

HB 4420

FILED

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SECRETARY OF STATE

**WEST VIRGINIA LEGISLATURE**  
SECOND REGULAR SESSION, 2008

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**SECOND  
ENROLLMENT**

**COMMITTEE SUBSTITUTE  
FOR  
House Bill No. 4420**

(By Delegates White, Kominar and Boggs)

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Passed March 16, 2008

In Effect January 1, 2009

**S E C O N D**  
**E N R O L L M E N T**

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**H. B. 4420**

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(BY DELEGATES WHITE, KOMINAR AND BOGGS)

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[Amended and again passed March 16, 2008, as a result of the objections of the Governor; in effect January 1, 2009.]

AN ACT to amend and reenact §11-24-3a of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §11-24-4b, all relating generally to the manner in which the corporate net income tax is to be imposed on business entities; providing definitions of terms relating to insurance companies, unitary businesses and certain trusts and investment companies; and establishing the applicability of the tax upon real estate investment trusts, regulated investment companies, qualified real estate investment trusts and qualified regulated investment companies.

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

That §11-24-3a of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto a new section, designated §11-24-4b, all to read as follows:

## ARTICLE 24. CORPORATION NET INCOME TAX.

### §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 the  
4 regular course of the taxpayer’s trade or business and  
5 includes income from tangible and intangible property if the  
6 acquisition, management and disposition of the property or  
7 the rendering of services in connection therewith constitute  
8 integral parts of the taxpayer’s regular trade or business  
9 operations and includes all income which is apportionable  
10 under the Constitution of the United States.

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

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

22 (4) *Compensation.* -- The term “compensation” means  
23 wages, salaries, commissions and any other form of  
24 remuneration paid to employees for personal services.

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

38 (6) *Delegate*. -- The term "delegate" in the phrase "or his  
39 or her delegate", when used in reference to the Tax  
40 Commissioner, means any officer or employee of the State  
41 Tax Department duly authorized by the Tax Commissioner  
42 directly, or indirectly by one or more redelegations of  
43 authority, to perform the functions mentioned or described in  
44 this article or regulations promulgated thereunder.

45 (7) *Domestic corporation*. -- The term "domestic  
46 corporation" means any corporation organized under the laws  
47 of West Virginia and certain corporations organized under  
48 the laws of the State of Virginia before the twentieth day of  
49 June, one thousand eight hundred sixty-three. Every other  
50 corporation is a foreign corporation.

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

55 (9) *Federal Form 1120*. -- The term "Federal Form 1120"  
56 means the annual federal income tax return of any

57 corporation made pursuant to the United States Internal  
58 Revenue Code of 1986, as amended, or in successor  
59 provisions of the laws of the United States, in respect to the  
60 federal taxable income of a corporation, and filed with the  
61 federal Internal Revenue Service. In the case of a  
62 corporation that elects to file a federal income tax return as  
63 part of an affiliated group, but files as a separate corporation  
64 under this article, then as to such corporation Federal Form  
65 1120 means its pro forma Federal Form 1120.

66 (10) *Fiduciary*. -- The term “fiduciary” means, and  
67 includes, a guardian, trustee, executor, administrator,  
68 receiver, conservator or any person acting in any fiduciary  
69 capacity for any person.

70 (11) *Financial organization*. -- The term “financial  
71 organization” means:

72 (A) A holding company or a subsidiary thereof. As used  
73 in this section “holding company” means a corporation  
74 registered under the federal Bank Holding Company Act of  
75 1956 or registered as a savings and loan holding company  
76 other than a diversified savings and loan holding company as  
77 defined in Section 408(a)(1)(F) of the federal National  
78 Housing Act, 12 U. S. C. §1730(a)(1)(F);

79 (B) A regulated financial corporation or a subsidiary  
80 thereof. As used in this section “regulated financial  
81 corporation” means:

82 (i) An institution, the deposits, shares or accounts of  
83 which are insured under the Federal Deposit Insurance Act or  
84 by the federal Savings and Loan Insurance Corporation;

85 (ii) An institution that is a member of a federal home loan  
86 bank;

87 (iii) Any other bank or thrift institution incorporated or  
88 organized under the laws of a state that is engaged in the  
89 business of receiving deposits;

90 (iv) A credit union incorporated and organized under the  
91 laws of this state;

92 (v) A production credit association organized under 12 U.  
93 S. C. §2071;

94 (vi) A corporation organized under 12 U. S. C. §611  
95 through §631 (an Edge Act corporation); or

96 (vii) A federal or state agency or branch of a foreign bank  
97 as defined in 12 U. S. C. §3101; or

98 (C) A corporation which derives more than fifty percent  
99 of its gross business income from one or more of the  
100 following activities:

101 (i) Making, acquiring, selling or servicing loans or  
102 extensions of credit. Loans and extensions of credit include:

103 (I) Secured or unsecured consumer loans;

104 (II) Installment obligations;

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

107 (IV) Credit card loans;

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

110 (VI) Loans arising in factoring.

111 (ii) Leasing or acting as an agent, broker or advisor in  
112 connection with leasing real and personal property that is the  
113 economic equivalent of an extension of credit as defined by  
114 the Federal Reserve Board in 12 CFR 225.25(b)(5).

115 (iii) Operating a credit card business.

116 (iv) Rendering estate or trust services.

117 (v) Receiving, maintaining or otherwise handling  
118 deposits.

119 (vi) Engaging in any other activity with an economic  
120 effect comparable to those activities described in  
121 subparagraph (i), (ii), (iii), (iv) or (v) of this paragraph.

122 (12) *Fiscal year.* -- The term “fiscal year” means an  
123 accounting period of twelve months ending on any day other  
124 than the last day of December and on the basis of which the  
125 taxpayer is required to report for federal income tax purposes.

126 (13) *Includes and including.* -- The terms “includes” and  
127 “including”, when used in a definition contained in this  
128 article, do not exclude other things otherwise within the  
129 meaning of the term being defined.

130 (14) *Insurance company.* -- The term “insurance  
131 company” means any corporation subject to taxation under  
132 section twenty-two, article three, chapter twenty-nine of this  
133 code or chapter thirty-three of this code or an insurance  
134 carrier subject to the surcharge imposed by subdivision (1) or  
135 (3), subsection (f), section three, article two-c, chapter  
136 twenty-three of this code or any corporation that would be  
137 subject to taxation under any of those provisions were its  
138 business transacted in this state.

139 (15) "Internal Revenue Code" means the Internal  
140 Revenue Code as defined in section three of this article,  
141 without regard to application of federal treaties unless  
142 expressly made applicable to states of the United States.

143 (16) *Nonbusiness income*. -- The term "nonbusiness  
144 income" means all income other than business income.

145 (17) "Partnership" means a general or limited partnership  
146 or organization of any kind treated as a partnership for tax  
147 purposes under the laws of this state.

148 (18) *Person*. -- The term "person" is considered  
149 interchangeable with the term "corporation" in this section.  
150 The term "person" means any individual, firm, partnership,  
151 general partner of a partnership, limited liability company,  
152 registered limited liability partnership, foreign limited  
153 liability partnership, association, corporation whether or not  
154 the corporation is, or would be if doing business in this state,  
155 subject to the tax imposed by this article, company,  
156 syndicate, estate, trust, business trust, trustee, trustee in  
157 bankruptcy, receiver, executor, administrator, assignee or  
158 organization of any kind.

159 (19) *Pro forma return*. -- The term "pro forma return"  
160 when used in this article means the return which the taxpayer  
161 would have filed with the Internal Revenue Service had it not  
162 elected to file federally as part of an affiliated group.

163 (20) *Public utility*. -- The term "public utility" means any  
164 business activity to which the jurisdiction of the Public  
165 Service Commission of West Virginia extends under section  
166 one, article two, chapter twenty-four of this code.

167 (21) *Qualified real estate investment trust*. -- The term  
168 "Qualified Real Estate Investment Trust" means any real

169 estate invest trust where no single entity owns or controls,  
170 directly or indirectly, constructively or otherwise, fifty  
171 percent or more of the voting power or value of the beneficial  
172 interests or shares of the trust, if the single entity is

173 (A) Subject to the provisions of subchapter C, chapter 1,  
174 subtitle A, title 26 of the United States Code, as amended;

175 (B) Not exempt from federal income tax pursuant to the  
176 provisions of section 501 of the Internal Revenue Code of  
177 1986, as amended; and

178 (C) Not a real estate invest trust as defined in this section  
179 or a qualified real estate invest trust subsidiary under section  
180 856(i) of the Internal Revenue Code of 1986, as amended.

181 (22) *Qualified regulated investment company.* -- The term  
182 "Qualified Regulated Investment Company" means any  
183 regulated company where no single entity owns or controls,  
184 directly or indirectly, constructively or otherwise, fifty  
185 percent or more of the voting power or value of the beneficial  
186 interests or shares of the company, if the single entity is:

187 (A) Subject to the provision of subchapter C, chapter 1,  
188 subtitle A, title 26 of the United States Code, as amended;

189 (B) Not exempt from federal income tax pursuant to the  
190 provision of section 501 of the Internal Revenue Code of  
191 1986, as amended; and

192 (C) Not a regulated investment company as defined in  
193 section 3 of the Investment Company Act of 1940, as  
194 amended, 15 U.S.C. 80a-3.

195 (23) *Real estate investment trust.* -- The term "Real Estate  
196 Investment Trust" has the meaning ascribed to such term in

197 section 856 of the Internal Revenue Code of 1986, as  
198 amended.

199 (24) *Regulated investment company.* -- The term  
200 “Regulated Investment Company” has the same meaning as  
201 ascribed to such term in section 851 of the Internal Revenue  
202 Code of 1986, as amended.

203 (25) *Sales.* -- The term “sales” means all gross receipts of  
204 the taxpayer that are “business income” as defined in this  
205 section.

206 (26) *State.* -- The term “state” means any state of the  
207 United States, the District of Columbia, the Commonwealth  
208 of Puerto Rico, any territory or possession of the United  
209 States and any foreign country or political subdivision  
210 thereof.

211 (27) *Taxable year, tax year.* -- The term “taxable year” or  
212 “tax year” means the taxable year for which the taxable  
213 income of the taxpayer is computed under the federal income  
214 tax law.

215 (28) *Tax.* -- The term “tax” includes, within its meaning,  
216 interest and additions to tax, unless the intention to give it a  
217 more limited meaning is disclosed by the context.

218 (29) *Tax Commissioner.* -- The term “Tax  
219 Commissioner” means the Tax Commissioner of the State of  
220 West Virginia or his or her delegate.

221 (30) “Tax haven” means a jurisdiction that, for a  
222 particular tax year in question: (A) Is identified by the  
223 Organization for Economic Cooperation and Development as  
224 a tax haven or as having a harmful preferential tax regime; or  
225 (B) a jurisdiction that has no, or nominal, effective tax on the

226 relevant income and: (i) That has laws or practices that  
227 prevent effective exchange of information for tax purposes  
228 with other governments regarding taxpayers subject to, or  
229 benefitting from, the tax regime; (ii) that lacks transparency,  
230 for purposes of this definition, a tax regime lacks  
231 transparency if the details of legislative, legal or  
232 administrative provisions are not open to public scrutiny and  
233 apparent or are not consistently applied among similarly  
234 situated taxpayers; (iii) facilitates the establishment of  
235 foreign-owned entities without the need for a local  
236 substantive presence or prohibits these entities from having  
237 any commercial impact on the local economy; (iv) explicitly  
238 or implicitly excludes the jurisdiction's resident taxpayers  
239 from taking advantage of the tax regime's benefits or  
240 prohibits enterprises that benefit from the regime from  
241 operating in the jurisdiction's domestic market; or (v) has  
242 created a tax regime which is favorable for tax avoidance,  
243 based upon an overall assessment of relevant factors,  
244 including whether the jurisdiction has a significant untaxed  
245 offshore financial or other services sector relative to its  
246 overall economy. For purposes of this definition, the phrase  
247 "tax regime" means a set or system of rules, laws, regulations  
248 or practices by which taxes are imposed on any person,  
249 corporation or entity, or on any income, property, incident,  
250 indicia or activity pursuant to governmental authority.

251 (31) *Taxpayer*. -- The term "taxpayer" means any person  
252 subject to the tax imposed by this article.

253 (32) *This code*. -- The term "this code" means the Code  
254 of West Virginia, one thousand nine hundred thirty-one, as  
255 amended.

256 (33) *This state*. -- The term "this state" means the State of  
257 West Virginia.

258           (34) “United States” means the United States of America  
259 and includes all of the states of the United States, the District  
260 of Columbia and United States territories and possessions.

261           (35) “Unitary business” means a single economic  
262 enterprise that is made up either of separate parts of a single  
263 business entity or of a commonly controlled group of  
264 business entities that are sufficiently interdependent,  
265 integrated and interrelated through their activities so as to  
266 provide a synergy and mutual benefit that produces a sharing  
267 or exchange of value among them and a significant flow of  
268 value to the separate parts. For purposes of this article and  
269 article twenty-three of this chapter, any business conducted  
270 by a partnership shall be treated as conducted by its partners,  
271 whether directly held or indirectly held through a series of  
272 partnerships, to the extent of the partner’s distributive share  
273 of the partnership’s income, regardless of the percentage of  
274 the partner’s ownership interest or the percentage of its  
275 distributive or any other share of partnership income. A  
276 business conducted directly or indirectly by one corporation  
277 through its direct or indirect interest in a partnership is  
278 unitary with that portion of a business conducted by one or  
279 more other corporations through their direct or indirect  
280 interest in a partnership if there is a synergy and mutual  
281 benefit that produces a sharing or exchange of value among  
282 them and a significant flow of value to the separate parts and  
283 the corporations are members of the same commonly  
284 controlled group.

285           (36) *West Virginia taxable income.* -- The term “West  
286 Virginia taxable income” means the taxable income of a  
287 corporation as defined by the laws of the United States for  
288 federal income tax purposes, adjusted, as provided in this  
289 article: *Provided,* That in the case of a corporation having  
290 income from business activity which is taxable without this  
291 state, its “West Virginia taxable income” shall be the portion

292 of its taxable income as defined and adjusted as is allocated  
293 or apportioned to this state under the provisions of this  
294 article.

**§11-24-4b. Regulated investment companies and real estate  
investment trusts subject to tax.**

1 (a) The tax imposed by this article shall be imposed upon  
2 regulated investment companies as defined by this article,  
3 and shall be computed only upon that part of the net income  
4 of the regulated investment company which is subject to  
5 federal income tax as provided in sections 852 and 4982 of  
6 the Internal Revenue Code of 1986, as amended, except as  
7 otherwise provided in this section.

8 (b) The dividend paid deduction otherwise allowed by a  
9 federal law in computing net income of a regulated  
10 investment company that is subject to federal income tax  
11 shall be added back in computing the tax imposed by this  
12 article unless the regulated invested company is a qualified  
13 regulated investment company, as defined in this article.

14 (c) The tax imposed by this article shall be imposed upon  
15 real estate investment trusts and shall be computed only upon  
16 that part of the net income of the real estate investment trust  
17 which is subject to federal income tax as provided in sections  
18 857 and 858 of the Internal Revenue Code of 1986, as  
19 amended, except as otherwise provided in this section.

20 (d) The dividend paid deduction otherwise allowed by  
21 federal law in computing net income of real estate investment  
22 trusts that is subject to federal income tax shall be added back  
23 in computing the tax imposed by this article unless the real  
24 estate investment trust is either:

25 (1) Publicly traded on an established securities market; or,

26       (2) A qualified real estate investment trust, as defined in  
27 this article.

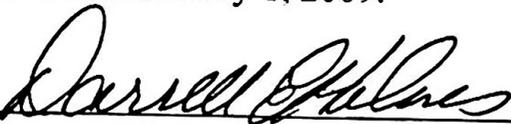
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

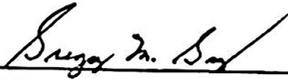
  
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Chairman Senate Committee

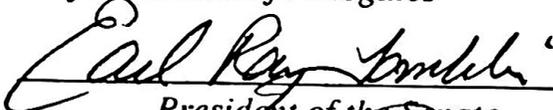
  
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Chairman House Committee

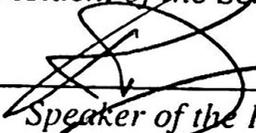
Originating in the House.

In effect January 1, 2009.

  
\_\_\_\_\_  
Clerk of the Senate

  
\_\_\_\_\_  
Clerk of the House of Delegates

  
\_\_\_\_\_  
President of the Senate

  
\_\_\_\_\_  
Speaker of the House of Delegates

The within is approved this the 28<sup>th</sup>  
day of March, 2008.

  
\_\_\_\_\_  
Governor

PRESENTED TO THE  
GOVERNOR

MAR 26 2008

Time

9:05 pm