WEST VIRGINIA LEGISLATURE
SEVENTY-EIGHTH LEGISLATURE
REGULAR SESSION, 2007

ENROLLED

Senate Bill No. 749

(By Senators Helmick, Plymale, Chafin, Prezioso, Edgell, Love, Bailey, Bowman, McCabe, Unger, Sypolt, Fanning, Facemyer, Boley, Sprouse and Guills)

[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.


1 Notwithstanding any other provisions of this article or this code to the contrary, for tax years beginning on or after the first day of January, two thousand nine, the provisions of section five-a of this article are null and 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 hereby imposed on the privilege of doing business in this state and in respect of the benefits and protection conferred. Such tax shall be collected from every domestic corporation, every corporation having its commercial domicile in this state, every foreign or domestic corporation owning or leasing real or tangible personal property located in this state or doing business in this state and from every partnership owning or leasing real or tangible personal property located in this state or doing business after the first day of July, one thousand nine hundred eighty-seven.
(b) Amount of tax and rate; effective date. —

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

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

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

(4) Taxable years after the thirty-first day of December, two thousand six. — For taxable years beginning on or after the first day of January, two thousand seven, the amount of tax due under this article shall be the greater of fifty dollars or fifty-five one
hundredths of one percent of the value of the tax base as determined under this article.

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

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

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

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

(9) Taxable years after the thirty-first day of December, two thousand twelve. — For taxable years beginning on or after the first day of January, two thousand thirteen, the amount of tax due under this
article shall be the greater of fifty dollars or 0.20 percent of the value of the tax base as determined under this article.

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

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

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

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

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

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

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

ARTICLE 24. CORPORATION NET INCOME TAX.

§11-24-1. Legislative findings.

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

The Legislature does therefore declare that this article
be construed so as to accomplish the foregoing purposes.

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

§11-24-3a. Specific terms defined.

For purposes of this article:

(1) Business income. — The term "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property or the rendering of services in connection therewith constitute integral parts of the taxpayer's regular trade or business operations and includes all income which is apportionable under the Constitution of the United States.

(2) "Combined group" means the group of all persons whose income and apportionment factors are required to be taken into account pursuant to subsection (a) or (b), section thirteen-a of this article in determining the taxpayer's share of the net business income or loss apportionable to this state.
18 (3) Commercial domicile. — The term "commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed: Provided, That the commercial domicile of a financial organization, which is subject to regulation as such, shall be at the place designated as its principal office with its regulating authority.

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

28 (5) Corporation. — "Corporation" means any corporation as defined by the laws of this state or organization of any kind treated as a corporation for tax purposes under the laws of this state, wherever located, which if it were doing business in this state would be a "taxpayer". The business conducted by a partnership which is directly or indirectly held by a corporation shall be considered the business of the corporation to the extent of the corporation's distributive share of the partnership income, inclusive of guaranteed payments to the extent prescribed by regulation. The term "corporation" includes a joint-stock company and any association or other organization which is taxable as a corporation under the federal income tax law.

43 (6) Delegate. — The term "delegate" in the phrase "or his delegate", when used in reference to the Tax Commissioner, means any officer or employee of the State Tax Department duly authorized by the Tax Commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this article or regulations promulgated thereunder.
(7) Domestic corporation. — The term "domestic corporation" means any corporation organized under the laws of West Virginia and certain corporations organized under the laws of the state of Virginia before the twentieth day of June, one thousand eight hundred sixty-three. Every other corporation is a foreign corporation.

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

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

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

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

(A) A holding company or a subsidiary thereof. As used in this section "holding company" means a corporation registered under the federal Bank Holding
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:
(1) Making, acquiring, selling or servicing loans or extensions of credit. Loans and extensions of credit include:

(I) Secured or unsecured consumer loans;

(II) Installment obligations;

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

(IV) Credit card loans;

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

(VI) Loans arising in factoring.

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

(3) Operating a credit card business.

(4) Rendering estate or trust services.

(5) Receiving, maintaining or otherwise handling deposits.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(25) “Tax haven” means a jurisdiction that, for a
particular tax year in question: (A) Is identified by the
Organization for Economic Cooperation and
Development as a tax haven or as having a harmful preferential tax regime; or (B) a jurisdiction that has no, or nominal, effective tax on the relevant income and: (i) That has laws or practices that prevent effective exchange of information for tax purposes with other governments regarding taxpayers subject to, or benefiting from, the tax regime; or (ii) that lacks transparency. For purposes of this definition, a tax regime lacks transparency if the details of legislative, legal or administrative provisions are not open to public scrutiny and apparent, or are not consistently applied among similarly situated taxpayers; (iii) facilitates the establishment of foreign-owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the local economy; (iv) explicitly or implicitly excludes the jurisdiction’s resident taxpayers from taking advantage of the tax regime’s benefits or prohibits enterprises that benefit from the regime from operating in the jurisdiction’s domestic market; or (v) has created a tax regime which is favorable for tax avoidance, based upon an overall assessment of relevant factors, including whether the jurisdiction has a significant untaxed offshore financial or other services sector relative to its overall economy. For purposes of this definition the phrase “tax regime” means a set or system of rules, laws, regulations or practices by which taxes are imposed on any person, corporation or entity, or on any income, property, incident, indicia or activity pursuant to governmental authority.

(26) Taxpayer. — The term “taxpayer” means any person subject to the tax imposed by this article.

(27) This code. — The term “this code” means the Code of West Virginia, one thousand nine hundred thirty-one, as amended.
(28) *This state.* — The term "this state" means the State of West Virginia.

(29) "United States" means the United States of America and includes all of the states of the United States, the District of Columbia and United States territories and possessions.

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

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


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

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

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

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

(c) Business activities entirely within West Virginia. — If the business activities of a taxpayer take place entirely within this state, the entire net income of the taxpayer is subject to the tax imposed by this article. The business activities of a taxpayer are considered to have taken place in their entirety within this state if the taxpayer is not "taxable in another state": Provided, That for tax years beginning before the first day of January, two thousand nine, the income from the business activities of a financial organization not having its commercial domicile in this state shall be apportioned according to the applicable provisions of this article.
(d) Business activities partially within and partially without West Virginia; allocation of nonbusiness income. — If the business activities of a taxpayer take place partially within and partially without this state and the taxpayer is also taxable in another state, rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income of the taxpayer, shall be allocated as provided in subdivisions (1) through (4), inclusive, of this subsection: Provided, That to the extent the items constitute business income of the taxpayer, they may not be so allocated but they shall be apportioned to this state according to the provisions of subsection (e) of this section and to the applicable provisions of section seven-b of this article.

(1) Net rents and royalties. —

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

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

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

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

(C) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the
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property in the state during the rental or royalty period
in the taxable year and the denominator of which is the
number of days of physical location of the property
everywhere during all rental or royalty periods in the
taxable year. If the physical location of the property
during the rental or royalty period is unknown or
unascertainable by the taxpayer, tangible personal
property is utilized in the state in which the property
was located at the time the rental or royalty payer
obtained possession.

(2) Capital gains. —

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

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

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

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

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

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

(3) Interest and dividends are allocable to this state if
the taxpayer's commercial domicile is in this state.
(4) Patent and copyright royalties. —

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

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

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

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

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

(5) Corporate partner's distributive share. —

(A) Persons carrying on business as partners in a partnership, as defined in Section 761 of the Internal Revenue Code of 1986, as amended, are liable for income tax only in their separate or individual capacities.
(B) A corporate partner's distributive share of income, gain, loss, deduction or credit of a partnership shall be modified as provided in section six of this article for each partnership. For taxable years beginning on or after the thirty-first day of December, one thousand nine hundred ninety-eight, the distributive share shall then be allocated and apportioned as provided in this section, using the partnership's property, payroll and sales factors. The sum of that portion of the distributive share allocated and apportioned to this state shall then be treated as distributive share allocated to this state; and that portion of distributive share allocated or apportioned outside this state shall be treated as distributive share allocated outside this state, unless the taxpayer requests or the tax commissioner, under subsection (h) of this section requires that the distributive share be treated differently.

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

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

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

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

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

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

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

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

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

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

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

(A) Any officer of a corporation; or

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

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

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

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

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

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

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

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

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

(11) Allocation of sales of tangible personal property.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) Other methods of allocation and apportionment. —

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

(A) Separate accounting;

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

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

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

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

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

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

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

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


(a) Privilege to file consolidated return. —

(1) An affiliated group of corporations (as defined for
purposes of filing a consolidated federal income tax
return) shall, subject to the provisions of this section
and in accordance with any regulations prescribed by
the Tax Commissioner, have the privilege of filing a
consolidated return with respect to the tax imposed by
this article for the taxable year in lieu of filing separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time during the taxable year have been members of the affiliated group are included in such return and consent to the filing of such return. The filing of a consolidated return shall be considered as such consent. When a corporation is a member of an affiliated group for a fractional part of the year, the consolidated return shall include the income of such corporation for that part of the year during which it is a member of the affiliated group.

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

(b) Election binding. —

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

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

(c) Consolidated return - financial organizations. —

An affiliated group that includes one or more financial organizations may elect under this section to
file a consolidated return when that affiliated group complies with all of the following rules:

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

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

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

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

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

(C) The pro forma West Virginia taxable income of all other members included in the federal consolidated income tax return, as shown on a combined pro forma West Virginia return prepared for all such nonfinancial organization members, except that income, income adjustments and exclusions, apportionment factors and other items considered when determining tax liability
shall not be included in the pro forma return prepared under this paragraph for a member that is totally exempt from tax under section five of this article, or for a member that is subject to a different special industry apportionment rule provided for in this article. When a different special industry apportionment rule applies, the West Virginia taxable income of a member(s) subject to that special industry apportionment rule shall be determined on a separate pro forma West Virginia return for the member(s) subject to that special industry rule and the West Virginia taxable income so determined shall be included in the consolidated return.

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

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

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

(d) Combined return. —

(1) A combined return may be filed under this article by a unitary group, including a unitary group that includes one or more financial organizations, only pursuant to the prior written approval of the Tax Commissioner. A request for permission to file a combined return must be filed on or before the statutory due date of the return, determined without inclusion of
any extension of time to file the return. Permission to
file a combined return may be granted by the tax
commissioner only when taxpayer submits evidence
that conclusively establishes that failure to allow the
filing of a combined return will result in an
unconstitutional distortion of taxable income. When
permission to file a combined return is granted,
combined filing will be allowed for the year(s) stated in
the tax commissioner's letter. The combined return
must be filed in accordance with regulations of the tax
commissioner promulgated in accordance with article
three, chapter twenty-nine-a of this code.

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

(e) Method of filing under this article deemed
controlling for purposes of other business taxes articles.

—

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

(f) Regulations. —

The Tax Commissioner shall prescribe such
regulations as he may deem necessary in order that the
tax liability of any affiliated group or combined group
of corporations filing a consolidated return, or of any
unitary group of corporations filing a combined return,
and of each corporation in the affiliated or unitary
group, both during and after the period of affiliation,
may be returned, determined, computed, assessed,
collected and adjusted, in such manner as the Tax
Commissioner deems necessary to clearly reflect the income tax liability and the income factors necessary for the determination of such liability and in order to prevent avoidance of such tax liability.

(g) Computation and payment of tax. —

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

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

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

(i) Effective date. —
The amendments to this section made by chapter one
hundred seventy-nine, Acts of the Legislature in the
year one thousand nine hundred ninety, shall apply to
all taxable years ending after the eighth day of March,
one thousand nine hundred ninety. Amendments to this
article enacted by this act in the year one thousand nine
hundred ninety-six shall apply to taxable years
beginning on or after the first day of January, one
thousand nine hundred ninety-six, except that financial
organizations that are part of an affiliated group may
elect, after the effective date of this act, to file a
consolidated return prepared in accordance with the
provisions of this section, as amended, and subject to
applicable statutes of limitation, for taxable years
beginning on or after the first day of January, one
thousand nine hundred ninety-one, but before the first
day of January, one thousand nine hundred ninety-six,
notwithstanding provisions then in effect prohibiting
out-of-state financial organizations from filing
consolidated returns for those years: Provided, That
when the statute of limitation on filing an amended
return for any of those years expires before the first day
of July, one thousand nine hundred ninety-six, the
consolidated return for such year, if filed, must be filed
by said first day of July.

(j) Combined reporting required. —

For tax years beginning on and after the first day of
January, two thousand nine, any taxpayer engaged in a
unitary business with one or more other corporations
shall file a combined report which includes the income,
determined under section thirteen-d or thirteen-c of this
article, and the allocation and apportionment of income
provisions of this article, of all corporations that are
members of the unitary business, and such other
information as may be required by the Tax
Commissioner.

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

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

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

(3) With respect to inclusion of associated
apportionment factors pursuant to this section, the Tax
Commissioner may require the exclusion of any one or
more of the factors, the inclusion of one or more
additional factors which will fairly represent the
taxpayer's business activity in this state, or the
employment of any other method to effectuate a proper
reflection of the total amount of income subject to
apportionment and an equitable allocation and
apportionment of the taxpayer's income.
§11-24-13c. Determination of taxable income or loss using combined report.

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

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

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

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

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

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

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

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

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

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

(2) Except where otherwise provided, no tax credit or post-apportionment deduction earned by one member of the group, but not fully used by or allowed to that member, may be used, in whole or in part, by another member of the group or applied, in whole or in part,
against the total income of the combined group; and a
post-apportionment deduction carried over into a
subsequent year as to the member that incurred it, and
available as a deduction to that member in a subsequent
year, will be considered in the computation of the
income of that member in the subsequent year
regardless of the composition of that income as
apportioned, allocated or wholly within this state.

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

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

1. The business income of the combined group,
determined under section thirteen-d of this article; and

2. The taxpayer member's apportionment percentage,
determined in accordance with this article, associated
with the combined group's unitary business in this
state, and including in the denominator the property,
payroll and sales of all members of the combined group,
including the taxpayer, which property, payroll and
sales are associated with the combined group's unitary
business wherever located. The property, payroll and
sales of a partnership shall be included in the
determination of the partner's apportionment
percentage in proportion to a ratio the numerator of
which is the amount of the partner's distributive share
of partnership's unitary income included in the income
of the combined group in accordance with section
thirteen-d of this article and the denominator of which
is the amount of the partnership's total unitary income.
§11-24-13d. Determination of the business income of the combined group.

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

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

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

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

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

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

(B) Adjustments shall be made to the profit and loss
statement to conform it to the accounting principles generally accepted in the United States for the preparation of such statements except as modified by this regulation.

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

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

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

(3) In lieu of the procedures set forth in subdivision (2) of this subsection, and subject to the determination of the Tax Commissioner that it reasonably approximates income as determined under this article, any member not included in subdivision (1) of this subsection may determine its income on the basis of the consolidated profit and loss statement which includes the member and which is prepared for filing with the Securities and Exchange Commission by related corporations. If the member is not required to file with the Securities and Exchange Commission, the Tax Commissioner may allow the use of the consolidated profit and loss statement prepared for reporting to shareholders and subject to review by an independent auditor. If above statements do not reasonably approximate income as determined under this article, the Tax Commissioner may accept those statements with appropriate adjustments to approximate that income.
(c) If a unitary business includes income from a partnership, the income to be included in the total income of the combined group shall be the member of the combined group's direct and indirect distributive share of the partnership's unitary business income.

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

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

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

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

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

(C) Converted by the buyer to a use outside the
(2) The buyer and seller are no longer members of the same combined group, regardless of whether the members remain unitary.

(f) A charitable expense incurred by a member of a combined group shall, to the extent allowable as a deduction pursuant to Internal Revenue Code Section 170, be subtracted first from the business income of the combined group (subject to the income limitations of that section applied to the entire business income of the group) and any remaining amount shall then be treated as a nonbusiness expense allocable to the member that incurred the expense (subject to the income limitations of that section applied to the nonbusiness income of that specific member). Any charitable deduction disallowed under the foregoing rule, but allowed as a carryover deduction in a subsequent year, shall be treated as originally incurred in the subsequent year by the same member and the rules of this section shall apply in the subsequent year in determining the allowable deduction in that year.

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

(1) For each class of gain or loss (short term capital, long term capital, Internal Revenue Code Section 1231 and involuntary conversions) all members' business gain and loss for the class shall be combined (without netting
between such classes) and each class of net business
gain or loss separately apportioned to each member
using the member's apportionment percentage
determined under subsection (c), section thirteen-c of
this article.

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

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

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

(h) Any expense of one member of the unitary group
which is directly or indirectly attributable to the
nonbusiness or exempt income of another member of
the unitary group shall be allocated to that other
member as corresponding nonbusiness or exempt
expense, as appropriate.
§11-24-13e. Designation of surety.

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

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

(a) Water's-edge election. —

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

(1) The entire income and apportionment factors of any member incorporated in the United States or formed under the laws of any state, the District of Columbia or any territory or possession of the United
(2) The entire income and apportionment factors of any member, regardless of the place incorporated or formed, if the average of its property, payroll and sales factors within the United States is twenty percent or more;

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

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

(5) Any member that is a "controlled foreign corporation", as defined in Internal Revenue Code Section 957, to the extent of the income of that member that is defined in Section 952 of Subpart F of the Internal Revenue Code ("Subpart F income") not excluding lower-tier subsidiaries' distributions of such income which were previously taxed, determined without regard to federal treaties, and the apportionment factors related to that income; any item of income received by a controlled foreign corporation shall be excluded if such income was subject to an effective rate of income tax imposed by a foreign country greater than ninety percent of the maximum
rate of tax specified in Internal Revenue Code Section 11;

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

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

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

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

(2) Such election shall constitute consent to the
reasonable production of documents and taking of
depositions in accordance with the provisions of this
code.

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

(4) A water's-edge election is binding for and
applicable to the tax year it is made and all tax years
thereafter for a period of ten years. It may be
withdrawn or reinstituted after withdrawal, prior to the
expiration of the ten-year period, only upon written
request for reasonable cause based on extraordinary
hardship due to unforeseen changes in state tax
statutes, law or policy and only with the written
permission of the Tax Commissioner. If the Tax
Commissioner grants a withdrawal of election, he or she
shall impose reasonable conditions as necessary to
prevent the evasion of tax or to clearly reflect income
for the election period prior to or after the withdrawal.
Upon the expiration of the ten-year period, a taxpayer
may withdraw from the water's-edge election. Such
withdrawal must be made in writing within one year of
the expiration of the election and is binding for a period
of ten years, subject to the same conditions as applied to
the original election. If no withdrawal is properly made,
the water's-edge election shall be in place for an
additional ten-year period, subject to the same
conditions as applied to the original election.
§11-24-24. Credit for income tax paid to another state.

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

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

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

(b) Any additional payments of such tax to other states, or to political subdivisions thereof, by a financial organization described in this section and any refunds of such taxes made or received by such financial organization with respect to the taxable year, but after the due date of the annual return required by this article for the taxable year, including any extensions, shall likewise be accounted for in the taxable year in which such additional payment is made or such refund is received by the financial organization.
(c) For tax years beginning on or after the first day of January, two thousand nine, the provisions of this 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.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

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

Governor