WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2008

SECOND ENROLLMENT

COMMITTEE SUBSTITUTE
FOR
House Bill No. 4420

(By Delegates White, Kominar and Boggs)

Passed March 16, 2008

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.

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.

(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.

(4) Compensation. -- The term "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.
(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 subject to the tax imposed by this article. 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.

(6) Delegate. -- The term "delegate" in the phrase "or his or her 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 Company Act of 1956 or registered as a savings and loan holding company other than a diversified savings and loan holding company as defined in Section 408(a)(1)(F) of the federal National Housing Act, 12 U. S. C. §1730(a)(1)(F);

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

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

(ii) An institution that is a member of a federal home loan bank;
(iii) Any other bank or thrift institution incorporated or organized under the laws of a state that is engaged in the business of receiving deposits;

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

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

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

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

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

(i) 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.
(ii) 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 CFR 225.25(b)(5).

(iii) Operating a credit card business.

(iv) Rendering estate or trust services.

(v) Receiving, maintaining or otherwise handling deposits.

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

(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, do not exclude other things otherwise within the meaning of the term being defined.

(14) **Insurance company.** -- The term “insurance company” means any corporation subject to taxation under section twenty-two, article three, chapter twenty-nine of this code or chapter thirty-three of this code or an insurance carrier subject to the surcharge imposed by subdivision (1) or (3), subsection (f), section three, article two-c, chapter twenty-three of this code or any corporation that would be subject to taxation under any of those provisions were its business transacted in this state.
(15) "Internal Revenue Code" means the Internal Revenue Code as defined in section three of this article, without regard to application of federal treaties unless expressly made applicable to states of the United States.

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

(17) “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.

(18) *Person.* -- The term “person” is considered 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.

(19) *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.

(20) *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.

(21) *Qualified real estate investment trust.* -- The term “Qualified Real Estate Investment Trust” means any real
estate invest trust where no single entity owns or controls, directly or indirectly, constructively or otherwise, fifty percent or more of the voting power or value of the beneficial interests or shares of the trust, if the single entity is

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

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

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

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

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

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

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

(23) Real estate investment trust. -- The term “Real Estate Investment Trust” has the meaning ascribed to such term in
section 856 of the Internal Revenue Code of 1986, as amended.

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

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

(26) 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.

(27) 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.

(28) 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.

(29) Tax Commissioner. -- The term "Tax Commissioner" means the Tax Commissioner of the State of West Virginia or his or her delegate.

(30) "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; (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.

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

(32) This code. -- The term “this code” means the Code of West Virginia, one thousand nine hundred thirty-one, as amended.

(33) This state. -- The term “this state” means the State of West Virginia.
(34) "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.

(35) "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. For purposes of this article and article twenty-three of this chapter, any business conducted by a partnership shall be treated as conducted by its partners, whether directly held or indirectly held through a series of partnerships, to the extent of the partner's distributive share of the partnership's income, regardless of the percentage of the partner's ownership interest or the percentage of its distributive or any other share of partnership income. A business conducted directly or indirectly by one corporation through its direct or indirect interest in a partnership is unitary with that portion of a business conducted by one or more other corporations through their direct or indirect interest in a partnership if there is 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 and the corporations are members of the same commonly controlled group.

(36) *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 the portion
of its taxable income as defined and adjusted as is allocated or apportioned to this state under the provisions of this article.

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

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

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

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

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

(1) Publicly traded on an established securities market; or,
(2) A qualified real estate investment trust, as defined in this article.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

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 28th day of March, 2008.

Governor