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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 2011



ENROLLED

House Bill No. 2993

(By Delegates White and T. Campbell)
[By Request of the State Tax Division]



Passed March 12, 2011

In Effect Ninety Days From Passage

HB 2993

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ENROLLED DEPARTMENT OF WEST VIRGINIA
SECRETARY OF STATE

H. B. 2993

(BY DELEGATES WHITE AND T. CAMPBELL)
[BY REQUEST OF THE STATE TAX DIVISION]

[Passed March 12, 2011; in effect ninety days from passage.]

AN ACT to amend and reenact §11-13AA-3, §11-13AA-4, §11-13AA-5, §11-13AA-7, §11-13AA-11 and §11-13AA-12 of the Code of West Virginia, 1931, as amended, all relating to modifying the provisions of the West Virginia Commercial Patents Incentives Tax Act generally; defining terms; providing for tax credit carryover and accrual; restricting eligibility for tax credit; providing for disallowance of tax credit; providing for strict construction; and retroactively adjusting the effective date of the provisions of the Act.

Be it enacted by the Legislature of West Virginia:

That §11-13AA-3, §11-13AA-4, §11-13AA-5, §11-13AA-7, §11-13AA-11 and §11-13AA-12 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

**ARTICLE 13AA. COMMERCIAL PATENT INCENTIVES
TAX ACT.**

§11-13AA-3. Definitions.

1 (a) *General.* -- When used in this article, or in the
2 administration of this article, terms defined in subsection (b)
3 of this section have the meanings ascribed to them by this
4 section, unless a different meaning is clearly required by
5 either the context in which the term is used, or by specific
6 definition, in this article.

7 (b) *Terms defined.* --

8 (1) "Agreement" means any agreement or contractual
9 relationship entered into after the effective date of this
10 section between a person developing patents in this state and
11 either:

12 (A) A corporation established under the laws of this state
13 that meet the requirements of section three, article twelve,
14 chapter eighteen-b of this code; or

15 (B) A center for economic development and
16 technological advancement created pursuant to section three,
17 article twelve-a, chapter eighteen-b of this code.

18 (2) "Business activity" means all activities engaged in or
19 caused to be engaged in by a person with the object of gain
20 or economic benefit, direct or indirect. For purposes of this
21 definition, the term "gain or economic benefit, direct or
22 indirect" does not include income realized by any person in
23 the form of wages, salary or income that is reported on
24 federal form W-2.

25 (3) “Commercial use” means selling, licensing, leasing or
26 otherwise making patents available to a third party for a
27 price, fee, royalty, commission or other consideration called
28 by whatever name. “Commercial use” also means, in the
29 case of patents developed by the developer for the
30 developer’s own commercial use, the first use of the patents
31 in a manufacturing or other business activity of the
32 developer. “Commercial use” does not include any selling,
33 licensing, leasing or otherwise making patents available to a
34 third party when done by a broker or by any person who does
35 not own the patent sold, licensed, leased or otherwise made
36 available.

37 (4) “Commissioner” and “Tax Commissioner” are used
38 interchangeably herein and mean the Tax Commissioner of
39 the State of West Virginia or his or her designee.

40 (5) “Copyright” means a copyright that is registered with
41 the United States Copyright Office or with a similar office of
42 a foreign country when the foreign copyright is recognized
43 under federal law.

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

51 (7) “Development of a patent,” “developing patents” or
52 “development” means the act of inventing or discovering any
53 new and useful process, machine, article of manufacture, or
54 composition of matter, or any new and useful improvement
55 thereto through significant investment of money,
56 performance of research, or application of design or

57 engineering expertise, which culminates in the issuance of a
58 patent, as defined in this article.

59 (8) “Developer” means a person engaged in this state in
60 developing patents for direct use in a manufacturing process
61 or product and who has an agreement, as defined in this
62 section, with Marshall University or West Virginia
63 University.

64 (9) “Directly used in manufacturing process or product,”
65 and “direct use in manufacturing process or product” with
66 reference to patents means application or incorporation of a
67 patented process, machine, article of manufacture or
68 composition of matter, in manufacturing operations or
69 processes, or in manufactured products, in circumstances
70 where United States or foreign patent laws require that the
71 specific patent for the process, machine, article of
72 manufacture or composition of matter be owned by the
73 manufacturer, or purchased, leased, licensed or authorized by
74 contract to be applied or incorporated in the manufacturing
75 operation, processes or product, and where such lawful
76 ownership, purchase, lease, licensure or contractual
77 authorization is in effect.

78 (10) “Manufacturing” means any business activity
79 classified as having a sector identifier, consisting of the first
80 two digits of the six-digit North American Industry
81 Classification System code number of thirty-one, thirty-two
82 or thirty-three.

83 (11) “Mask work” means a series of related images,
84 however fixed or encoded:

85 (A) Having or representing the predetermined, three-
86 dimensional pattern of metallic, insulating or semiconductor

87 material present or removed from the layers of a
88 semiconductor chip product; and

89 (B) In which series the relation of the images to one
90 another is that each image has the pattern of the surface of
91 one form of the semiconductor chip product.

92 (12) "Net profits" means West Virginia taxable income
93 as determined for purposes of article twenty four of this
94 chapter, before application of this credit and after application
95 of all credits allowable under this chapter except this credit.
96 In the case of taxpayers that are not subject to the tax
97 imposed by article twenty-four, "net profits" means West
98 Virginia taxable income as determined for purposes of article
99 twenty-one of this chapter, before application of this credit
100 and after application of all credits allowable under this
101 chapter except this credit. In circumstances where net profit
102 is not solely attributable to and the exclusive result of the
103 direct use of a patent in a manufacturing process or product
104 in this state, the taxpayer shall determine net profit solely
105 attributable to and the exclusive result of the direct use of a
106 patent in a manufacturing process or product in this state, and
107 net profit for purposes of determining the amount of credit
108 allowable under this article shall be the net profit solely
109 attributable to and the exclusive result of the direct use of a
110 patent in a manufacturing process or product in this state.

111 (13) "Owner", when used in reference to a pass-through
112 entity, means a person who owns an equity interest in the
113 pass-through entity.

114 (14) "Partnership" includes a syndicate, group, pool, joint
115 venture or other unincorporated organization through or by
116 means of which any business, financial operation or venture
117 is carried on, which is not a sole proprietorship, trust or

118 estate, and which is treated as a partnership for federal
119 income tax purposes for the taxable year.

120 (15) “Pass-through entity” means a partnership, limited
121 liability company, small business corporation (S corporation)
122 or other entity treated as a partnership for federal income tax
123 purposes for the taxable year.

124 (16) “Patent” means a United States patent issued
125 pursuant to 35 U.S.C. §101, et seq. or the Patent Cooperation
126 Treaty done at Washington, on June 19, 1970 and is limited
127 to plant patents, design patents and patents developed in this
128 state for direct use in a manufacturing process or product, or
129 both developed for use and directly used in a manufacturing
130 process or product in this state. For purposes of this article,
131 patents do not include copyrights, trademarks, mask works,
132 trade secrets or any intellectual property that is not a patent.

133 (17) “Person” includes a natural person, corporation,
134 limited liability company or partnership. A single member
135 liability company that is treated as a disregarded entity for
136 federal income tax purposes is be treated as a disregarded
137 entity for purposes of this article.

138 (18) “Purchase” means a transaction under which title to
139 an item is transferred for consideration, or a license or lease
140 contract for at least three years is executed, regardless of
141 whether title to the item is transferred at the end of the lease
142 or license period.

143 (19) “Taxpayer” means any person subject to the tax
144 imposed by article twenty-three or twenty-four of this chapter
145 or to both taxes. In the case of a sole proprietorship that is
146 not subject to either the tax imposed by article twenty-three
147 or twenty-four of this chapter, the term “taxpayer” means a
148 natural person who owns a disregarded entity and who is

149 subject to the tax imposed by article twenty-one of this
150 chapter on his or her income from business activity in this
151 state, or any sole proprietor who is subject to the tax imposed
152 by article twenty-one of this chapter.

153 (20) "Trademark" means any trademark, trade name,
154 service mark or other identifying symbol or name that is
155 registered with the United States Patent and Trademark
156 Office or with a similar office of a foreign country when the
157 foreign registration is recognized under federal law.

158 (21) "Trade secret" means information, including a
159 formula, pattern, compilation, program device, method,
160 technique or process, that:

161 (A) Derives independent economic value, actual or
162 potential, from not being generally known to, and not being
163 readily ascertainable by proper means, by other persons who
164 can obtain economic value from its disclosure or use; and

165 (B) Is the subject of efforts that are reasonable under the
166 circumstances to maintain its secrecy.

§11-13AA-4. Tax incentive for developing patents in this state.

1 (a) *Allowance of credit.* -- A person engaging in this state
2 in developing plant patent, design patent or patents for direct
3 use in a manufacturing process or product and who has an
4 agreement, as defined in section three of this article, is
5 allowed a credit, when computing the person's liability for
6 business franchise tax imposed by article twenty-three of this
7 chapter and corporation net income tax imposed by article
8 twenty-four of this chapter, in the amount allowed under
9 subsection (b) of this section. When the developer is a sole
10 proprietor or a pass-through entity, that amount of the credit
11 remaining after first applying it against the tax liability under

12 article twenty-three of this chapter for the taxable year is
13 allowed when computing the tax imposed by article twenty-
14 one of this chapter on income from the person's business
15 activity. No credit is allowed under this article for any
16 activity, investment, assets, or expenditures for which any of
17 the tax credits authorized under articles thirteen-d, thirteen-e,
18 thirteen-q, thirteen-r, thirteen-s, or thirteen-x of this chapter,
19 has been authorized, taken or allowed. No credit is allowed
20 under this article for any activity, investment, assets, or
21 expenditures for which the tax credits authorized under
22 article thirteen, chapter eighteen-b, has been, authorized,
23 taken or allowed.

24 (b) *Amount of credit.* -- The amount of credit allowed
25 under this section is equal to twenty percent of the royalties,
26 license fees or other consideration received by the developer
27 during the taxable year from the sale, lease or licensing of a
28 patent developed in this state for direct use in a
29 manufacturing process or product by the person in taxable
30 years beginning on or after January 1, 2011: *Provided*, That
31 the amount of credit allowed under this section is thirty
32 percent, rather than twenty percent, when the person reinvests
33 at least eighty percent of the amount of the credit claimed for
34 the taxable year in depreciable property purchased for
35 purposes of developing additional patents in this state in
36 taxable years beginning on or after January 1, 2011, or
37 improving upon a patent developed in this state or
38 contributing to a stipend to retain a graduate or post-doctoral
39 student in this state integral to the development of the patents
40 or related technology in taxable years beginning on or after
41 January 1, 2011, during the next taxable year of the person,
42 and the person has an agreement, as defined in section three
43 of this article, for the development of a patent.

44 (c) *Rules for application of credit.* -- The amount of
45 credit computed under this section is allowed in accordance

46 with the following rules and applied as provided in
47 subsection (d) of this section:

48 (1) No credit is allowed under this section for royalties,
49 rents, license fees or other consideration received by the
50 developer of the patent for a patent developed outside this
51 state, except as provided in subdivision (2) of this subsection;

52 (2) When the person developed the patent for direct use
53 in a manufacturing process or product through that person's
54 activity in this state and through that person's activity in one
55 or more other states, the consideration received by the
56 developer during the taxable year from the sale, lease or
57 license of the patent developed through multistate activity of
58 the developer is multiplied by a fraction, the numerator of
59 which is the direct costs of developing the patent in this state
60 and the denominator of which is the total direct costs of
61 developing the patent. The product of this computation
62 establishes the consideration to be used in subsection (b) of
63 this section;

64 (3) If a person receives a portion of a royalty that would
65 be eligible for a tax credit under this section because of a
66 business association, licensing agreement or otherwise, the
67 person may receive the tax credit allowable to the portion of
68 royalties that person receives provided the person has an
69 agreement, as defined in section three of this article and
70 otherwise meets the requirements for entitlement to this
71 credit, as set forth in subsection (a) of this section;

72 (4) Unused credit may be carried forward until the earlier
73 of the tax year when the credit is used up or the ninth
74 consecutive tax year after the first tax year in which the
75 taxpayer is eligible to claim the credit. When the person is an
76 owner of a pass-through entity, credit may be taken by the
77 owner beginning in the tax year when credit may be taken by

78 the pass-through entity or when the pass through entity gains
79 entitlement to the credit;

80 (5) No credit is allowed under this section for
81 consideration received by the developer for patents
82 developed for direct use in a manufacturing process or
83 product before the taxable year beginning January 1, 2011.
84 For purposes of this subdivision, a patent was developed for
85 direct use in a manufacturing process or product before
86 January 1, 2011, if it was sold, leased or licensed to a third
87 party prior to January 1, 2011, or before that day it was
88 reduced to practice for purely commercial purposes by the
89 developer or a person related to the developer, as defined in
90 subsection (b), Section 267 of the Internal Revenue Code of
91 1986, as amended;

92 (6) No credit is allowed under this section for
93 consideration received by the developer from a person related
94 to the developer, as defined in subsection (b), Section 267 of
95 the Internal Revenue Code of 1986, as amended for patents
96 developed for direct use in a manufacturing process or
97 product; and

98 (7) No credit is allowed under this section beginning with
99 the eleventh taxable year after the patent was first directly
100 used in a manufacturing process or product.

101 (d) *Application of credit.* -- The amount of the credit
102 computed under this section is allowed as a credit against tax
103 as provided in this subsection, but the credit may not reduce
104 the tax below zero.

105 (1) *Business franchise tax.*-- The amount of the allowable
106 credit shall first be taken as a credit against the tax liability of
107 the developer for the taxable year under article twenty-three
108 of this chapter.

109 (2) *Corporation net income tax.* -- The amount of the
110 allowable credit remaining, if any, after first applying the
111 credit against the tax imposed by article twenty-three of this
112 chapter shall then be taken as a credit when computing the
113 liability of the developer for the taxable year under article
114 twenty-four of this chapter.

115 (3) *Personal income tax on business income.* --

116 (A) When the developer is a sole proprietor, the amount
117 of the allowable credit is taken as a credit when computing
118 the liability of the developer for the taxable year on business
119 income under article twenty-one of this chapter.

120 (B) When the developer is a pass-through entity, the
121 amount of allowable credit remaining, if any, after first
122 applying the credit against the tax imposed by article twenty-
123 three of this chapter for the taxable year is allowed as a credit
124 against the tax imposed for the taxable year on the West
125 Virginia source income of the pass-through entity under
126 article twenty-one of this chapter and the amount of the credit
127 is distributed to the owners of the pass-through entity in the
128 same manner as items of partnership income, gain loss or
129 deduction are distributed or allocated for the taxable year.

**§11-13AA-5. Tax credit for use of a patent in a manufacturing
process or product in this state that was
developed in this state.**

1 (a) *Allowance of credit.* -- A person directly using a plant
2 patent, design patent or patent developed in this state in a
3 manufacturing process or product in this state is allowed a
4 credit against the person's liability for business franchise tax
5 imposed by article twenty-three of this chapter and
6 corporation net income tax imposed by article twenty-four of
7 this chapter, the amount computed under subsection (b) of

8 this section. When the user of a patent is a sole proprietor or
9 a pass-through entity, that amount of credit allowed against
10 income taxes shall be against the tax imposed by article
11 twenty-one of this chapter.

12 (b) *Amount of credit.* -- The amount of credit allowed
13 under this section is equal to twenty percent of the net profit
14 attributable to the patent: *Provided,* That the amount of
15 credit allowed under this section is equal to thirty percent of
16 the net profit attributable to the patent when the person
17 claiming the credit reinvests in capital improvements to add
18 product lines to or increase productivity in this state during
19 the next taxable year an amount equal to at least eighty
20 percent of the tax credit amount used for the taxable year.

21 (c) *Rules for application of credit.* -- The amount of
22 credit computed under this section is allowed in accordance
23 with the following rules and applied as provided in
24 subsection (d) of this section:

25 (1) The credit allowed by this section is applied after all
26 other credits allowed by this chapter have been applied
27 against the person's business franchise tax and West Virginia
28 income tax liabilities for the taxable year under this chapter;

29 (2) Unused credit may be carried forward until the earlier
30 of the tax year when the credit is used up or the ninth
31 consecutive tax year after the first tax year in which the
32 taxpayer is eligible to claim the credit. When the person is an
33 owner of a pass-through entity, credit may be taken by the
34 owner beginning in the tax year when credit may be taken by
35 the pass-through entity or when the pass through entity gains
36 entitlement to the credit;

37 (3) Any credit not used within the ten-year period
38 described in subdivision (2) of this subsection is forfeited

39 beginning with the eleventh taxable year after the first tax
40 year in which the taxpayer is eligible to claim the credit;

41 (4) No credit is allowed under this section for using a
42 patent in this state when the person began using the patent
43 before January 1, 2011;

44 (5) No credit is allowed under this section for using a
45 patent in this state for which the taxpayer is allowed credit
46 under another article of this chapter.

47 (6) No credit is allowed under this section for any patent
48 acquired from, by or between, leased from, by or between,
49 licensed from, by or between, or otherwise authorized to be
50 used from, by or between related persons, as defined in
51 subsection (b), Section 267 of the Internal Revenue Code of
52 1986, as amended.

53 (7) Amounts received from, by or between related
54 persons, as defined in subsection (b), Section 267 of the
55 Internal Revenue Code of 1986, as amended, are disallowed
56 when calculating net profit attributable to a patent.

57 (d) *Application of credit.* -- The amount of the credit
58 computed under this section is allowed as a credit against tax
59 as provided in this subsection, but the credit may not reduce
60 the tax below zero.

61 (1) *Business franchise tax.* -- The amount of the
62 allowable credit shall first be taken as a credit against the tax
63 liability of the person allowed the credit for the taxable year
64 under article twenty-three of this chapter.

65 (2) *Corporation net income tax.* -- The amount of the
66 allowable credit remaining, if any, after first applying the
67 credit against the tax imposed by article twenty-three of this

68 chapter shall then be taken as a credit when computing the
69 liability of the corporation for the taxable year under article
70 twenty-four of this chapter.

71 (3) *Personal income tax on business income.* --

72 (A) When the person allowed the credit is a sole
73 proprietor, the amount of the allowable credit is taken as a
74 credit when computing the liability of the person allowed the
75 credit for the taxable year on business income under article
76 twenty-one of this chapter.

77 (B) When the person allowed the credit is a pass-through
78 entity, the amount of allowable credit remaining, if any, after
79 first applying the credit against the tax imposed by article
80 twenty-three of this chapter for the taxable year is allowed as
81 a credit against the tax imposed for the taxable year on the
82 West Virginia source income of the pass-through entity under
83 article twenty-one of this chapter and the amount of the credit
84 is distributed to the owners of the pass-through entity in the
85 same manner as items of partnership income, gain loss or
86 deduction are distributed or allocated for the taxable year.

§11-13AA-7. Identification of a patent and required records.

1 (a) *Required records.* -- Every developer of a patent in
2 this state for direct use in a manufacturing process or product
3 and every person who uses a patent directly in a
4 manufacturing process or product in this state who claims a
5 credit under this article shall maintain sufficient records to
6 establish the following facts for each item of a patent for
7 which a credit is allowed under this article:

8 (1) Its identity;

9 (2) The amount of net profit attributable to the patent;

10 (3) The month and taxable year in which the patent was
11 first used, placed in service or directly used in the person's
12 manufacturing process or product in this state;

13 (4) The amount of credit taken; and

14 (5) The date the patent was disposed of or otherwise
15 ceased to be directly used in the person's manufacturing
16 process or product in this state.

17 (b) *Enhanced credit.* -- Any person who claims the
18 enhanced credit under section four or five of this article shall
19 maintain sufficient records to clearly establish entitlement to
20 claim the amount of the enhanced credit. At a minimum
21 those records shall identify:

22 (1) Each and every item of depreciable property
23 purchased for purposes of claiming the enhanced credit;

24 (2) The date the depreciable property identified in
25 subdivision (1) of this subsection was purchased, its cost and
26 its estimated useful life determined using straight-line
27 method of depreciation;

28 (3) The date the depreciable property identified in
29 subdivision (1) of this subsection was placed in service or
30 used in the person's business activity in this state;

31 (4) The date the depreciable property identified in
32 subdivision (1) of this subsection was taken out of service or
33 use in the person's business activity in this state and the
34 reason why the property was taken out of service or use; and

35 (5) Other information that the Tax Commissioner may
36 reasonably require by rule promulgated as provided in section
37 eleven of this article.

38 (c) *New jobs.* -- Every person who claims a credit under
39 this article shall also maintain sufficient records to establish
40 the number and types of new jobs, if any created, the wages
41 and benefits paid to employees filling the new jobs and the
42 duration of each job.

43 (d) *Exception.* -- This section does not apply to an owner
44 of a pass-through entity that develops or uses a patent for
45 which a credit is allowed under this article.

§11-13AA-11. Interpretation and construction.

1 (a) No inference, implication or presumption of
2 legislative construction or intent may be drawn or made by
3 reason of the location or grouping of any particular section,
4 provision or portion of this article; and no legal effect may be
5 given to any descriptive matter or heading relating to any
6 section, subsection or paragraph of this article.

7 (b) The provisions of this article shall be strictly
8 construed in order to effectuate the legislative intent recited
9 in section two of this article.

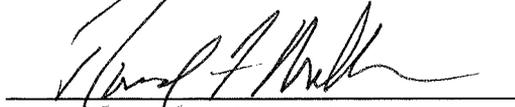
§11-13AA-12. Effective date.

1 The provisions of this article retroactively become
2 effective on January 1, 2011, and apply only to a patent
3 developed in this state in tax years beginning on or after
4 January 1, 2011, and to a patent purchased, leased or licensed
5 for use on or after that date for direct use in the taxpayer's
6 manufacturing process or product in this state.

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



Chairman, House Committee



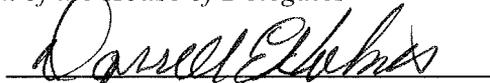
Chairman, Senate Committee

Originating in the House.

To take effect ninety days from passage.



Clerk of the House of Delegates



Clerk of the Senate



Speaker of the House of Delegates



Acting President of the Senate

The within is approved this the 30th
day of March, 2011.



Governor

2011 MAR 30 PM 3:19
OFFICE OF THE
SECRETARY OF STATE
VIRGINIA

PRESENTED TO THE GOVERNOR

MAR 28 2011

Time 3:33 pm