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2007 APR -4 PM 3: 57

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**WEST VIRGINIA LEGISLATURE**  
**SEVENTY-EIGHTH LEGISLATURE**  
**REGULAR SESSION, 2007**

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**ENROLLED**

**Senate Bill No. 749**

(BY SENATORS HELMICK, PLYMALE, CHAFIN, PREZIOSO,  
EDGELL, LOVE, BAILEY, BOWMAN, MCCABE, UNGER, SYPOLT,  
FANNING, FACEMYER, BOLEY, SPROUSE AND GUILLS)

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[Passed March 10, 2007; in effect from passage.]

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AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §11-23-5b; to amend and reenact §11-23-6 and §11-23-27 of said code; to amend and reenact §11-24-1, §11-24-3a, §11-24-7, §11-24-13a and §11-24-24 of said code; and to amend said code by adding thereto four new sections, designated §11-24-13c, §11-24-13d, §11-24-13e and §11-24-13f, all relating to business taxes generally; reducing the business franchise tax; and requiring combined reporting of certain taxes upon businesses.

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

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new section, designated §11-23-5b; that §11-23-6 and §11-23-27 of said code be amended and reenacted; that §11-24-1, §11-24-3a, §11-24-7, §11-24-13a and §11-24-24 of said code be amended and reenacted; and that said code be amended by adding thereto four new sections, designated §11-24-13c, §11-24-13d, §11-24-13e and §11-24-13f, all to read as follows:

**ARTICLE 23. BUSINESS FRANCHISE TAX.**

**§11-23-5b. Apportionment of income of Financial organizations.**

1 Notwithstanding any other provisions of this article or  
2 this code to the contrary, for tax years beginning on or  
3 after the first day of January, two thousand nine, the  
4 provisions of section five-a of this article are null and  
5 void and of no force or effect.

**§11-23-6. Imposition of tax; change in rate of tax.**

1 (a) *General.* — An annual business franchise tax is  
2 hereby imposed on the privilege of doing business in  
3 this state and in respect of the benefits and protection  
4 conferred. Such tax shall be collected from every  
5 domestic corporation, every corporation having its  
6 commercial domicile in this state, every foreign or  
7 domestic corporation owning or leasing real or tangible  
8 personal property located in this state or doing business  
9 in this state and from every partnership owning or  
10 leasing real or tangible personal property located in this  
11 state or doing business in this state, effective on and  
12 after the first day of July, one thousand nine hundred  
13 eighty-seven.

14 (b) *Amount of tax and rate; effective date.* —

15 (1) On and after the first day of July, one thousand  
16 nine hundred eighty-seven, the amount of tax shall be  
17 the greater of fifty dollars or fifty-five one hundredths  
18 of one percent of the value of the tax base, as  
19 determined under this article: *Provided*, That when the  
20 taxpayer's first taxable year under this article is a short  
21 taxable year, the taxpayer's liability shall be prorated  
22 based upon the ratio which the number of months in  
23 which such short taxable year bears to twelve:  
24 *Provided, however*, That this subdivision shall not  
25 apply to taxable years beginning on or after the first  
26 day of January, one thousand nine hundred eighty-nine.

27 (2) *Taxable years after the thirty-first day of*  
28 *December, one thousand nine hundred eighty-eight.* —  
29 For taxable years beginning on or after the first day of  
30 January, one thousand nine hundred eighty-nine, the  
31 amount of tax due under this article shall be the greater  
32 of fifty dollars or seventy-five one hundredths of one  
33 percent of the value of the tax base as determined under  
34 this article.

35 (3) *Taxable years after the thirtieth day of June, one*  
36 *thousand nine hundred ninety-seven.* — For taxable  
37 years beginning on or after the first day of July, one  
38 thousand nine hundred ninety-seven, the amount of tax  
39 due under this article shall be the greater of fifty dollars  
40 or seventy hundredths of one percent of the value of the  
41 tax base as determined under this article.

42 (4) *Taxable years after the thirty-first day of*  
43 *December, two thousand six.* — For taxable years  
44 beginning on or after the first day of January, two  
45 thousand seven, the amount of tax due under this article  
46 shall be the greater of fifty dollars or fifty-five one

47 hundredths of one percent of the value of the tax base  
48 as determined under this article.

49 (5) *Taxable years after the thirty-first day of*  
50 *December, two thousand eight.* — For taxable years  
51 beginning on or after the first day of January, two  
52 thousand nine, the amount of tax due under this article  
53 shall be the greater of fifty dollars or 0.48 percent of the  
54 value of the tax base as determined under this article.

55 (6) *Taxable years after the thirty-first day of*  
56 *December, two thousand nine.* — For taxable years  
57 beginning on or after the first day of January, two  
58 thousand ten, the amount of tax due under this article  
59 shall be the greater of fifty dollars or 0.41 percent of the  
60 value of the tax base as determined under this article.

61 (7) *Taxable years after the thirty-first day of*  
62 *December, two thousand ten.* — For taxable years  
63 beginning on or after the first day of January, two  
64 thousand eleven, the amount of tax due under this  
65 article shall be the greater of fifty dollars or 0.34  
66 percent of the value of the tax base as determined under  
67 this article.

68 (8) *Taxable years after the thirty-first day of*  
69 *December, two thousand eleven.* — For taxable years  
70 beginning on or after the first day of January, two  
71 thousand twelve, the amount of tax due under this  
72 article shall be the greater of fifty dollars or 0.27  
73 percent of the value of the tax base as determined under  
74 this article.

75 (9) *Taxable years after the thirty-first day of*  
76 *December, two thousand twelve.* — For taxable years  
77 beginning on or after the first day of January, two  
78 thousand thirteen, the amount of tax due under this

79 article shall be the greater of fifty dollars or 0.20  
80 percent of the value of the tax base as determined under  
81 this article.

82 (c) *Short taxable years.* — When the taxpayer's  
83 taxable year for federal income tax purposes is a short  
84 taxable year, the tax determined by application of the  
85 tax rate to the taxpayer's tax base shall be prorated  
86 based upon the ratio which the number of months in  
87 such short taxable year bears to twelve: *Provided*, That  
88 when the taxpayer's first taxable year under this article  
89 is less than twelve months, the taxpayer's liability shall  
90 be prorated based upon the ratio which the number of  
91 months the taxpayer was doing business in this state  
92 bears to twelve but in no event shall the tax due be less  
93 than fifty dollars.

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

1 (a) Effective for taxable years beginning on or after  
2 the first day of January, one thousand nine hundred  
3 ninety-one, and notwithstanding any provisions of this  
4 code to the contrary, any financial organization having  
5 its 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 lesser of:

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

16 (2) The portion of the tax actually paid that the

17 financial organization would have paid if the rate of tax  
18 imposed by this article is applied to the tax base  
19 determined under the law of such other state.

20 (b) Any additional payments of such tax to other  
21 states, 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  
24 organization with respect to the taxable year, but after  
25 the due date of the annual return required by this  
26 article for the taxable year, including any extensions,  
27 shall likewise be accounted for in the taxable year in  
28 which such additional payment is made or such refund  
29 is received by the financial organization.

30 (c) For tax years beginning on or after the first day of  
31 January, two thousand nine, the provisions of this  
32 section are null and void and of no force or effect.

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

##### **§11-24-1. Legislative findings.**

1 The Legislature hereby finds and declares that the  
2 adoption by this state for its corporation net income tax  
3 purposes of certain provisions of the laws of the United  
4 States relating to the determination of income for  
5 federal income tax purposes will: (1) Simplify  
6 preparation of state corporation net income tax returns  
7 by taxpayers: (2) improve enforcement of the state  
8 corporation net income tax through better use of  
9 information obtained from federal income tax audits:  
10 and (3) aid interpretation of the state corporation net  
11 income tax law through increased use of federal judicial  
12 and administrative determinations and precedents.

13 The Legislature does therefore declare that this article

14 be construed so as to accomplish the foregoing  
15 purposes.

16 In recognition of the fact that corporate business is  
17 increasingly conducted on a national and international  
18 basis, it is the intent of the Legislature to adopt a  
19 combined system of income tax reporting for  
20 corporations. A separate accounting system is  
21 sometimes not adequate to accurately measure the  
22 income of multistate and multinational corporations  
23 doing business in this state and sometimes creates tax  
24 disadvantages for West Virginia corporations in  
25 competition with those multistate and multinational  
26 corporations. Therefore, it is the intent of the  
27 Legislature to capture lost revenue with adoption of a  
28 combined reporting tax base.

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

1 For purposes of this article:

2 (1) *Business income*. — The term “business income”  
3 means income arising from transactions and activity in  
4 the regular course of the taxpayer’s trade or business  
5 and includes income from tangible and intangible  
6 property if the acquisition, management and disposition  
7 of the property or the rendering of services in  
8 connection therewith constitute integral parts of the  
9 taxpayer’s regular trade or business operations and  
10 includes all income which is apportionable under the  
11 Constitution of the United States.

12 (2) “Combined group” means the group of all persons  
13 whose income and apportionment factors are required  
14 to be taken into account pursuant to subsection (a) or  
15 (b), section thirteen-a of this article in determining the  
16 taxpayer’s share of the net business income or loss  
17 apportionable to this state.

18       (3) *Commercial domicile.* — The term “commercial  
19 domicile” means the principal place from which the  
20 trade or business of the taxpayer is directed or  
21 managed: *Provided*, That the commercial domicile of a  
22 financial organization, which is subject to regulation as  
23 such, shall be at the place designated as its principal  
24 office with its regulating authority.

25       (4) *Compensation.* — The term “compensation” means  
26 wages, salaries, commissions and any other form of  
27 remuneration paid to employees for personal services.

28       (5) *Corporation.* — “Corporation” means any  
29 corporation as defined by the laws of this state or  
30 organization of any kind treated as a corporation for  
31 tax purposes under the laws of this state, wherever  
32 located, which if it were doing business in this state  
33 would be a “taxpayer”. The business conducted by a  
34 partnership which is directly or indirectly held by a  
35 corporation shall be considered the business of the  
36 corporation to the extent of the corporation’s  
37 distributive share of the partnership income, inclusive  
38 of guaranteed payments to the extent prescribed by  
39 regulation. The term “corporation” includes a joint-  
40 stock company and any association or other  
41 organization which is taxable as a corporation under  
42 the federal income tax law.

43       (6) *Delegate.* — The term “delegate” in the phrase “or  
44 his delegate”, when used in reference to the Tax  
45 Commissioner, means any officer or employee of the  
46 State Tax Department duly authorized by the Tax  
47 Commissioner directly, or indirectly by one or more  
48 redelegations of authority, to perform the functions  
49 mentioned or described in this article or regulations  
50 promulgated thereunder.

51 (7) *Domestic corporation*. — The term “domestic  
52 corporation” means any corporation organized under  
53 the laws of West Virginia and certain corporations  
54 organized under the laws of the state of Virginia before  
55 the twentieth day of June, one thousand eight hundred  
56 sixty-three. Every other corporation is a foreign  
57 corporation.

58 (8) *Engaging in business*. — The term “engaging in  
59 business” or “doing business” means any activity of a  
60 corporation which enjoys the benefits and protection of  
61 government and laws in this state.

62 (9) *Federal Form 1120*. — The term “Federal Form  
63 1120” means the annual federal income tax return of  
64 any corporation made pursuant to the United States  
65 Internal Revenue Code of 1986, as amended, or in  
66 successor provisions of the laws of the United States, in  
67 respect to the federal taxable income of a corporation,  
68 and filed with the federal Internal Revenue Service. In  
69 the case of a corporation that elects to file a federal  
70 income tax return as part of an affiliated group, but  
71 files as a separate corporation under this article, then as  
72 to such corporation Federal Form 1120 means its pro  
73 forma Federal Form 1120.

74 (10) *Fiduciary*. — The term “fiduciary” means, and  
75 includes, a guardian, trustee, executor, administrator,  
76 receiver, conservator or any person acting in any  
77 fiduciary capacity for any person.

78 (11) *Financial organization*. — The term “financial  
79 organization” means:

80 (A) A holding company or a subsidiary thereof. As  
81 used in this section “holding company” means a  
82 corporation registered under the federal Bank Holding

83 Company Act of 1956 or registered as a savings and loan  
84 holding company other than a diversified savings and  
85 loan holding company (as defined in section 408(a)(1)(F)  
86 of the federal National Housing Act (12 U. S. C.  
87 §1730(a)(1)(F));

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

91 (1) An institution, the deposits, shares or accounts of  
92 which are insured under the Federal Deposit Insurance  
93 Act or by the federal Savings and Loan Insurance  
94 Corporation;

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

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

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

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

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

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

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

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

114 (I) Secured or unsecured consumer loans;

115 (II) Installment obligations;

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

118 (IV) Credit card loans;

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

121 (VI) Loans arising in factoring.

122 (2) Leasing or acting as an agent, broker or advisor in  
123 connection with leasing real and personal property that  
124 is the economic equivalent of an extension of credit (as  
125 defined by the Federal Reserve Board in 12 C. F. R.  
126 225.25(b)(5)).

127 (3) Operating a credit card business.

128 (4) Rendering estate or trust services.

129 (5) Receiving, maintaining or otherwise handling  
130 deposits.

131 (6) Engaging in any other activity with an economic  
132 effect comparable to those activities described in item  
133 (1), (2), (3), (4) or (5) of this subparagraph.

134 (12) *Fiscal year*. — The term “fiscal year” means an  
135 accounting period of twelve months ending on any day

136 other than the last day of December and on the basis of  
137 which the taxpayer is required to report for federal  
138 income tax purposes.

139 (13) *Includes and including*. — The terms “includes”  
140 and “including”, when used in a definition contained in  
141 this article, shall not be deemed to exclude other things  
142 otherwise within the meaning of the term being defined.

143 (14) “Internal Revenue Code” means Title 26 of the  
144 United States Code, as amended, without regard to  
145 application of federal treaties unless expressly made  
146 applicable to states of the United States.

147 (15) *Nonbusiness income*. — The term “nonbusiness  
148 income” means all income other than business income.

149 (16) “Partnership” means a general or limited  
150 partnership, or organization of any kind treated as a  
151 partnership for tax purposes under the laws of this  
152 state.

153 (17) *Person*. — The term “person” is to be deemed  
154 interchangeable with the term “corporation” in this  
155 section. The term “person” means any individual, firm,  
156 partnership, general partner of a partnership, limited  
157 liability company, registered limited liability  
158 partnership, foreign limited liability partnership,  
159 association, corporation (whether or not the corporation  
160 is, or would be if doing business in this state, subject to  
161 the tax imposed by this article, company, syndicate,  
162 estate, trust, business trust, trustee, trustee in  
163 bankruptcy, receiver, executor, administrator, assignee  
164 or organization of any kind.

165 (18) *Pro forma return*. — The term “pro forma return”  
166 when used in this article means the return which the

167 taxpayer would have filed with the Internal Revenue  
168 Service had it not elected to file federally as part of an  
169 affiliated group.

170 (19) *Public utility*. — The term “public utility” means  
171 any business activity to which the jurisdiction of the  
172 Public Service Commission of West Virginia extends  
173 under section one, article two, chapter twenty-four of  
174 this code.

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

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

183 (22) *Taxable year, tax year*. — The term “taxable  
184 year” or “tax year” means the taxable year for which  
185 the taxable income of the taxpayer is computed under  
186 the federal income tax law.

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

191 (24) *Tax Commissioner*. — The term “Tax  
192 Commissioner” means the Tax Commissioner of the  
193 State of West Virginia or his delegate.

194 (25) “Tax haven” means a jurisdiction that, for a  
195 particular tax year in question: (A) Is identified by the  
196 Organization for Economic Cooperation and

197 Development as a tax haven or as having a harmful  
198 preferential tax regime; or (B) a jurisdiction that has no,  
199 or nominal, effective tax on the relevant income and: (i)  
200 That has laws or practices that prevent effective  
201 exchange of information for tax purposes with other  
202 governments regarding taxpayers subject to, or  
203 benefiting from, the tax regime; or (ii) that lacks  
204 transparency. For purposes of this definition, a tax  
205 regime lacks transparency if the details of legislative,  
206 legal or administrative provisions are not open to public  
207 scrutiny and apparent, or are not consistently applied  
208 among similarly situated taxpayers; (iii) facilitates the  
209 establishment of foreign-owned entities without the  
210 need for a local substantive presence or prohibits these  
211 entities from having any commercial impact on the local  
212 economy; (iv) explicitly or implicitly excludes the  
213 jurisdiction's resident taxpayers from taking advantage  
214 of the tax regime's benefits or prohibits enterprises that  
215 benefit from the regime from operating in the  
216 jurisdiction's domestic market; or (v) has created a tax  
217 regime which is favorable for tax avoidance, based upon  
218 an overall assessment of relevant factors, including  
219 whether the jurisdiction has a significant untaxed  
220 offshore financial or other services sector relative to its  
221 overall economy. For purposes of this definition the  
222 phrase "tax regime" means a set or system of rules,  
223 laws, regulations or practices by which taxes are  
224 imposed on any person, corporation or entity, or on any  
225 income, property, incident, indicia or activity pursuant  
226 to governmental authority.

227 (26) *Taxpayer*. — The term "taxpayer" means any  
228 person subject to the tax imposed by this article.

229 (27) *This code*. — The term "this code" means the  
230 Code of West Virginia, one thousand nine hundred  
231 thirty-one, as amended.

232 (28) *This state.* — The term “this state” means the  
233 State of West Virginia.

234 (29) “United States” means the United States of  
235 America and includes all of the states of the United  
236 States, the District of Columbia and United States  
237 territories and possessions.

238 (30) “Unitary business” means a single economic  
239 enterprise that is made up either of separate parts of a  
240 single business entity or of a commonly controlled  
241 group of business entities that are sufficiently  
242 interdependent, integrated and interrelated through  
243 their activities so as to provide a synergy and mutual  
244 benefit that produces a sharing or exchange of value  
245 among them and a significant flow of value to the  
246 separate parts.

247 (31) *West Virginia taxable income.* — The term “West  
248 Virginia taxable income” means the taxable income of  
249 a corporation as defined by the laws of the United  
250 States for federal income tax purposes, adjusted, as  
251 provided in this article: *Provided*, That in the case of a  
252 corporation having income from business activity which  
253 is taxable without this state, its “West Virginia taxable  
254 income” shall be such portion of its taxable income as  
255 so defined and adjusted as is allocated or apportioned  
256 to this state under the provisions of this article.

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

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

6 federal taxable income adjusted as provided in section  
7 six.

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

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

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

19 (c) *Business activities entirely within West Virginia.* —  
20 If the business activities of a taxpayer take place  
21 entirely within this state, the entire net income of the  
22 taxpayer is subject to the tax imposed by this article.  
23 The business activities of a taxpayer are considered to  
24 have taken place in their entirety within this state if the  
25 taxpayer is not “taxable in another state”: *Provided,*  
26 That for tax years beginning before the first day of  
27 January, two thousand nine, the business activities of a  
28 financial organization having its commercial domicile  
29 in this state are considered to take place entirely in this  
30 state, notwithstanding that the organization may be  
31 “taxable in another state”: *Provided, however,* That for  
32 tax years beginning before the first day of January, two  
33 thousand nine, the income from the business activities  
34 of a financial organization not having its commercial  
35 domicile in this state shall be apportioned according to  
36 the applicable provisions of this article.

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

53 (1) *Net rents and royalties.* —

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

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

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

60 (ii) In their entirety if the taxpayer's commercial  
61 domicile is in this state and the taxpayer is not  
62 organized under the laws of or taxable in the state in  
63 which the property is utilized.

64 (C) The extent of utilization of tangible personal  
65 property in a state is determined by multiplying the  
66 rents and royalties by a fraction, the numerator of  
67 which is the number of days of physical location of the

68 property in the state during the rental or royalty period  
69 in the taxable year and the denominator of which is the  
70 number of days of physical location of the property  
71 everywhere during all rental or royalty periods in the  
72 taxable year. If the physical location of the property  
73 during the rental or royalty period is unknown or  
74 unascertainable by the taxpayer, tangible personal  
75 property is utilized in the state in which the property  
76 was located at the time the rental or royalty payer  
77 obtained possession.

78 (2) *Capital gains.* —

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

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

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

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

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

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

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

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

98       (A) Patent and copyright royalties are allocable to this  
99       state:

100       (i) If and to the extent that the patent or copyright is  
101       utilized by the payer in this state; or

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

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

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

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

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

127 (B) A corporate partner's distributive share of income,  
128 gain, loss, deduction or credit of a partnership shall be  
129 modified as provided in section six of this article for  
130 each partnership. For taxable years beginning on or  
131 after the thirty-first day of December, one thousand  
132 nine hundred ninety-eight, the distributive share shall  
133 then be allocated and apportioned as provided in this  
134 section, using the partnership's property, payroll and  
135 sales factors. The sum of that portion of the distributive  
136 share allocated and apportioned to this state shall then  
137 be treated as distributive share allocated to this state;  
138 and that portion of distributive share allocated or  
139 apportioned outside this state shall be treated as  
140 distributive share allocated outside this state, unless the  
141 taxpayer requests or the tax commissioner, under  
142 subsection (h) of this section requires that the  
143 distributive share be treated differently.

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

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

162 of all real and tangible personal property leased and  
163 used by the taxpayer during the taxable year.

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

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

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

191 (3) *Movable property.* — The value of movable  
192 tangible personal property used both within and  
193 without this state shall be included in the numerator to  
194 the extent of its utilization in this state. The extent of

195 the utilization shall be determined by multiplying the  
196 original cost of the property by a fraction, the  
197 numerator of which is the number of days of physical  
198 location of the property in this state during the taxable  
199 period and the denominator of which is the number of  
200 days of physical location of the property everywhere  
201 during the taxable year. The number of days of physical  
202 location of the property may be determined on a  
203 statistical basis or by other reasonable method  
204 acceptable to the tax commissioner.

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

213 (5) *Average value of property.* — The average value of  
214 property shall be determined by averaging the values at  
215 the beginning and ending of the taxable year: *Provided,*  
216 That the Tax Commissioner may require the averaging  
217 of monthly values during the taxable year if substantial  
218 fluctuations in the values of the property exist during  
219 the taxable year, or where property is acquired after the  
220 beginning of the taxable year, or is disposed of, or  
221 whose rental contract ceases, before the end of the  
222 taxable year.

223 (6) *Payroll factor.* — The payroll factor is a fraction,  
224 the numerator of which is the total compensation paid  
225 in this state during the taxable year by the taxpayer for  
226 compensation and the denominator of which is the total  
227 compensation paid by the taxpayer during the taxable  
228 year, as shown on the taxpayer's federal income tax

229 return as filed with the Internal Revenue Service, as  
230 reflected in the schedule of wages and salaries and that  
231 portion of cost of goods sold which reflects  
232 compensation or as shown on a pro forma return.

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

246 (8) *Employee*. — The term “employee” means:

247 (A) Any officer of a corporation; or

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

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

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

255 (B) The employee’s service is performed both within  
256 and without this state, but the service performed  
257 without the state is incidental to the individual’s service  
258 within this state. The word “incidental” means any

259 service which is temporary or transitory in nature or  
260 which is rendered in connection with an isolated  
261 transaction; or

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

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

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

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

282 (10) *Sales factor*. — The sales factor is a fraction, the  
283 numerator of which is the gross receipts of the taxpayer  
284 derived from transactions and activity in the regular  
285 course of its trade or business in this state during the  
286 taxable year (business income), less returns and  
287 allowances. The denominator of the fraction is the total  
288 gross receipts derived by the taxpayer from transactions  
289 and activity in the regular course of its trade or business  
290 during the taxable year (business income), and reflected

291 in its gross income reported and as appearing on the  
292 taxpayer's Federal Form 1120, and consisting of those  
293 certain pertinent portions of the (gross income) elements  
294 set forth: *Provided*, That if either the numerator or the  
295 denominator includes interest or dividends from  
296 obligations of the United States government which are  
297 exempt from taxation by this state, the amount of such  
298 interest and dividends, if any, shall be subtracted from  
299 the numerator or denominator in which it is included.

300 (11) Allocation of sales of tangible personal property.  
301 —

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

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

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

321 (B) All other sales of tangible personal property  
322 delivered or shipped to a purchaser within a state in

323 which the taxpayer is not taxed, as defined in  
324 subsection (b) of this section, shall be excluded from the  
325 denominator of the sales factor.

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

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

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

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

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

351 (f) *Income-producing activity.* — The term “income-  
352 producing activity” applies to each separate item of  
353 income and means the transactions and activity directly

354 engaged in by the taxpayer in the regular course of its  
355 trade or business for the ultimate purpose of obtaining  
356 gain or profit. The activity does not include transactions  
357 and activities performed on behalf of the taxpayer, such  
358 as those conducted on its behalf by an independent  
359 contractor. "Income-producing activity" includes, but  
360 is not limited to, the following:

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

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

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

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

370 The mere holding of intangible personal property is  
371 not, in itself, an income-producing activity: *Provided*,  
372 That the conduct of the business of a financial  
373 organization is an income-producing activity.

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

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

380 (1) *General.* — If the allocation and apportionment  
381 provisions of subsections (d) and (e) of this section do  
382 not fairly represent the extent of the taxpayer's business

383 activities in this state, the taxpayer may petition for or  
384 the Tax Commissioner may require, in respect to all or  
385 any part of the taxpayer's business activities, if  
386 reasonable:

387 (A) Separate accounting;

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

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

392 (D) The employment of any other method to effectuate  
393 an equitable allocation or apportionment of the  
394 taxpayer's income. The petition shall be filed no later  
395 than the due date of the annual return for the taxable  
396 year for which the alternative method is requested,  
397 determined without regard to any extension of time for  
398 filing the return and the petition shall include a  
399 statement of the petitioner's objections and of the  
400 alternative method of allocation or apportionment as it  
401 believes to be proper under the circumstances with such  
402 detail and proof as the Tax Commissioner may require.

403 (2) *Alternative method for public utilities.* — If the  
404 taxpayer is a public utility and if the allocation and  
405 apportionment provisions of subsections (d) and (e) of  
406 this section do not fairly represent the taxpayer's  
407 business activities in this state, the taxpayer may  
408 petition for, or the Tax Commissioner may require, as  
409 an alternative to the other methods provided for in  
410 subdivision (1) of this subsection, the allocation and  
411 apportionment of the taxpayer's net income in  
412 accordance with any system of accounts prescribed by  
413 the public service commission of this state pursuant to  
414 the provisions of section eight, article two, chapter

415 twenty-four of this code: *Provided*, That the allocation  
416 and apportionment provisions of the system of accounts  
417 fairly represent the extent of the taxpayer's business  
418 activities in this state for the purposes of the tax  
419 imposed by this article.

420 (3) *Burden of proof.* — In any proceeding before the  
421 Tax Commissioner or in any court in which employment  
422 of one of the methods of allocation or apportionment  
423 provided for in subdivision (1) or (2) of this subsection  
424 is sought, on the ground that the allocation and  
425 apportionment provisions of subsections (d) and (e) of  
426 this section do not fairly represent the extent of the  
427 taxpayer's business activities in this state, the burden of  
428 proof is:

429 (A) If the Tax Commissioner seeks employment of one  
430 of the methods, on the Tax Commissioner; or

431 (B) If the taxpayer seeks employment of one of the  
432 other methods, on the taxpayer.

433 (4) For tax years beginning on or after the first day of  
434 January, two thousand nine, the provisions of sections  
435 seven-a and seven-b of this article shall be null and void  
436 and of no force or effect.

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

1 (a) *Privilege to file consolidated return.* —

2 (1) An affiliated group of corporations (as defined for  
3 purposes of filing a consolidated federal income tax  
4 return) shall, subject to the provisions of this section  
5 and in accordance with any regulations prescribed by  
6 the Tax Commissioner, have the privilege of filing a  
7 consolidated return with respect to the tax imposed by

8 this article for the taxable year in lieu of filing separate  
9 returns. The making of a consolidated return shall be  
10 upon the condition that all corporations which at any  
11 time during the taxable year have been members of the  
12 affiliated group are included in such return and consent  
13 to the filing of such return. The filing of a consolidated  
14 return shall be considered as such consent. When a  
15 corporation is a member of an affiliated group for a  
16 fractional part of the year, the consolidated return shall  
17 include the income of such corporation for that part of  
18 the year during which it is a member of the affiliated  
19 group.

20 (2) For tax years beginning on and after the first day  
21 of January, two thousand nine, the provisions of this  
22 subsection are null and void and of no further force or  
23 effect.

24 (b) *Election binding.* —

25 (1) If an affiliated group of corporations elects to file  
26 a consolidated return under this article for any taxable  
27 year ending after the thirtieth day of June, one  
28 thousand nine hundred eighty-seven, such election once  
29 made shall not be revoked for any subsequent taxable  
30 year without the written approval of the tax  
31 commissioner consenting to the revocation.

32 (2) For tax years beginning on and after the first day  
33 of January, two thousand nine, the provisions of this  
34 subsection are null and void and of no further force or  
35 effect.

36 (c) *Consolidated return - financial organizations.* —

37 An affiliated group that includes one or more  
38 financial organizations may elect under this section to

39 file a consolidated return when that affiliated group  
40 complies with all of the following rules:

41 (1) The affiliated group of which the financial  
42 organization is a member must file a federal  
43 consolidated income tax return for the taxable year.

44 (2) All members of the affiliated group included in the  
45 federal consolidated return must consent to being  
46 included in the consolidated return filed under this  
47 article. The filing of a consolidated return under this  
48 article is conclusive proof of such consent.

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

51 (A) The pro forma West Virginia taxable income of all  
52 financial organizations having their commercial  
53 domicile in this state that are included in the federal  
54 consolidated return, as shown on a combined pro forma  
55 West Virginia return prepared for such financial  
56 organizations; plus

57 (B) The pro forma West Virginia taxable income of all  
58 financial organizations not having their commercial  
59 domicile in this state that are included in the federal  
60 consolidated return, as shown on a combined pro forma  
61 West Virginia return prepared for such financial  
62 organizations; plus

63 (C) The pro forma West Virginia taxable income of all  
64 other members included in the federal consolidated  
65 income tax return, as shown on a combined pro forma  
66 West Virginia return prepared for all such nonfinancial  
67 organization members, except that income, income  
68 adjustments and exclusions, apportionment factors and  
69 other items considered when determining tax liability

70 shall not be included in the pro forma return prepared  
71 under this paragraph for a member that is totally  
72 exempt from tax under section five of this article, or for  
73 a member that is subject to a different special industry  
74 apportionment rule provided for in this article. When a  
75 different special industry apportionment rule applies,  
76 the West Virginia taxable income of a member(s) subject  
77 to that special industry apportionment rule shall be  
78 determined on a separate pro forma West Virginia  
79 return for the member(s) subject to that special industry  
80 rule and the West Virginia taxable income so  
81 determined shall be included in the consolidated return.

82 (4) The West Virginia consolidated return is prepared  
83 in accordance with regulations of the Tax Commissioner  
84 promulgated as provided in article three, chapter  
85 twenty-nine-a of this code.

86 (5) The filing of a consolidated return does not distort  
87 taxable income. In any proceeding, the burden of proof  
88 that taxpayer's method of filing does not distort taxable  
89 income shall be upon the taxpayer.

90 (6) For tax years beginning on and after the first day  
91 of January, two thousand nine, the provisions of this  
92 subsection are null and void and of no further force or  
93 effect.

94 (d) *Combined return.* —

95 (1) A combined return may be filed under this article  
96 by a unitary group, including a unitary group that  
97 includes one or more financial organizations, only  
98 pursuant to the prior written approval of the Tax  
99 Commissioner. A request for permission to file a  
100 combined return must be filed on or before the statutory  
101 due date of the return, determined without inclusion of

102 any extension of time to file the return. Permission to  
103 file a combined return may be granted by the tax  
104 commissioner only when taxpayer submits evidence  
105 that conclusively establishes that failure to allow the  
106 filing of a combined return will result in an  
107 unconstitutional distortion of taxable income. When  
108 permission to file a combined return is granted,  
109 combined filing will be allowed for the year(s) stated in  
110 the tax commissioner's letter. The combined return  
111 must be filed in accordance with regulations of the tax  
112 commissioner promulgated in accordance with article  
113 three, chapter twenty-nine-a of this code.

114 (2) For tax years beginning on and after the first day  
115 of January, two thousand nine, the provisions of this  
116 subsection are null and void and of no further force or  
117 effect.

118 (e) *Method of filing under this article deemed*  
119 *controlling for purposes of other business taxes articles.*  
120 —

121 The taxpayer shall file on the same basis under article  
122 twenty-three of this chapter as such taxpayer files  
123 under this article for the taxable year.

124 (f) *Regulations.* —

125 The Tax Commissioner shall prescribe such  
126 regulations as he may deem necessary in order that the  
127 tax liability of any affiliated group or combined group  
128 of corporations filing a consolidated return, or of any  
129 unitary group of corporations filing a combined return,  
130 and of each corporation in the affiliated or unitary  
131 group, both during and after the period of affiliation,  
132 may be returned, determined, computed, assessed,  
133 collected and adjusted, in such manner as the Tax

134 Commissioner deems necessary to clearly reflect the  
135 income tax liability and the income factors necessary  
136 for the determination of such liability and in order to  
137 prevent avoidance of such tax liability.

138 (g) *Computation and payment of tax.* —

139 In any case in which a consolidated or combined  
140 return is filed, or required to be filed, the tax due under  
141 this article from the affiliated, combined or unitary  
142 group shall be determined, computed, assessed,  
143 collected and adjusted in accordance with regulations  
144 prescribed by the Tax Commissioner, in effect on the  
145 last day prescribed by section thirteen of this article for  
146 the filing of such return, and such affiliated, combined  
147 or unitary group, as the case may be, shall be treated as  
148 the taxpayer. However, when any member of an  
149 affiliated, combined or unitary group that files a  
150 consolidated or combined return under this article is  
151 allowed to claim credit against its tax liability under  
152 this article for payment of any other tax, the amount of  
153 credit allowed may not exceed that member's  
154 proportionate share of the affiliated, combined or  
155 unitary group's precredit tax liability under this article,  
156 as shown on its pro forma return.

157 (h) *Consolidated or combined return may be required.*  
158 —

159 The Tax Commissioner may require any person or  
160 corporation to make and file a separate return or to  
161 make and file a composite, unitary, consolidated or  
162 combined return, as the case may be, in order to clearly  
163 reflect the taxable income of such corporations.

164 (i) *Effective date.* —

165       The amendments to this section made by chapter one  
166       hundred seventy-nine, Acts of the Legislature in the  
167       year one thousand nine hundred ninety, shall apply to  
168       all taxable years ending after the eighth day of March,  
169       one thousand nine hundred ninety. Amendments to this  
170       article enacted by this act in the year one thousand nine  
171       hundred ninety-six shall apply to taxable years  
172       beginning on or after the first day of January, one  
173       thousand nine hundred ninety-six, except that financial  
174       organizations that are part of an affiliated group may  
175       elect, after the effective date of this act, to file a  
176       consolidated return prepared in accordance with the  
177       provisions of this section, as amended, and subject to  
178       applicable statutes of limitation, for taxable years  
179       beginning on or after the first day of January, one  
180       thousand nine hundred ninety-one, but before the first  
181       day of January, one thousand nine hundred ninety-six,  
182       notwithstanding provisions then in effect prohibiting  
183       out-of-state financial organizations from filing  
184       consolidated returns for those years: *Provided*, That  
185       when the statute of limitation on filing an amended  
186       return for any of those years expires before the first day  
187       of July, one thousand nine hundred ninety-six, the  
188       consolidated return for such year, if filed, must be filed  
189       by said first day of July.

190       (j) *Combined reporting required.* —

191       For tax years beginning on and after the first day of  
192       January, two thousand nine, any taxpayer engaged in a  
193       unitary business with one or more other corporations  
194       shall file a combined report which includes the income,  
195       determined under section thirteen-d or thirteen-c of this  
196       article, and the allocation and apportionment of income  
197       provisions of this article, of all corporations that are  
198       members of the unitary business, and such other

199 information as may be required by the Tax  
200 Commissioner.

201 (k) *Combined reporting at Tax Commissioner's*  
202 *discretion.* —

203 (1) The Tax Commissioner may require the combined  
204 report to include the income and associated  
205 apportionment factors of any persons that are not  
206 included pursuant to subsection (j) of this section, but  
207 that are members of a unitary business, in order to  
208 reflect proper apportionment of income of the entire  
209 unitary businesses. The Tax Commissioner may require  
210 combination of persons that are not or would not be  
211 doing business in this state pursuant to this section.

212 (2) If the Tax Commissioner determines that the  
213 reported income or loss of a taxpayer engaged in a  
214 unitary business with any person not included pursuant  
215 to subsection (j) of this section represents an avoidance  
216 or evasion of tax by such taxpayer, the Tax  
217 Commissioner may, on a case-by-case basis, require all  
218 or any part of the income and associated apportionment  
219 factors of such person be included in the taxpayer's  
220 combined report.

221 (3) With respect to inclusion of associated  
222 apportionment factors pursuant to this section, the Tax  
223 Commissioner may require the exclusion of any one or  
224 more of the factors, the inclusion of one or more  
225 additional factors which will fairly represent the  
226 taxpayer's business activity in this state, or the  
227 employment of any other method to effectuate a proper  
228 reflection of the total amount of income subject to  
229 apportionment and an equitable allocation and  
230 apportionment of the taxpayer's income.

**§11-24-13c. Determination of taxable income or loss using combined report.**

1 (a) The use of a combined report does not disregard  
2 the separate identities of the taxpayer members of the  
3 combined group. Each taxpayer member is responsible  
4 for tax based on its taxable income or loss apportioned  
5 or allocated to this state, which shall include, in  
6 addition to other types of income, the taxpayer  
7 member's apportioned share of business income of the  
8 combined group, where business income of the  
9 combined group is calculated as a summation of the  
10 individual net business incomes of all members of the  
11 combined group. A member's net business income is  
12 determined by removing all but business income,  
13 expense and loss from that member's total income, as  
14 provided in this section and section thirteen-d of this  
15 article.

16 (b) *Components of income subject to tax in this state;*  
17 *application of tax credits and post-apportionment*  
18 *deductions. —*

19 (1) Each taxpayer member is responsible for tax based  
20 on its taxable income or loss apportioned or allocated to  
21 this state, which shall include:

22 (A) Its share of any business income apportionable to  
23 this state of each of the combined groups of which it is  
24 a member, determined under subsection (c) of this  
25 section;

26 (B) Its share of any business income apportionable to  
27 this state of a distinct business activity conducted  
28 within and without the state wholly by the taxpayer  
29 member, determined under the provisions for  
30 apportionment of business income set forth in this

31 article;

32 (C) Its income from a business conducted wholly by  
33 the taxpayer member entirely within the state;

34 (D) Its income sourced to this state from the sale or  
35 exchange of capital or assets, and from involuntary  
36 conversions, as determined under subsection (g), section  
37 thirteen-d of this article;

38 (E) Its nonbusiness income or loss allocable to this  
39 state, determined under the provisions for allocation of  
40 nonbusiness income set forth in this article;

41 (F) Its income or loss allocated or apportioned in an  
42 earlier year, required to be taken into account as state  
43 source income during the income year, other than a net  
44 operating loss; and

45 (G) Its net operating loss carryover. If the taxable  
46 income computed pursuant to this section and section  
47 thirteen-d of this article results in a loss for a taxpayer  
48 member of the combined group, that taxpayer member  
49 has a West Virginia net operating loss, subject to the net  
50 operating loss limitations, and carryover provisions of  
51 this article. This West Virginia net operating loss is  
52 applied as a deduction in a prior or subsequent year  
53 only if that taxpayer has West Virginia source positive  
54 net income, whether or not the taxpayer is or was a  
55 member of a combined reporting group in the prior or  
56 subsequent year.

57 (2) Except where otherwise provided, no tax credit or  
58 post-apportionment deduction earned by one member  
59 of the group, but not fully used by or allowed to that  
60 member, may be used, in whole or in part, by another  
61 member of the group or applied, in whole or in part,

62 against the total income of the combined group; and a  
63 post-apportionment deduction carried over into a  
64 subsequent year as to the member that incurred it, and  
65 available as a deduction to that member in a subsequent  
66 year, will be considered in the computation of the  
67 income of that member in the subsequent year  
68 regardless of the composition of that income as  
69 apportioned, allocated or wholly within this state.

70 (c) *Determination of taxpayer's share of the business*  
71 *income of a combined group apportionable to this state.*

72 —

73 The taxpayer's share of the business income  
74 apportionable to this state of each combined group of  
75 which it is a member shall be the product of:

76 (1) The business income of the combined group,  
77 determined under section thirteen-d of this article; and

78 (2) The taxpayer member's apportionment percentage,  
79 determined in accordance with this article, associated  
80 with the combined group's unitary business in this  
81 state, and including in the denominator the property,  
82 payroll and sales of all members of the combined group,  
83 including the taxpayer, which property, payroll and  
84 sales are associated with the combined group's unitary  
85 business wherever located. The property, payroll and  
86 sales of a partnership shall be included in the  
87 determination of the partner's apportionment  
88 percentage in proportion to a ratio the numerator of  
89 which is the amount of the partner's distributive share  
90 of partnership's unitary income included in the income  
91 of the combined group in accordance with section  
92 thirteen-d of this article and the denominator of which  
93 is the amount of the partnership's total unitary income.

**§11-24-13d. Determination of the business income of the combined group.**

1 The business income of a combined group is  
2 determined as follows:

3 (a) From the total income of the combined group,  
4 determined under subsection (b) of this section, subtract  
5 any income and add any expense or loss, other than the  
6 business income, expense or loss of the combined group.

7 (b) Except as otherwise provided, the total income of  
8 the combined group is the sum of the income of each  
9 member of the combined group determined under  
10 federal income tax laws, as adjusted for state purposes,  
11 as if the member were not consolidated for federal  
12 purposes. The income of each member of the combined  
13 group shall be determined as follows:

14 (1) For any member incorporated in the United States,  
15 or included in a consolidated federal corporate income  
16 tax return, the income to be included in the total income  
17 of the combined group shall be the taxable income for  
18 the corporation after making allowable adjustments  
19 under this article.

20 (2) For any member not included in subdivision (1) of  
21 this subsection, the income to be included in the total  
22 income of the combined group shall be determined as  
23 follows:

24 (A) A profit and loss statement shall be prepared for  
25 each foreign branch or corporation in the currency in  
26 which the books of account of the branch or corporation  
27 are regularly maintained.

28 (B) Adjustments shall be made to the profit and loss

29 statement to conform it to the accounting principles  
30 generally accepted in the United States for the  
31 preparation of such statements except as modified by  
32 this regulation.

33 (C) Adjustments shall be made to the profit and loss  
34 statement to conform it to the tax accounting standards  
35 required by this article.

36 (D) Except as otherwise provided by regulation, the  
37 profit and loss statement of each member of the  
38 combined group, and the apportionment factors related  
39 thereto, whether United States or foreign, shall be  
40 translated into the currency in which the parent  
41 company maintains its books and records.

42 (E) Income apportioned to this state shall be expressed  
43 in United States dollars.

44 (3) In lieu of the procedures set forth in subdivision (2)  
45 of this subsection, and subject to the determination of  
46 the Tax Commissioner that it reasonably approximates  
47 income as determined under this article, any member  
48 not included in subdivision (1) of this subsection may  
49 determine its income on the basis of the consolidated  
50 profit and loss statement which includes the member  
51 and which is prepared for filing with the Securities and  
52 Exchange Commission by related corporations. If the  
53 member is not required to file with the Securities and  
54 Exchange Commission, the Tax Commissioner may  
55 allow the use of the consolidated profit and loss  
56 statement prepared for reporting to shareholders and  
57 subject to review by an independent auditor. If above  
58 statements do not reasonably approximate income as  
59 determined under this article, the Tax Commissioner  
60 may accept those statements with appropriate  
61 adjustments to approximate that income.

62 (c) If a unitary business includes income from a  
63 partnership, the income to be included in the total  
64 income of the combined group shall be the member of  
65 the combined group's direct and indirect distributive  
66 share of the partnership's unitary business income.

67 (d) All dividends paid by one to another of the  
68 members of the combined group shall, to the extent  
69 those dividends are paid out of the earnings and profits  
70 of the unitary business included in the combined report,  
71 in the current or an earlier year, be eliminated from the  
72 income of the recipient. This provision shall not apply  
73 to dividends received from members of the unitary  
74 business which are not a part of the combined group.

75 (e) Except as otherwise provided by regulation,  
76 business income from an intercompany transaction  
77 between members of the same combined group shall be  
78 deferred in a manner similar to 26 CFR 1.1502-13. Upon  
79 the occurrence of any of the following events, deferred  
80 business income resulting from an intercompany  
81 transaction between members of a combined group shall  
82 be restored to the income of the seller, and shall be  
83 apportioned as business income earned immediately  
84 before the event:

85 (1) The object of a deferred intercompany transaction  
86 is:

87 (A) Resold by the buyer to an entity that is not a  
88 member of the combined group;

89 (B) Resold by the buyer to an entity that is a member  
90 of the combined group for use outside the unitary  
91 business in which the buyer and seller are engaged; or

92 (C) Converted by the buyer to a use outside the

93 unitary business in which the buyer and seller are  
94 engaged; or

95 (2) The buyer and seller are no longer members of the  
96 same combined group, regardless of whether the  
97 members remain unitary.

98 (f) A charitable expense incurred by a member of a  
99 combined group shall, to the extent allowable as a  
100 deduction pursuant to Internal Revenue Code Section  
101 170, be subtracted first from the business income of the  
102 combined group (subject to the income limitations of  
103 that section applied to the entire business income of the  
104 group) and any remaining amount shall then be treated  
105 as a nonbusiness expense allocable to the member that  
106 incurred the expense (subject to the income limitations  
107 of that section applied to the nonbusiness income of  
108 that specific member). Any charitable deduction  
109 disallowed under the foregoing rule, but allowed as a  
110 carryover deduction in a subsequent year, shall be  
111 treated as originally incurred in the subsequent year by  
112 the same member and the rules of this section shall  
113 apply in the subsequent year in determining the  
114 allowable deduction in that year.

115 (g) Gain or loss from the sale or exchange of capital  
116 assets, property described by Internal Revenue Code  
117 Section 1231(a)(3) and property subject to an  
118 involuntary conversion shall be removed from the total  
119 separate net income of each member of a combined  
120 group and shall be apportioned and allocated as  
121 follows.

122 (1) For each class of gain or loss (short term capital,  
123 long term capital, Internal Revenue Code Section 1231  
124 and involuntary conversions) all members' business gain  
125 and loss for the class shall be combined (without netting

126 between such classes) and each class of net business  
127 gain or loss separately apportioned to each member  
128 using the member's apportionment percentage  
129 determined under subsection (c), section thirteen-c of  
130 this article.

131 (2) Each taxpayer member shall then net its  
132 apportioned business gain or loss for all classes,  
133 including any such apportioned business gain and loss  
134 from other combined groups, against the taxpayer  
135 member's nonbusiness gain and loss for all classes  
136 allocated to this state, using the rules of Internal  
137 Revenue Code Sections 1231 and 1222, without regard  
138 to any of the taxpayer member's gains or losses from the  
139 sale or exchange of capital assets, Section 1231 property  
140 and involuntary conversions which are nonbusiness  
141 items allocated to another state.

142 (3) Any resulting state source income (or loss, if the  
143 loss is not subject to the limitations of Internal Revenue  
144 Code Section 1211) of a taxpayer member produced by  
145 the application of the preceding subsections shall then  
146 be applied to all other state source income or loss of that  
147 member.

148 (4) Any resulting state source loss of a member that is  
149 subject to the limitations of Section 1211 shall be  
150 carried over by that member and shall be treated as  
151 state source short-term capital loss incurred by that  
152 member for the year for which the carryover applies.

153 (h) Any expense of one member of the unitary group  
154 which is directly or indirectly attributable to the  
155 nonbusiness or exempt income of another member of  
156 the unitary group shall be allocated to that other  
157 member as corresponding nonbusiness or exempt  
158 expense, as appropriate.

**§11-24-13e. Designation of surety.**

1 As a filing convenience, and without changing the  
2 respective liability of the group members, members of a  
3 combined reporting group may annually elect to  
4 designate one taxpayer member of the combined group  
5 to file a single return in the form and manner prescribed  
6 by the department, in lieu of filing their own respective  
7 returns, provided that the taxpayer designated to file  
8 the single return consents to act as surety with respect  
9 to the tax liability of all other taxpayers properly  
10 included in the combined report and agrees to act as  
11 agent on behalf of those taxpayers for the year of the  
12 election for tax matters relating to the combined report  
13 for that year. If for any reason the surety is unwilling or  
14 unable to perform its responsibilities, tax liability may  
15 be assessed against the taxpayer members.

**§11-24-13f. Water's-edge election; initiation and withdrawal.**

1 (a) *Water's-edge election.* —

2 Taxpayer members of a unitary group that meet the  
3 requirements of subsection (b) of this section may elect  
4 to determine each of their apportioned shares of the net  
5 business income or loss of the combined group pursuant  
6 to a water's-edge election. Under such election,  
7 taxpayer members shall take into account all or a  
8 portion of the income and apportionment factors of only  
9 the following members otherwise included in the  
10 combined group pursuant to section thirteen-a of this  
11 article:

12 (1) The entire income and apportionment factors of  
13 any member incorporated in the United States or  
14 formed under the laws of any state, the District of  
15 Columbia or any territory or possession of the United

16 States;

17 (2) The entire income and apportionment factors of  
18 any member, regardless of the place incorporated or  
19 formed, if the average of its property, payroll and sales  
20 factors within the United States is twenty percent or  
21 more;

22 (3) The entire income and apportionment factors of  
23 any member which is a domestic international sales  
24 corporations as described in Internal Revenue Code  
25 Sections 991 to 994, inclusive; a foreign sales  
26 corporation as described in Internal Revenue Code  
27 Sections 921 to 927, inclusive; or any member which is  
28 an export trade corporation, as described in Internal  
29 Revenue Code Sections 970 to 971, inclusive;

30 (4) Any member not described in subdivision (1), (2) or  
31 (3) of this subsection shall include the portion of its  
32 income derived from or attributable to sources within  
33 the United States, as determined under the Internal  
34 Revenue Code without regard to federal treaties, and its  
35 apportionment factors related thereto;

36 (5) Any member that is a "controlled foreign  
37 corporation", as defined in Internal Revenue Code  
38 Section 957, to the extent of the income of that member  
39 that is defined in Section 952 of Subpart F of the  
40 Internal Revenue Code ("Subpart F income") not  
41 excluding lower-tier subsidiaries' distributions of such  
42 income which were previously taxed, determined  
43 without regard to federal treaties, and the  
44 apportionment factors related to that income; any item  
45 of income received by a controlled foreign corporation  
46 shall be excluded if such income was subject to an  
47 effective rate of income tax imposed by a foreign  
48 country greater than ninety percent of the maximum

49 rate of tax specified in Internal Revenue Code Section  
50 11;

51 (6) Any member that earns more than twenty percent  
52 of its income, directly or indirectly, from intangible  
53 property or service related activities that are deductible  
54 against the business income of other members of the  
55 combined group, to the extent of that income and the  
56 apportionment factors related thereto; and

57 (7) The entire income and apportionment factors of  
58 any member that is doing business in a tax haven,  
59 where "doing business in a tax haven" is defined as  
60 being engaged in activity sufficient for that tax haven  
61 jurisdiction to impose a tax under United States  
62 constitutional standards. If the member's business  
63 activity within a tax haven is entirely outside the scope  
64 of the laws, provisions and practices that cause the  
65 jurisdiction to meet the criteria set forth in the  
66 definition of a tax haven, the activity of the member  
67 shall be treated as not having been conducted in a tax  
68 haven.

69 (b) *Initiation and withdrawal of election.* —

70 (1) A water's-edge election is effective only if made on  
71 a timely filed, original return for a tax year by every  
72 member of the unitary business subject to tax under this  
73 article. The Tax Commissioner shall develop rules and  
74 regulations governing the impact, if any, on the scope or  
75 application of a water's-edge election, including  
76 termination or deemed election, resulting from a change  
77 in the composition of the unitary group, the combined  
78 group, the taxpayer members and any other similar  
79 change.

80 (2) Such election shall constitute consent to the

81 reasonable production of documents and taking of  
82 depositions in accordance with the provisions of this  
83 code.

84 (3) In the discretion of the Tax Commissioner, a  
85 water's-edge election may be disregarded, in part or in  
86 whole, and the income and apportionment factors of  
87 any member of the taxpayer's unitary group may be  
88 included in the combined report without regard to the  
89 provisions of this section, if any member of the unitary  
90 group fails to comply with any provision of this article  
91 or if a person otherwise not included in the water's-edge  
92 combined group was availed of with a substantial  
93 objective of avoiding state income tax.

94 (4) A water's-edge election is binding for and  
95 applicable to the tax year it is made and all tax years  
96 thereafter for a period of ten years. It may be  
97 withdrawn or reinstated after withdrawal, prior to the  
98 expiration of the ten-year period, only upon written  
99 request for reasonable cause based on extraordinary  
100 hardship due to unforeseen changes in state tax  
101 statutes, law or policy and only with the written  
102 permission of the Tax Commissioner. If the Tax  
103 Commissioner grants a withdrawal of election, he or she  
104 shall impose reasonable conditions as necessary to  
105 prevent the evasion of tax or to clearly reflect income  
106 for the election period prior to or after the withdrawal.  
107 Upon the expiration of the ten-year period, a taxpayer  
108 may withdraw from the water's-edge election. Such  
109 withdrawal must be made in writing within one year of  
110 the expiration of the election and is binding for a period  
111 of ten years, subject to the same conditions as applied to  
112 the original election. If no withdrawal is properly made,  
113 the water's-edge election shall be in place for an  
114 additional ten-year period, subject to the same  
115 conditions as applied to the original election.

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

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

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

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

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

31 (c) For tax years beginning on or after the first day of  
32 January, two thousand nine, the provisions of this  
33 section are null and void and of no force or effect.

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

*Cl White*  
.....  
Chairman Senate Committee

*[Signature]*  
.....  
Chairman House Committee

Originated in the Senate.

In effect from passage.

*Darrell Holcomb*  
.....  
Clerk of the Senate

*Bryce A. Seal*  
.....  
Clerk of the House of Delegates

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

*[Signature]*  
.....  
Speaker House of Delegates

The within *is approved* ..... this  
the *4th* Day of *April* ....., 2007.

*[Signature]*  
.....  
Governor

PRESENTED TO THE  
GOVERNOR

APR 02 2007

Time 3:40 pm