ENROLLED

House Bill 112

BY DELEGATES HANSHAW (MR. SPEAKER) AND MILEY

(BY REQUEST OF THE EXECUTIVE)

[Passed May 20, 2019; in effect from passage.]
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[Passed May 20, 2019; in effect from passage.]
AN ACT to amend and reenact §11-21-17 and §11-21-17a of the Code of West Virginia, 1931, as amended; to amend and reenact §11-21-37c of said code as contained in Chapter 244, Acts of the Legislature, Regular Session, 2019; and to amend said code by adding thereto a new section, designated §11-21-12j, all relating generally to the personal income tax; creating additional modification to West Virginia adjusted gross income of shareholder of S corporation, or member of a limited liability company, when engaged in business as a financial organization in this state; setting forth apportionment rules for certain financial organizations; specifying special gross receipts factor; defining terms; making technical corrections; and providing retroactive effective date.

Be it enacted by the Legislature of West Virginia:

ARTICLE 21. PERSONAL INCOME TAX.

§11-21-12j. Additional modification reducing federal adjusted gross income for shareholders of S corporations and members of limited liability companies engaged in banking business.

(a) For taxable years beginning on and after January 1, 2018, the West Virginia adjusted gross income of a taxpayer who is a shareholder of an S corporation, or member of a limited liability company, engaged in business as a financial organization as defined in §11-24-3a(a)(14) of this code, as adjusted pursuant to §11-21-12 of this code, shall be further adjusted by multiplying that portion of the taxpayer’s West Virginia adjusted gross income attributable to the taxpayer’s proportional share of all items of income, loss, deduction or credit of the S corporation, or limited liability company, as shown on the K-1 received by the taxpayer for the tax year, by a fraction equal to one minus a fraction:

(1) The numerator of which is the sum of the average of the monthly beginning and ending account balances of the S corporation, or limited liability company, during the taxable year (account balances to be determined at cost in the same manner that obligations, investments and
loans are reported on Schedule L of Federal Form 1120S, or Schedule L of Form 1065) of the following:

(A) Obligations or securities of the United States, or of any agency, authority, commission or instrumentality of the United States and any other corporation or entity created under the authority of the United States Congress for the purpose of implementing or furthering an objective of national policy;

(B) Obligations or securities of this state and any political subdivision or authority of the state;

(C) Investments or loans primarily secured by mortgages, or deeds of trust, on residential property located in this state and occupied by nontransients; and

(D) Loans primarily secured by a lien or security agreement on residential property in the form of a mobile home, modular home or double-wide located in this state and occupied by nontransients.

(2) The denominator of which is the average of the monthly beginning and ending account balances of the total assets of the S corporation, or limited liability company, which are shown on Schedule L of Federal Form 1120S, which is filed by the S corporation, or on Schedule L of Federal Form 1065, which is filed by the limited liability company, with the Internal Revenue Service: Provided, That the adjustment allowed herein shall not be made to the extent that the adjustments provided for in this section are otherwise allowed by §11-21-12 of this code and shall not be made to adjusted gross income of a taxpayer who is a shareholder of an S corporation, or a member of a limited liability company, engaged in banking business if the income of the S corporation, or limited liability company, of which the taxpayer is a shareholder, or member, has been adjusted at the S corporation, or limited liability company, level for the tax year.

(b) Apportionment rules for organizations engaged in business both within and without this state. — For taxable years beginning on and after January 1, 2018, an S corporation, or a limited liability company, engaged in business as a financial organization as defined in §11-24-3a(a)(14)
of this code, which regularly engages in business both within and without this state shall apportion
the business income component of its federal taxable income, after adjustment as provided in
subsection (a) of this section, by multiplying the amount thereof by the special gross receipts
factor determined as provided in subsection (c) of this section.

(c) Special gross receipts factor. — The gross receipts factor is a fraction, the numerator
of which is the total gross receipts of the S corporation, or limited liability company, engaged in
business as a financial organization as defined in §11-24-3a(a)(14) of this code from sources
within this state during the taxable year and the denominator of which is the total gross receipts
of the S corporation, or limited liability company, engaged in business as a financial organization
as defined in §11-24-3a(a)(14) of this code wherever earned during the taxable year: Provided,
That neither the numerator nor the denominator of the gross receipts factor shall include receipts
from obligations described in subsection(a) of this section.

(d) Effective date. — The provisions of this section are retroactive with respect to tax years
beginning on or after January 1, 2018, the law in effect for each of those years is fully preserved
as to those years, except as provided in this section.

§11-21-17. Resident partners.

(a) Partner's modifications. — In determining West Virginia adjusted gross income and
West Virginia taxable income of a resident partner, any modification described in §11-21-12(b),
§11-21-12(c), §11-21-12(d), or §11-21-12j of this code, which relates to an item of partnership
income, gain, loss or deduction shall be made in accordance with the partner's distributive share,
for federal income tax purposes, of the items to which the modifications relate. Where a partner's
distributive share of any such item is not required to be taken into account separately for federal
income tax purposes, the partner's distributive share of such item shall be his or her distributive
share for federal income tax purposes of partnership taxable income or loss generally.

(b) Character of items. — Each item of partnership income, gain, loss, or deduction shall
have the same character for a partner under this article as for federal income tax purposes. Where
an item is not characterized for federal income tax purposes, it shall have the same character for
a partner as if realized directly from the source from which realized by the partnership, or incurred
in the same manner as incurred by the partnership.

(c) West Virginia tax avoidance or evasion. — Where a partner’s distributive share of an
item of partnership income, gain, loss or deduction is determined for federal income tax purposes
by special provision in the partnership agreement with respect to such item, and where the
principal purpose of such provision is the avoidance or evasion of tax under this article, the
partner’s distributive share of such item, and any modification required with respect thereto shall
be determined as if the partnership agreement made no special provision with respect to such
item.

(d) Partnership defined. — For purposes of this article, “partnership” means a partnership
as defined in §11-21A-1 of this code.

§11-21-17a. Resident shareholders of S corporations.

(a) S corporation shareholder's modifications. — In determining West Virginia adjusted
gross income and West Virginia taxable income of a resident S corporation shareholder, any
modification described in §11-21-12(b), §11-21-12(c), §11-21-12(d), or §11-21-12j of this code,
which relates to an item of income, gain, loss or deduction shall be made in accordance with the
S corporation shareholder’s pro rata share, for federal income tax purposes, of the items to which
the modifications relate. Where a shareholder’s pro rata share of any such item is not required to
be taken into account separately for federal income tax purposes, the shareholder’s pro rata share
of such item shall be his or her pro rata share for federal income tax purposes of S corporation
taxable income or loss generally.

(b) Character of items. — Each item of S corporation income, gain, loss or deduction shall
have the same character for a shareholder under this article as for federal income tax purposes.
Where an item is not characterized for federal income tax purposes, it shall have the same
character for a shareholder as if realized directly from the source from which realized by the S corporation, or incurred in the same manner as incurred by the S corporation.

**§11-21-37c. Special apportionment rules - financial organizations.**

(a) *General.* — The Legislature hereby finds that the general formula set forth in §11-21-37a of this code for apportioning the business income of persons taxable in this state as well as in another state is inappropriate for use by financial organizations due to the particular characteristics of those organizations and the manner in which their business is conducted. Accordingly, the general formula set forth in §11-21-37a of this code may not be used to apportion the business income of financial organizations, which shall use only the apportionment formula and methods set forth in this section.

(b) *West Virginia financial organizations taxable in another state.* — The West Virginia taxable income of a financial organization that has its commercial domicile in this state and which is taxable in another state shall be the sum of: (1) The nonbusiness income component of its adjusted federal taxable income for the taxable year which is allocated to this state as provided §11-21-37a(d) of this code; plus (2) the business income component of its adjusted federal taxable income for the taxable year which is apportioned to this state as provided in this section.

(c) *Out-of-state financial organizations with business activities in this state.* — The West Virginia taxable income of a financial organization that does not have its commercial domicile in this state but which regularly engages in business in this state shall be the sum of: (1) The nonbusiness income component of its adjusted federal taxable income for the taxable year which is allocated to this state as provided in §11-21-37a(d) of this code; plus (2) the business income component of its adjusted federal taxable income for the taxable year which is apportioned to this state as provided in this section.

(d) *Engaging in business - nexus presumptions and exclusions.* — A financial organization that has its commercial domicile in another state is presumed to be regularly engaging in business in this state if during any year it obtains or solicits business with 20 or more persons within this
state, or if the sum of the value of its gross receipts attributable to sources in this state equals or exceeds $100,000. However, gross receipts from the following types of property, as well as those contacts with this state reasonably and exclusively required to evaluate and complete the acquisition or disposition of the property, the servicing of the property or the income from it, the collection of income from the property or the acquisition or liquidation of collateral relating to the property shall not be a factor in determining whether the owner is engaging in business in this state:

(1) An interest in a real estate mortgage investment conduit, a real estate investment trust, or a regulated investment company;

(2) An interest in a loan backed security representing ownership or participation in a pool of promissory notes or certificates of interest that provide for payments in relation to payments or reasonable projections of payments on the notes or certificates;

(3) An interest in a loan or other asset from which the interest is attributed to a consumer loan, a commercial loan, or a secured commercial loan and in which the payment obligations were solicited and entered into by a person that is independent, and not acting on behalf, of the owner;

(4) An interest in the right to service or collect income from a loan or other asset from which interest on the loan is attributed as a loan described in the previous paragraph and in which the payment obligations were solicited and entered into by a person that is independent, and not acting on behalf, of the owner; or

(5) Any amounts held in an escrow or trust account with respect to property described above.

(e) Definitions. — For purposes of this section:

(1) “Commercial domicile” has same meaning as that term is defined in §11-24-3a of this code.

(2) “Deposit” means:
(A) The unpaid balance of money or its equivalent received or held by a financial organization in the usual course of business and for which it has given or it is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account whether or not advance notice is required to withdraw the credit funds, or which is evidenced by a certificate of deposit, thrift certificate, investment certificate, or certificate of indebtedness, or other similar name, or a check or draft drawn against a deposit account and certified by the financial organization, or a letter of credit or a traveler's check on which the financial organization is primarily liable: Provided, That without limiting the generality of the term "money or its equivalent", any account or instrument must be regarded as evidencing the receipt of the equivalent of money when credited or issued in exchange for checks or drafts or for a promissory note upon which the person obtaining any credit or instrument is primarily or secondarily liable or for a charge against a deposit account or in settlement of checks, drafts or other instruments forwarded to the bank for collection;

(B) Trust funds received or held by the financial organization, whether held in the trust department or held or deposited in any other department of the financial organization;

(C) Money received or held by a financial organization or the credit given for money or its equivalent received or held by a financial organization in the usual course of business for a special or specific purpose, regardless of the legal relationship thereby established, including, without being limited to, escrow funds, funds held as security for an obligation due the financial organization or other, including funds held as dealers' reserves or for securities loaned by the financial organization, funds deposited by a debtor to meet maturing obligations, funds deposited as advance payment on subscriptions to United States government securities, funds held for distribution or purchase of securities, funds held to meet its acceptances or letters of credit, and withheld taxes: Provided, That there may not be included funds which are received by the financial organization for immediate application to the reduction of an indebtedness to the receiving
financial organization, or under condition that the receipt thereof immediately reduces or
extinguishes an indebtedness;

(D) Outstanding drafts, including advice or authorization to charge a financial
organization’s balance in another organization, cashier’s checks, money orders or other officer’s
checks issued in the usual course of business for any purpose, but not including those issued in
payment for services, dividends, or purchases or other costs or expenses of the financial
organization itself; and

(E) Money or its equivalent held as a credit balance by a financial organization on behalf
of its customer if the entity is engaged in soliciting and holding balances in the regular course of
its business.

(3) “Financial organization” has the same meaning as that term is defined in §11-21-3a of
this code.

(4) “Sales” means, for purposes of apportionment under this section, the gross receipts of
a financial organization included in the gross receipts factor described in subsection (g) of this
section, regardless of their source.

(f) Apportionment rules. — A financial organization which regularly engages in business
both within and without this state shall apportion the business income component of its federal
taxable income, after adjustment as provided in §11-21-12j of this code, by multiplying the amount
thereof by the special gross receipts factor determined as provided in subsection (g) of this
section.

(g) Special gross receipts factor. — The gross receipts factor is a fraction, the numerator
of which is the total gross receipts of the taxpayer from sources within this state during the taxable
year and the denominator of which is the total gross receipts of the taxpayer wherever earned
during the taxable year: Provided, That neither the numerator nor the denominator of the gross
receipts factor shall include receipts from obligations described in §11-21-12j(a)(1)(A), (B), (C),
and (D) of this code.
(1) Numerator. — The numerator of the gross receipts factor shall include, in addition to items otherwise includable in the sales factor under §11-21-37a of this code, the following:

A. Receipts from the lease or rental of real or tangible personal property whether as the economic equivalent of an extension of credit or otherwise if the property is located in this state;

B. Interest income and other receipts from assets in the nature of loans which are secured primarily by real estate or tangible personal property if the security property is located in the state. If the security property is also located in one or more other states, receipts are presumed to be from sources within this state, subject to rebuttal based upon factors described in rules to be proposed by the Tax Commissioner, including the factor that the proceeds of any loans were applied and used by the borrower entirely outside of this state;

C. Interest income and other receipts from consumer loans which are unsecured or are secured by intangible property that are made to residents of this state, whether at a place of business, by traveling loan officer, by mail, by telephone or other electronic means or otherwise;

D. Interest income and other receipts from commercial loans and installment obligations which are unsecured or are secured by intangible property if and to the extent that the borrower or debtor is a resident of or is domiciled in this state: Provided, That receipts are presumed to be from sources in this state and the presumption may be overcome by reference to factors described in rules to be proposed by the Tax Commissioner, including the factor that the proceeds of any loans were applied and used by the borrower entirely outside of this state;

E. Interest income and other receipts from a financial organization’s syndication and participation in loans, under the rules set forth in paragraphs (A) through (D), inclusive, of this subdivision;

F. Interest income and other receipts, including service charges, from financial institution credit card and travel and entertainment credit card receivables and credit card holders’ fees if the borrower or debtor is a resident of this state or if the billings for any receipts are regularly sent to an address in this state;
(G) Merchant discount income derived from financial institution credit card holder transactions with a merchant located in this state. When merchants are located within and without this state, only receipts from merchant discounts attributable to sales made from locations within this state shall be attributed to this state. It shall be presumed, subject to rebuttal, that the location of a merchant is the address shown on the invoice submitted by the merchant to the taxpayer;

(H) Gross receipts from the performance of services are attributed to this state if:

(i) The service receipts are loan-related fees, including loan servicing fees, and the borrower resides in this state, except that, at the taxpayer’s election, receipts from loan-related fees which are either: (I) “Pooled” or aggregated for collective financial accounting treatment; or (II) manually written as nonrecurring extraordinary charges to be processed directly to the general ledger may either be attributed to a state based upon the borrowers’ residences or upon the ratio that total interest sourced to that state bears to total interest from all sources;

(ii) The service receipts are deposit-related fees and the depositor resides in this state, except that, at the taxpayer’s election, receipts from deposit-related fees which are either: (I) “Pooled” or aggregated for collective financial accounting treatment; or (II) manually written as nonrecurring extraordinary charges to be processed directly to the general ledger may either be attributed to a state based upon the depositors’ residences or upon the ratio that total deposits sourced to that state bears to total deposits from all sources;

(iii) The service receipt is a brokerage fee and the account holder is a resident of this state;

(iv) The service receipts are fees related to estate or trust services and the estate’s decedent was a resident of this state immediately before death or the grantor who either funded or established the trust is a resident of this state; or

(v) The service receipt is associated with the performance of any other service not identified above and the service is performed for an individual resident of, or for a corporation or other business domiciled in, this state and the economic benefit of service is received in this state;
(l) Gross receipts from the issuance of travelers’ checks and money orders if the checks and money orders are purchased in this state; and

(J) All other receipts not attributed by this rule to a state in which the taxpayer is taxable shall be attributed pursuant to the laws of the state of the taxpayer’s commercial domicile.

(2) Denominator. — The denominator of the gross receipts factor shall include all of the taxpayer’s gross receipts from transactions of the kind included in the numerator, but without regard to their source or situs.

(h) Effective date. — The provisions of this section enacted in 2019 shall apply to all taxable years beginning on or after January 1, 2018.
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.

In effect from passage.

Clerk of the House of Delegates

Clerk of the Senate

Speaker of the House of Delegates

President of the Senate

The within is approved this the 29th day of May, 2019.

Governor
PRESENTED TO THE GOVERNOR

MAY 24, 2013

Time 3:44 pm