposed by article twenty-three of this chapter that is attributable to a new value-added steel product manufacturing facility located in this state and to a new value-added steel product production line at an existing manufacturing facility located in this state.

(b) *Application of remaining credit against income* *tax*. — After application of the allowable credit against the tax imposed by article twenty-three of this chapter, as provided in subsection (a) of this section, any remaining credit may be applied against the taxes imposed by article twenty-one or twenty-four of this chapter to the extent those taxes are attributable to a new value-added steel product manufacturing facility located in this state and to a new value-added steel product production line at an existing manufacturing facility located in this state: *Provided*, That no credit shall be allowed against employer withholding taxes due under article twenty-one of this chapter.

(c) *Excess credit carried over*. — If after application of subsections (a) and (b) of this section, any credit remains for the taxable year, the amount remaining may be carried over and applied as a credit against the tax liability of the taxpayer in accordance with this section to each of the next five taxable years unless sooner used. Unused credit may not be carried back to any prior taxable year.

(d) *Application of this credit when other credits apply*. — The credit allowed under this article shall be applied after application of all other applicable tax credits allowed for the taxable year against the taxes imposed by article twenty-one, twenty-three or twenty-four of this chapter.

(e) *Completion of annual schedule to assert credit*. — To assert this credit against tax, the eligible taxpayer shall prepare and file with the annual tax return filed under article twenty-one, twenty-three or twenty-four of this chapter, an annual schedule showing the amount of tax paid for the taxable year, and the amount of credit allowed under this article. This annual schedule shall set forth the information and be in the form prescribed by the tax commissioner.

(f) *Payments of estimated tax*. — A taxpayer may consider the amount of credit allowed under this article when determining the taxpayer's liability under articles twenty-one, twenty-three and twenty-four of this chapter for periodic payments of estimated tax for the taxable year, in accordance with the procedures and requirements prescribed by the tax commissioner. The annual total tax liability and total tax credit allowed under this article are subject to adjustment and reconciliation pursuant to the filing of the annual schedule required by subsection (e) of this section.

§11-13N-6. Proration of credit among partners, members of limited liability companies, or shareholders in small business corporations.

The amount of credit allowed under this article for the taxable year to a partnership or limited liability company classified as a partnership for the taxable year, or to an electing small business corporation, that remains after application the credit against the tax imposed by article twenty-three of this chapter as provided in subsection (a), section five of this article shall be allocated to the individual partners, members or shareholders, as the case may be, in proportion to their ownership interest in the partnership, limited liability company or electing small business corporation. The amount of credit allocated to the individual partners, members or shareholders, as the case may be, may be applied against the taxes imposed by articles twenty-one and twenty-four of this chapter in accordance with the rule set forth in subsection (b), section five of this article.

§11-13N-7. Annual computation of the number of new jobs held by full-time employees.

(a) The eligible taxpayer shall annually determine the number of new jobs held by full-time permanent employees of the eligible taxpayer in the taxable year by calculating the average number of full-time employees holding jobs for each month of the taxable year by averaging the beginning and ending monthly employment of full-time employees, then totaling the monthly averages and dividing that total by twelve.

(b) The eligible taxpayer shall also annually determine the number of new jobs filled during the taxable year by full-time employees of the eligible taxpayer employed at a new value-added product manufacturing facility, or at a new value-added steel product line at an existing manufacturing facility, located in this state that is owned or operated by the eligible taxpayer, by calculating the average number of new jobs held by full-time employees for each month of the taxable year by averaging the beginning and ending monthly employment of full-time employees holding new jobs, then totaling the monthly averages and dividing that total by twelve.

(c) Preexisting jobs carried over from a corporation or other entity merged with the taxpayer, and not reflective of a true increase in the number of new jobs in West Virginia, or preexisting jobs formerly in place with a contract service provider which are taken over or supplanted by the internal operations of the taxpayer, or any other increase in the count of jobs in place with a taxpayer which is not reflective of new jobs, as defined in section two of this article, shall not count as new jobs for purposes of the credit allowed under this article.

(d) The tax commissioner may prescribe by rule alternative methods for determining the number of jobs held by full-time permanent employees in the taxable year upon a finding by the tax commissioner that an alternative method is appropriate for ascertaining an accurate and realistic determination of new jobs held by full-time employees in the taxable year. For purposes of prescribing alternative methods, the tax commissioner may require the deduction or inclusion of jobs in place with contract service providers that provide or at any time provided any service to any eligible taxpayer or to any member of the affiliated group related to any eligible taxpayer or to any one or more entities related to the eligible taxpayer: *Provided*, That deduction, or inclusion of those jobs shall only pertain to jobs held by employees of the contract service provider that are attributable or that were formerly attributable to the service provided by the contract service provider to the taxpayer. The tax commissioner may require any deconsolidation of any filing entity, or may require an alternative method based on separate accounting, unitary combination, combination of the affiliated group or combination of the taxpayer and one or more entities related to the taxpayer, or any other method determined by the tax commissioner to be appropriate for ascertaining an accurate and realistic determination of new jobs held by full-time employees in the taxable year.

§11-13N-8. Availability of credit to successors.

(a) *Transfer or sale*. — When there is a transfer or sale of the business assets of an eligible taxpayer to a successor taxpayer which continues to operate the new value-added steel product manufacturing facility located in this state, or the new value-added steel product line of an existing manufacturing facility located in this state, the successor taxpayer is entitled to the credit allowed under this article: *Provided*, That the successor taxpayer otherwise remains in compliance with the requirements of this article for entitlement to the credit.

(b) *Allocation of credit between eligible taxpayer and successor eligible taxpayer*. — For any taxable year during which a transfer, or sale of the business assets of an eligible taxpayer to a successor taxpayer under this section occurs, or a merger allowed under this section occurs, the credit allowed under this article shall be apportioned between the predecessor eligible taxpayer and the successor taxpayer based on the number of days during the taxable year that each taxpayer acted as the legal employer of individuals filling new jobs for which the credit allowed under this article is based and the number of days during the taxable year that each taxpayer owned the new value-added steel product manufacturing facility located in this state, or the new value-added steel product line of an existing manufacturing facility located in this state.

(c) *Stock purchases*. — When a corporation which is an eligible taxpayer entitled to the credit allowed under this article is purchased through a stock purchase by a new owner, and the corporation remains a legal entity so as to retain its corporate identity, the entitlement of that corporation to the credit allowed under this article will not be affected by the ownership change.

(d) *Mergers*. —

(1) When a corporation or other entity which is an eligible taxpayer entitled to the credit allowed under this article is merged with another corporation, or entity, the surviving corporation, or entity, shall be entitled to the credit to which the predecessor eligible taxpayer was originally entitled only if the surviving corporation, or entity, otherwise complies with the provisions of this article.

(2) The amount of credit available in any taxable year during which a merger occurs shall be apportioned between the predecessor eligible taxpayer and the successor eligible taxpayer based on the number of days during the taxable year that each taxpayer acted as the legal employer of employees holding the new jobs upon which the credit allowed under this article is based and the number of days during the taxable year that each owned the transferred business assets: *Provided*, That when the taxable year of the predecessor eligible taxpayer and the taxable year of the successor eligible taxpayer are different, the apportionment shall be made in accordance with legislative rules prescribed by the tax commissioner.

(e) No provision of this section or of this article shall be construed to allow sales or other transfers of the tax credit allowed under this article. The credit allowed under this article may be transferred only in circumstances where there is a valid successorship as described under this section.

§11-13N-9. Credit recapture; interest; penalties; additions to tax; statute of limitations.

(a) If it appears upon audit or otherwise that any person has improperly claimed the credit allowed by this article, the amount improperly claimed and which the person was not entitled to take shall be recaptured. Amended returns shall be filed for any taxable year for which the credit was improperly taken. Any additional taxes due under this chapter shall be remitted with the amended return or returns filed with the tax commissioner, along with interest, as provided in section seventeen, article ten of this chapter, and a ten percent penalty plus such other penalties and additions to tax as may be applicable under the provisions of article ten of this chapter.

(b) *Recapture for jobs lost.* —

(1) In any tax year the number of individuals employed in full-time positions by the eligible taxpayer decreases by more than ten percent, credit recapture shall apply, and the taxpayer shall return to the state an amount of tax determined by multiplying five hundred dollars by the number of full-time jobs lost which exceed ten percent. An amended return shall be filed for the tax year for which credit recapture is required. Any additional taxes due under this chapter shall be remitted with the amended return filed with the tax commissioner, along with interest, as provided in section seventeen, article ten of this chapter, and a ten percent penalty plus such other penalties and additions to tax as may be applicable under the provisions of article ten of this chapter.

(2) Notwithstanding the provisions of article ten of this chapter, penalties and additions to tax imposed under article ten of this chapter and the ten percent penalty imposed under this section may be waived, in whole or in part, at the discretion of the tax commissioner. However, interest may not be waived.

(c) Notwithstanding the provisions of article ten of this chapter, the time within which a notice of assessment may be issued by the tax commissioner to recover recapture tax shall be five years from the date of filing of any tax return on which this credit was taken or five years from the date of payment of any tax liability calculated pursuant to the assertion of the credit allowed under this article, whichever is later.

§11-13N-10. Administrative rules.

The tax commissioner may prescribe such rules as may be necessary to carry out the purposes of this article, including, but not limited to, rules relating to applicability of credit, method of claiming of credit, credit recapture, documentation necessary to claim credit and rules preventing abuse of this article by related persons or by change in the form of doing business. All rules promulgated under this article shall be promulgated in accordance with article three, chapter twenty-nine-a of this code.

§11-13N-11. Construction of article.

The provisions of this article shall be reasonably construed. The burden of proof is on the person claiming the credit allowed by this article to establish by clear and convincing evidence that the person is entitled to the amount of credit asserted for the taxable year.

§11-13N-12. Effective date.

This article shall be effective for taxable years beginning on or after the first day of July, one thousand nine hundred ninety-eight.

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

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within approved this the 7th day of April, 1998.

Governor

® GCIU 326-C

PRESENTED TO THE

GOVERNOR

Date 3/31/98

Time 3:36 pm