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# WEST VIRGINIA LEGISLATURE

SECOND REGULAR SESSION, 1998



# ENROLLED

## House Bill No. 4619

(By Mr. Speaker, Mr. Kiss,  
and Delegate Michael)



Passed March 11, 1998

In Effect from Passage

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SENATE OF WEST VIRGINIA

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# H. B. 4619

(BY MR. SPEAKER, MR. KISS, AND DELEGATE MICHAEL)

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[Passed March 11, 1998; in effect from passage.]

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AN ACT to amend and reenact sections seven-a and fourteen, article thirteen-c, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to providing small business tax credit, specifying amount of credit allowed; specifying application of credit; specifying certification of new jobs; providing for small business tax credit projects; providing for issuance of regulations; specifying effective dates; specifying restrictions and limitations on credits allowed by said article thirteen-c; setting forth legislative findings; specifying construction; specifying nonapplication against severance taxes; setting forth transition rules; specifying treatment of successor project participants; setting forth definitions; specifying requirement for application for credit; and specifying penalty for failure to file.

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

That sections seven-a and fourteen, article thirteen-c, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

### ARTICLE 13C. BUSINESS INVESTMENT AND JOBS EXPANSION CREDIT.

#### §11-13C-7a. Small business credit.

1       (a) "*Small business*" *defined.* — For purposes of this  
2 section, the term "small business" means a business which  
3 has an annual payroll of one million five hundred  
4 thousand dollars or less, or annual gross sales of not more  
5 than five million dollars: *Provided,* That beginning the  
6 first day of January, one thousand nine hundred  
7 eighty-nine, and each first day of January thereafter, the  
8 tax commissioner shall prescribe amounts which shall  
9 apply in lieu of the above amounts during that calendar  
10 year. These amounts shall be prescribed by increasing the  
11 amount of each by the cost-of-living adjustment for such  
12 calendar year. The requirements for annual payroll and  
13 annual gross receipts, once met by a given taxpayer in that  
14 taxable year when qualified investment is first placed in  
15 service or use shall not again be applied to that same  
16 taxpayer in subsequent years to defeat the small business  
17 credit to which the taxpayer gained entitlement in that  
18 year. However, the median compensation requirements  
19 applicable to any small business, except a small business  
20 entitled to a certified project credit, shall be determined  
21 when qualified investment is first placed in service or use;  
22 and subsequently redetermined inflation adjusted amounts  
23 for median compensation for each year shall be the  
24 requirements applicable to that small business for each  
25 year throughout the ten-year credit period and any further  
26 carryover or other extended credit period for the original  
27 credit to which the requirements relate.

28       (1) *Cost-of-living adjustment.* — For purposes of  
29 subsection (a), the cost-of-living adjustment for any  
30 calendar year is the percentage (if any) by which:

31       (A) The consumer price index for the preceding  
32 calendar year exceeds;

33       (B) The consumer price index for the calendar year  
34 one thousand nine hundred eighty-seven.

35       (2) *Consumer price index for any calendar year.* —  
36 For purposes of subdivision (1), the consumer price index  
37 for any calendar year is the average of the federal  
38 consumer price index as of the close of the twelve-month  
39 period ending on the thirty-first day of August of such  
40 calendar year.

41       (3) *Consumer price index.* — For purposes of  
42 subdivision (2), the term "Federal Consumer Price Index"  
43 means the last consumer price index for all urban  
44 consumers published by the United States department of  
45 labor.

46       (4) *Rounding.* — If any increase under subdivision  
47 (1) is not a multiple of fifty dollars, such increase shall be  
48 rounded to the next lowest multiple of fifty dollars.

49       (b) *Amount of credit allowed.*

50       (1) *Credit allowed.* — An eligible small business  
51 taxpayer shall be allowed a credit against the portion of  
52 taxes imposed by this state that are attributable to and the  
53 direct consequence of the eligible small business  
54 taxpayer's qualified investment in a new or expanded  
55 business in this state which results in the creation of at least  
56 ten new jobs. The amount of this credit shall be  
57 determined as provided in this section.

58       (2) *Amount of credit.* — The amount of credit  
59 allowable under this section is determined by dividing the  
60 amount of the eligible small business taxpayer's "qualified  
61 investment" (determined under section six) in "property  
62 purchased for business expansion" (as defined in section  
63 three) by ten. The amount of qualified investment so  
64 apportioned to each year of the ten-year credit period  
65 shall be the annual measure against which taxpayer's  
66 annual new jobs percentage (determined under subsection  
67 (d)) is applied. The product of this calculation establishes  
68 the maximum amount of credit allowable each year for  
69 ten consecutive years under this section due to the  
70 qualified investment.

71       (3) *Application of credit.* — The annual credit  
72 allowance must be taken beginning with the taxable year  
73 in which the taxpayer places the qualified investment into  
74 service or use in this state, unless the taxpayer elects to  
75 delay the beginning of the ten-year credit period until the  
76 next succeeding taxable year. This election shall be made  
77 in the annual income tax return filed under this chapter by  
78 the taxpayer for the taxable year in which the qualified  
79 investment is placed in service or use. Once made, this

80 election cannot be revoked. The annual credit allowance  
81 shall be taken and applied in the manner prescribed in  
82 section five.

83 (c) *New jobs.* — The term "new jobs" has the meaning  
84 ascribed to it in subdivision (14), subsection (b), section  
85 three of this article: *Provided*, That the median  
86 compensation of such new jobs shall not be less than  
87 eleven thousand dollars per year and that beginning the  
88 first day of January, one thousand nine hundred  
89 eighty-nine, and each first day of January thereafter, the  
90 tax commissioner shall adjust the median annual  
91 compensation specified in this subsection by increasing  
92 the amount thereof by the annual cost-of-living  
93 adjustment determined under subsection (a).

94 (1) The term "new employee" shall have the meaning  
95 ascribed to it in subdivision (13), subsection (b), section  
96 three of this article: *Provided*, That such term shall not  
97 include employees filling new jobs who:

98 (A) Are related individuals, as defined in subsection  
99 (i), section 51 of the Internal Revenue Code of 1986, or a  
100 person who owns ten percent or more of the business with  
101 such ownership interest to be determined under rules set  
102 forth in subsection (b), section 267 of said Internal  
103 Revenue Code; or

104 (B) Worked for the taxpayer during the six-month  
105 period ending on the date taxpayer's qualified investment  
106 is placed in service or use and is rehired by the taxpayer  
107 during the six-month period beginning on the date  
108 taxpayer's qualified investment is placed in service or use.

109 (2) *When a job is attributable.* — An employee's  
110 position is directly attributable to the qualified investment  
111 if:

112 (A) The employee's service is performed or his or her  
113 base of operations is at the new or expanded business  
114 facility;

115 (B) The position did not exist prior to the  
116 construction, renovation, expansion or acquisition of the

117 business facility and the making of the qualified  
118 investment; and

119 (C) But for the qualified investment, the position  
120 would not have existed.

121 (d) *New jobs percentage.* — The annual new jobs  
122 percentage is based on the number of new jobs created in  
123 this state by the taxpayer that is directly attributable to  
124 taxpayer's qualified investment.

125 (1) If at least ten new jobs are created and filled  
126 during the taxable year in which the qualified investment  
127 is placed in service or use, the applicable new jobs  
128 percentage shall be thirty percent: *Provided*, That for  
129 each new job over ten, up to forty such additional new  
130 jobs, the applicable new jobs percentage shall be increased  
131 by adding thereto one half of one percent, with the  
132 maximum new jobs percentage not to exceed fifty  
133 percent.

134 (2) During each of the remaining nine years of the  
135 ten-year credit period, the annual new jobs percentage  
136 shall be based on the average number of new jobs that  
137 were filled during that taxable year: *Provided*, That for  
138 purposes of estimating the new jobs percentage that will be  
139 applicable for each subsequent credit year, the taxpayer  
140 shall use the new jobs percentage allowable for the taxable  
141 year immediately prior thereto, and in the annual income  
142 tax return filed under this chapter for the then current tax  
143 year, taxpayer shall redetermine his or her allowable new  
144 jobs percentage for that year based on the average number  
145 of new employees employed in new jobs during that year  
146 (determined on a monthly basis) created as the direct  
147 result of taxpayer's qualified investment.

148 (e) *Certification of new jobs.* — With the annual  
149 income tax return filed under this chapter for each taxable  
150 year during the ten-year credit period, the taxpayer shall  
151 certify:

152 (1) The new jobs percentage for that taxable year;

153 (2) The amount of the credit allowance for that year;

154       (3) If the business is a partnership or electing small  
155 business corporation, the amount of credit allocated to the  
156 partners or shareholders, as the case may be;

157       (4) That qualified investment property continue to be  
158 used in the business, or if any of it was disposed of during  
159 the year the date of disposition and that such property was  
160 not disposed of prior to expiration of its useful life, as  
161 determined under section six;

162       (5) That the new jobs created by the qualified  
163 investment continue to exist and are filled by persons who  
164 meet the definition of new employee (as defined in  
165 subdivision (1), subsection (c) of this section) and are paid  
166 an average annual compensation equal to or greater than  
167 the minimum average annual compensation required by  
168 this section.

169       (f) *Small business project.* — A small business may  
170 apply to the tax commissioner under section four-b for  
171 certification of subdivision (1), subsection (a), section  
172 four-b project if that project will create at least ten new  
173 jobs.

174       (g) *Regulations.* — The tax commissioner shall  
175 prescribe such regulations as he or she may deem  
176 necessary in order to determine the amount of credit  
177 allowed under this section to a taxpayer; to verify  
178 taxpayer's continued entitlement to claim such credit; and  
179 to verify proper application of the credit allowed. The tax  
180 commissioner may, by regulation, require a taxpayer  
181 intending to claim credit under this section to file with the  
182 tax commissioner a notice of intent to claim this credit,  
183 before the taxpayer begins reducing his or her monthly or  
184 quarterly installment payments of estimated tax for the  
185 credit provided in this section.

186       (h) *Effective date.*

187       (1) The credit provided in this section shall be allowed  
188 for qualified investment property purchased or leased  
189 after the thirtieth day of June, one thousand nine hundred  
190 eighty-seven.

191       (2) The amendments to this section, enacted in the  
192 year one thousand nine hundred ninety-eight, shall be  
193 retroactive to tax years beginning on or after the first day  
194 of January, one thousand nine hundred ninety-five.

**§11-13C-14. Restrictions and limitations on credits allowed by  
this article.**

1       (a) *Findings.* — The Legislature finds that the tax  
2 credits allowed under provisions of this article heretofore  
3 enacted have not effectively and efficiently increased  
4 employment through investment in certain industry  
5 segments; that while there has been a significant net  
6 decrease in employment in the coal industry in recent  
7 years the amount of credit being claimed by producers of  
8 coal has significantly increased; that the increasing cost of  
9 the credits allowed by this article to coal producers is  
10 eroding the state's ability to reasonably fund essential state  
11 services such as public education, public safety and basic  
12 human services; and that this erosion will continue unless  
13 remedial legislation is enacted.

14       (b) *Construction.* — The rule of statutory construction  
15 codified in subsection (b), section twelve of this article, is  
16 hereby replaced with a rule of reasonable construction in  
17 which the burden of proof is on the taxpayer to establish  
18 by clear and convincing evidence that the taxpayer is  
19 entitled to the benefits allowed by this article.

20       (c) *Credit not to be applied against severance taxes.*

21       (1) Notwithstanding any provision in this chapter to  
22 the contrary, no credit shall be allowed against the taxes  
23 imposed by article thirteen-a of this chapter for taxable  
24 years ending on or after the tenth day of March, one  
25 thousand nine hundred ninety, unless one of the transition  
26 rules in paragraph (2) of this subsection (c) applies.

27       (2) *Transition rules.* — The general rule stated in  
28 paragraph (1) of this subsection (c) shall not apply:

29       (A) To qualified investment property placed in service  
30 or use prior to the tenth day of March, one thousand nine  
31 hundred ninety.



32 (B) To property purchased or leased for business  
33 expansion that is placed in service or use on or after the  
34 tenth day of March, one thousand nine hundred ninety, if  
35 at least one of the following clauses applies to such  
36 property:

37 (i) The new or expanded business facility was  
38 constructed, reconstructed or erected, pursuant to a written  
39 construction contract executed prior to the tenth day of  
40 March, one thousand nine hundred ninety, as limited to  
41 the provisions of such contract as of such date then  
42 binding on the taxpayer, but only to the extent such new  
43 or expanded business facility is placed in service or use  
44 prior to the first day of January, one thousand nine  
45 hundred ninety-two.

46 (ii) The new or expanded business facility which is  
47 part of a project described in paragraph (1), subsection  
48 (a), section four-b of this article, was constructed,  
49 reconstructed or erected, pursuant to a written construction  
50 contract executed prior to the tenth day of March, one  
51 thousand nine hundred ninety, as limited to the provisions  
52 of such contract as of such date then binding on the  
53 taxpayer: *Provided*, That only that portion of the contract  
54 price attributable to that percentage of the construction  
55 contract completed prior to the first day of January, one  
56 thousand nine hundred ninety-two, (determined under  
57 principles set forth in Section 460(b) of the Internal  
58 Revenue Code of 1986, as in effect before the tenth day of  
59 March, one thousand nine hundred ninety, which is placed  
60 in service or use prior to the first day of January, one  
61 thousand nine hundred ninety-four, may be treated as  
62 property purchased for business expansion under section  
63 six of this article.

64 (iii) The new or expanded business facility was  
65 purchased or leased pursuant to a written contract  
66 executed prior to the tenth day of March, one thousand  
67 nine hundred ninety, as limited to the provisions then  
68 binding on the taxpayer as of such date, but only to the  
69 extent such new or expanded business facility is placed in  
70 service or use prior to the first day of January, one  
71 thousand nine hundred ninety-two.

72 (iv) The machinery or equipment or other tangible  
73 personal property purchased or leased for business  
74 expansion at a new or expanded business facility was  
75 purchased or leased by the taxpayer pursuant to a written  
76 contract to purchase or lease identifiable tangible personal  
77 property executed before the tenth day of March, one  
78 thousand nine hundred ninety, as limited to the provisions  
79 of such written contract then binding on the taxpayer, but  
80 only to the extent the tangible personal property  
81 purchased or leased under such contract is placed in  
82 service or use before the first day of January, one  
83 thousand nine hundred ninety-two: *Provided*, That when  
84 such tangible personal property is purchased or leased as  
85 aforesaid as part of a project described in clause (ii) of this  
86 subparagraph (B), such tangible personal property must  
87 be placed in service or use prior to the first day of  
88 January, one thousand nine hundred ninety-four, to be  
89 treated as property purchased or leased for business  
90 expansion under section six of this article.

91 (C) To property purchased or leased for business  
92 expansion that is placed in service or use on or after the  
93 tenth day of March, one thousand nine hundred ninety, as  
94 part of a project otherwise eligible for the credit under  
95 subsection (a), section four-b of this article, if all of the  
96 requirements of clauses (i), (ii), (iii) and (iv) of this  
97 subparagraph are satisfied:

98 (i) The taxpayer and other participants in the project,  
99 if any, have made investments in property purchased or  
100 leased for business expansion as defined in subsection  
101 (b)(19), section three of this article prior to the tenth day  
102 of March, one thousand nine hundred ninety, in excess of  
103 ten million dollars.

104 (ii) The investments described in clause (i) were made  
105 pursuant to a plan for an integrated project to be  
106 developed over a period of one or more years and with the  
107 expectation of making additional investments in the  
108 integrated project.

109 (iii) The portion of the project constructed, purchased  
110 or leased after the tenth day of March, one thousand nine

111 hundred ninety, meets the definition of new business  
112 facility in subsection (e)(3) of this section.

113 (iv) The new jobs created by the project after the  
114 tenth day of March, one thousand nine hundred ninety,  
115 are filled by new employees as defined in subsection (e)  
116 (4) of this section.

117 (3) *Notice of claim under transition rules.*

118 (A) *Notice required.* — Any person intending to assert  
119 a claim for credit based, in whole or in part, on application  
120 of the transition rules in subparagraph (B) or (C),  
121 paragraph (2) of this subsection (c), shall file written  
122 notice of such intention with the tax commissioner on or  
123 before the first day of July, one thousand nine hundred  
124 ninety. In the case of a multiparticipant project, this  
125 notice may be filed by the managing project participant  
126 on behalf of all participants in such project. Such notice  
127 shall be in a form prescribed by the tax commissioner and  
128 all information required by such form shall be provided.

129 (B) *Failure to file notice.* — If any person fails to  
130 timely file the notice required by this paragraph (3), such  
131 person shall be precluded from claiming credit under this  
132 article for such investment.

133 (d) *Treatment of successor project participants.* —  
134 Whenever a participant in a project certified under  
135 paragraph (2) or (3), subsection (a), section four-b of this  
136 article, is replaced by another participant in that project on  
137 or after the tenth day of March, one thousand nine  
138 hundred ninety, the tax credits available to such successor  
139 participant as a result of the transfer shall not exceed the  
140 amount of credits that would have been available to the  
141 predecessor participant had the transfer to the successor  
142 participant not occurred: *Provided*, That if the project  
143 plan provides for annual recalculation of the division of  
144 the credit allowable for each year among the participants  
145 in the project in order to maximize the collective use of  
146 such credit by the project participants, or for any other  
147 purpose, then the credit available to the successor  
148 participant as a result of the transfer shall be limited each  
149 year to the amount of credit actually used by the

150 predecessor participant to offset taxes for the taxable year  
151 immediately preceding the taxable year in which such  
152 participant's obligations or interest in the project, as  
153 described in the project plan certified by the tax  
154 commissioner, passed to the successor participant in the  
155 project.

156 (e) *Certain terms redefined.* — Notwithstanding the  
157 provisions of subsection (b), section three of this article, or  
158 any other provision of this article, to the contrary, the  
159 following terms have the meanings assigned to them by  
160 this section.

161 (1) *Construction contract.* — The term "construction  
162 contract" means any contract for the building,  
163 construction, reconstruction or rehabilitation of, or the  
164 installation of any integral components to, or  
165 improvements of, a new or existing business facility.

166 (2) *Excluded property.* — The term "property  
167 purchased or leased for business expansion" shall not  
168 include:

169 (A) Property owned or leased by the taxpayer and for  
170 which the taxpayer was previously allowed tax credit for  
171 industrial expansion, tax credit for industrial revitalization,  
172 tax credit for coal loading facilities or the tax credits  
173 allowed by this article.

174 (B) Property owned or leased by the taxpayer and for  
175 which the seller, lessor, or other transferor, was previously  
176 allowed tax credit for industrial expansion, tax credit for  
177 industrial revitalization, tax credit for coal loading  
178 facilities, or the tax credits allowed by this article.

179 (C) Repair costs, including materials used in the repair,  
180 unless for federal income tax purposes the cost of the  
181 repair must be capitalized and not expensed.

182 (D) Airplanes.

183 (E) Property which is primarily used outside this state,  
184 with use being determined based upon the amount of time  
185 the property is actually used both within and without this  
186 state.

187 (F) Property which is acquired incident to the  
188 purchase of the stock or assets of the seller, unless for  
189 good cause shown, the tax commissioner consents to  
190 waiving this requirement.

191 (G) Natural resources in place purchased or leased  
192 prior to the first day of March, one thousand nine  
193 hundred eighty-five, or purchased or leased after such  
194 date pursuant to an option to purchase or lease such  
195 natural resources in place acquired prior to such date but  
196 exercised, in whole or in part, on or after the tenth day of  
197 March, one thousand nine hundred ninety; and natural  
198 resources in place purchased or leased on or after the  
199 tenth day of March, one thousand nine hundred ninety,  
200 unless pursuant to a written contract to purchase or lease  
201 executed prior to the passage of this section.

202 (H) Property purchased or leased on or after the tenth  
203 day of March, one thousand nine hundred ninety, unless  
204 pursuant to a written contract to purchase or lease  
205 executed prior to the passage of this section, the cost or  
206 consideration for which cannot be quantified with any  
207 reasonable degree of accuracy at the time such property is  
208 placed in service or use: *Provided*, That when the contract  
209 of purchase or lease specifies a minimum purchase price  
210 or minimum annual rent the amount thereof shall be used  
211 to determine the qualified investment in such property  
212 under section six of this article if the property otherwise  
213 qualifies as property purchased or leased for business  
214 expansion.

215 (3) *New business facility*. — The term "new business  
216 facility" means a business facility which satisfies all the  
217 requirements of subparagraphs (A), (B), (C) and (D) of  
218 this paragraph.

219 (A) The facility is employed by the taxpayer in the  
220 conduct of a business the net income of which is or would  
221 be taxable under article twenty-one or twenty-four of this  
222 chapter. Such facility shall not be considered a new  
223 business facility in the hands of the taxpayer if the  
224 taxpayer's only activity with respect to such facility is to  
225 lease it to another person or persons.

226 (B) Such facility is purchased by, or leased to, the  
227 taxpayer after the first day of March, one thousand nine  
228 hundred eighty-five.

229 (C) The facility was not purchased or leased by the  
230 taxpayer from a related person or a project participant, or  
231 related person of a project participant, in any certified  
232 project in which the taxpayer is a participant. The tax  
233 commissioner may waive this requirement if the facility  
234 was acquired from a related party for its fair market value  
235 and the acquisition was not tax motivated.

236 (D) Such facility was not in service or use during the  
237 ninety days immediately prior to transfer of the title to  
238 such facility, or prior to the commencement of the term of  
239 the lease of such facility: *Provided*, That this ninety-day  
240 period may be waived by the tax commissioner if the  
241 commissioner determines that persons employed at the  
242 facility may be treated as "new employees" as that term is  
243 defined under paragraph (4) of this subsection.

244 (4) *New Employee.*

245 (A) The term "new employee" means a person residing  
246 and domiciled in this state, hired by the taxpayer to fill a  
247 position or a job in this state which previously did not  
248 exist in taxpayer's business enterprise in this state prior to  
249 the date on which the taxpayer's qualified investment is  
250 placed in service or use in this state. In no case shall the  
251 number of new employees directly attributable to such  
252 investment for purposes of this credit exceed the total net  
253 increase in the taxpayer's employment in this state:  
254 *Provided*, That with respect to taxpayers who file  
255 application for certification after the tenth day of March,  
256 one thousand nine hundred ninety, the tax commissioner  
257 may require that the net increase in the taxpayer's  
258 employment in this state be determined and certified for  
259 the taxpayer's controlled group; and in the case of a  
260 project involving more than one person for the controlled  
261 groups of all participants, taken as a whole: *Provided*,  
262 *however*, That persons filling jobs saved as a direct result  
263 of taxpayer's qualified investment in property purchased  
264 or leased for business expansion on or after the tenth day  
265 of March, one thousand nine hundred ninety, may be

266 treated as new employees filling new jobs if the taxpayer  
267 certifies the material facts to the tax commissioner and the  
268 tax commissioner expressly finds that:

269 (i) But for the new employer purchasing the assets of a  
270 business in bankruptcy under chapter seven or eleven of  
271 the United States bankruptcy code and such new employer  
272 making qualified investment in property purchased or  
273 leased for business expansion, the assets would have been  
274 sold by the United States bankruptcy court in a liquidation  
275 sale and the jobs so saved would have been lost; or

276 (ii) But for taxpayer's qualified investment in property  
277 purchased or leased for business expansion in this state,  
278 taxpayer would have closed its business facility in this state  
279 and the employees of the taxpayer located at such facility  
280 would have lost their jobs: *Provided*, That the tax  
281 commissioner shall not make this certification unless the  
282 tax commissioner finds that the taxpayer is insolvent as  
283 defined in 11 U.S.C. §101 (31) or that the taxpayer's  
284 business facility was destroyed, in whole or in significant  
285 part, by fire, flood or other act of God.

286 (B) A person shall be deemed to be a "new employee"  
287 only if such person's duties in connection with the  
288 operation of the business facility are on:

289 (i) A regular, full-time and permanent basis.

290 (I) "Full-time employment" means employment for at  
291 least one hundred forty hours per month at a wage not less  
292 than the prevailing state or federal minimum wage,  
293 depending on which minimum wage provision is  
294 applicable to the business;

295 (II) "Permanent employment" does not include  
296 employment that is temporary or seasonal and therefore  
297 the wages, salaries and other compensation paid to such  
298 temporary or seasonal employees will not be considered  
299 for purposes of sections five and seven of this article; or

300 (ii) A regular, part-time and permanent basis:  
301 *Provided*, That such person is customarily performing  
302 such duties at least twenty hours per week for at least six  
303 months during the taxable year.

304       (5) *Leased property*. — The term "leased property"  
305 does not include property which the taxpayer is required  
306 to show on its books and records as an asset under  
307 generally accepted principles of financial accounting. If  
308 the taxpayer is prohibited from expensing the lease  
309 payments for federal income tax purposes, the property  
310 shall be treated as purchased property under this section if  
311 the property was purchased on or after the tenth day of  
312 March, one thousand nine hundred ninety.

313       (6) *Small business*. — The term "small business"  
314 means a small business which has an annual payroll of one  
315 million seven hundred thousand dollars or less, and annual  
316 gross receipts of not more than five million five hundred  
317 thousand dollars: *Provided*, That on or before the  
318 fifteenth of January, one thousand nine hundred  
319 ninety-one, and on or before each fifteenth day of  
320 January thereafter, the tax commissioner shall prescribe  
321 amounts which shall apply in lieu of the above amounts  
322 for taxable years beginning on or after the first day of  
323 January of the calendar year in which determination is  
324 made. The prescribed amounts shall be determined in  
325 accordance with section seven-a of this article and notice  
326 thereof shall be filed in the state register. The  
327 requirements for annual payroll and annual gross receipts,  
328 once met by a given taxpayer in that taxable year when  
329 qualified investment is first placed in service or use shall  
330 not again be applied to that same taxpayer in subsequent  
331 years to defeat the small business credit to which the  
332 taxpayer gained entitlement in that year. However, the  
333 median compensation requirements applicable to any  
334 small business, except a small business entitled to a  
335 certified project credit, shall be determined when qualified  
336 investment is first placed in service or use; and  
337 subsequently redetermined inflation adjusted amounts for  
338 median compensation for each year shall be the  
339 requirements applicable to that small business for each  
340 year throughout the ten-year credit period and any further  
341 carryover or other extended credit period for the original  
342 credit to which the requirements relate. For purposes of  
343 this definition:



344       (A) *Annual Payroll.* — The annual payroll of a  
345 business shall include the employees of its domestic and  
346 foreign affiliates, whether employed on a full-time,  
347 part-time, temporary, or other basis, during the preceding  
348 twelve months. If a business has not been in existence for  
349 twelve months, the payroll of the business shall be divided  
350 by the number of weeks, including fractions of a week,  
351 that it has been in business, and the result multiplied by  
352 fifty-two. That amount shall then be added to the twelve  
353 month payrolls of its domestic and foreign affiliates to  
354 determine the annual payroll of the business for purposes  
355 of this section.

356       (B) *Annual gross receipts.* — The annual gross  
357 receipts of a business shall include the annual gross  
358 receipts of its foreign and domestic affiliates.

359       (i) The "annual gross receipts" of a business which has  
360 been in business for three or more complete fiscal years  
361 means the annual gross revenues of the business for the  
362 last three fiscal years. For purposes of this definition, the  
363 gross revenues of the business includes revenues from  
364 sales of tangible personal property and services, interest,  
365 rents, royalties, fees, commissions and receipts from any  
366 other source, but less returns and allowances, sales of fixed  
367 assets, interaffiliated transactions between a business and  
368 its domestic and foreign affiliates, and taxes collected for  
369 remittance to a third party, as shown on its books for  
370 federal income tax purposes.

371       (ii) The annual receipts of a business that has been in  
372 business for less than three complete fiscal years means its  
373 total receipts for the period it has been in business, divided  
374 by the number of weeks including fractions of a week that  
375 it has been in business, and multiplied by fifty-two.

376       (C) *Affiliates.* — The term "affiliates" includes all  
377 concerns which are affiliates of each other when either  
378 directly or indirectly: (i) One concern controls or has the  
379 power to control the other; or (ii) a third party or parties  
380 controls or has the power to control both. In determining  
381 whether concerns are independently owned and operated  
382 and whether or not affiliation exists, consideration shall be  
383 given to all appropriate factors, including common

384 ownership, common management and contractual  
385 relationships.

386 (D) *Concern.* — The term "concern" means any  
387 business entity organized for profit (even if its ownership  
388 is in the hands of a nonprofit entity), having a place of  
389 business located in this state, and which makes a  
390 contribution to the economy of this state through payment  
391 of taxes, or the sale or use in this state of tangible personal  
392 property, or the procurement or providing of services in  
393 this state, or the hiring of employees who work in this  
394 state. "Concern" includes, but is not limited to, any person  
395 as defined in paragraph eighteen, subsection (b), section  
396 three of this article.

397 (f) *Application for credit required.*

398 (1) *Application required.* — Notwithstanding any  
399 provision of this article to the contrary, no credit shall be  
400 allowed or applied under this article for any qualified  
401 investment property placed in service or use on or after  
402 the first day of January, one thousand nine hundred  
403 ninety, until the person asserting a claim for the allowance  
404 of credit under this article makes written application to the  
405 tax commissioner for allowance of credit as provided in  
406 this subsection and receives written acknowledgment of its  
407 receipt from tax commissioner: *Provided*, That in the case  
408 of a multiparticipant project this notice may be filed by  
409 the managing project participant on behalf of all  
410 participants in that project. An application for credit shall  
411 be filed no later than the last day of the due date, without  
412 extensions, for filing the tax returns required under article  
413 twenty-one or twenty-four of this chapter for the taxable  
414 year in which the property to which the credit relates is  
415 placed in service or use and all information required by  
416 such form shall be provided.

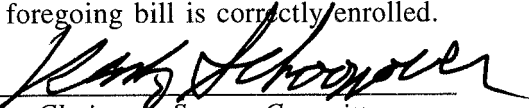
417 (2) *Failure to file.* — The failure to timely apply for  
418 the credit shall result in the forfeiture of fifty percent of  
419 the annual credit allowance otherwise allowable under this  
420 article. This penalty shall apply annually until such  
421 application is filed.

422 (g) *Effective date.*

423       (1) Except as otherwise expressly provided in this  
424 section, the provisions of this section shall apply to  
425 property placed in service or use on or after the tenth day  
426 of March, one thousand nine hundred ninety,  
427 notwithstanding any provision of prior law which may be  
428 in conflict with this section. In the case of any such  
429 ambiguity, the provisions of this section shall control  
430 resolution of such ambiguity.

431       (2) The amendments to this section enacted in the  
432 year, one thousand nine hundred ninety-eight, shall be  
433 retroactive, and shall be effective for tax years beginning  
434 on or after the first day of January, one thousand nine  
435 hundred ninety-five.

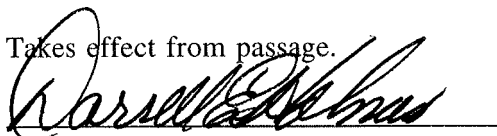
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

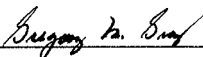
  
Chairman Senate Committee

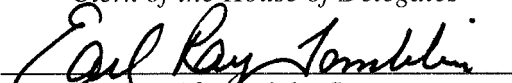
  
Chairman House Committee

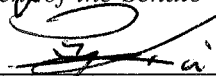
Originating in the House.

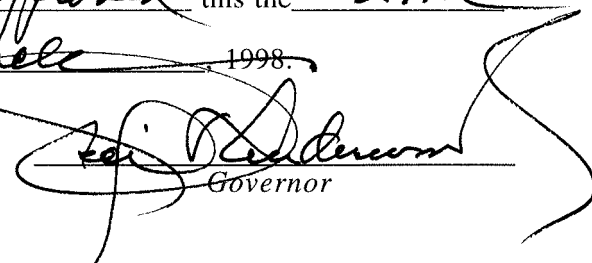
Takes effect from passage.

  
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 27th  
day of March 1998.  
  
Governor

PRESENTED TO THE

GOVERNOR

Date 3/23/98

Time 3:15 pm